



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT NO. MC06-49

Wellington Catholic District School Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

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INVESTIGATOR: **Mark Ratner**

INSTITUTION: **Wellington Catholic District School Board**

SUMMARY OF COMPLAINT:

The Office of the Information and Privacy Commissioner/Ontario (IPC) received a privacy complaint from an individual regarding the Wellington Catholic District School Board (the Board). Specifically, the individual was concerned that the Board had collected and disclosed his personal information in contravention of the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act).

Background

The complainant provided the following information to the IPC. The complainant's spouse (the employee) is an employee of the Board who sustained an injury during the course of her employment. As a result of the injury, the employee had claimed that she was unable to work and consequently, she was receiving benefits under the *Workplace Safety and Insurance Act* (WSIA).

According to the complainant, the Board hired a private investigation company to conduct surveillance of the employee. The complainant provided the IPC with a copy of a report that was prepared by the private investigator (the investigator).

The report provided by the complainant shows that, during the course of the surveillance, the investigator observed activity at the shared residence of the complainant and the employee, which included viewing both parties entering and exiting the house. The investigator also noted the licence plates of the cars parked outside of the house and used this information to check the registration of the vehicles. Through checking the vehicle registration, the investigator was able to determine that two of the cars were owned by the complainant and the employee, respectively. During the surveillance, the investigator also videotaped the activities of both the complainant and the employee.

In response to the complaint, the Board confirmed that it had hired a private investigator to conduct surveillance of the employee. The Board stated that the purpose of the surveillance was to determine the authenticity of the employee's medical absence and claim for disability benefits.

With respect to the complainant and his concerns, the Board explained that he was not the subject of the surveillance and that the surveillance of the complainant was ancillary to the surveillance to the employee. In sum, the Board's position is that it would not have been possible to conduct adequate surveillance of the employee without capturing the image of other individuals who were at the same location as the employee during the period of the surveillance.

With respect to the investigator's act of checking the registration of the complainant's licence plates, the Board noted that at the time the licence plates were checked, the investigator did not know that the car was owned by the complainant. The Board explained that the purpose of checking the licence was to allow the investigator to obtain as much information as possible about the vehicles in order to know which vehicles the employee may be driving and therefore be able to locate her whereabouts at any given period.

The records at issue in this privacy complaint include the surveillance videotape as well as the Report prepared by the investigator. These records were initially collected by the investigator, and then were subsequently provided to the Workplace Safety and Insurance Board, (WSIB) where a claim was pending regarding the employee's injury.

The Board has taken the position that the records are excluded from the scope of the *Act*. The Board stated that the complainant's information was collected during the course of surveillance of the employee for the purpose of determining whether the employee's claim for benefits was legitimate. The Board stated that the records were provided to WSIB in order to meet its obligations under *WSIA* to inform WSIB of any material change in circumstances regarding a *WSIA* claim.

In support of its position, the Board is relying on section 52(3)3 of the *Act*, which states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest ... [emphasis added].

Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

In order for an institution to show that a given record or records fall within the scope of section 52(3)3, it must demonstrate that the records satisfy the three criteria set out below [see, for example, Order MO-1910].

The institution must demonstrate that:

1. the record was collected, prepared, maintained or used by the institution, or on its behalf; and
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or to the employment-related matters in which the institution has an interest.

With respect to the first criterion, the records were collected by an investigator hired by the Board, which clearly qualifies as having been collected by the Board, or on its behalf. With respect to the second criterion, the records were used by the Board in discussions and communications with WSIB, which is consistent with the fact that the complainant obtained the records through the WSIB process.

And finally, with respect to the third criterion, the employee is an employee of the Board, and the records in question relate to her claim for benefits arising from her employment by the Board.

Therefore, the process undertaken by the Board to determine the veracity of the employee's claim of a work-related injury is an employment related matter in which the Board has an interest, and consequently, the third criterion is satisfied.

Based on the foregoing, I agree with the Board and accept its position that the records in question fall within section 52(3), and are therefore excluded from the scope of the *Act*.

CONCLUSION:

I have reached the following conclusion based on the results of my investigation.

- Section 52(3) applies to the records in question and consequently, the records are not subject to the *Act*. Therefore, the *Act* does not apply to this complaint.

POSTSCRIPT:

In this Privacy Complaint Report, I have concluded that the records in question are not subject to the provisions of the *Act*. I have reached this conclusion notwithstanding the fact that the complainant's personal information was collected even though he was not the subject of the Board's surveillance.

While I appreciate that the collection of the complainant's personal information may have been an unavoidable consequence of the surveillance of the employee, I would like to take this opportunity to caution the Board to be extremely careful when engaging in surveillance of employees to ensure that the personal information of third parties is not collected. The Board should be cognizant of what information it is collecting in order to prevent the inadvertent collection of any other individuals' information whenever possible.

In sum, the Board is responsible for the activities of its staff, including any investigators they may retain and for ensuring that the surveillance is conducted in a reasonable and privacy protective manner.

Original signed by: _____
Mark Ratner
Investigator

August 9, 2007 _____