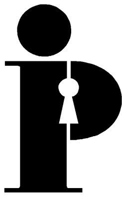
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1344

Appeal MA-990335-1

York Region District School Board

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NATURE OF THE APPEAL:

The York Region District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “the minutes or records of the meeting of the Trustees at which they voted to 'lock out' the members of the Elementary Teachers Federation of Ontario York Region.” The requester also wanted to receive “the individual record of how each Trustee voted.”

The Board identified one responsive record, and denied access to it pursuant to section 6(1)(b) of the *Act* (*in camera* meeting). The Board relied on section 207(2) of the *Education Act* in support of the exemption claim. The Board did provide the requester with access to “the related recommendation reported by the Board in public session on November 26, 1998.”

The requester, now the appellant, appealed the Board's decision.

During mediation, the appellant raised the possible application of section 6(2)(b), which acts as an exception to the section 6(1) exemption if the subject matter of the *in camera* deliberation has been considered in a meeting open to the public. The mediator also raised the possible application of section 52(3) of the *Act*, which removes certain employment and labour relations records from the scope of the *Act*.

The appellant was advised during mediation that the record does not identify how each trustee voted on the “lock-out” motion.

I sent an initial Notice of Inquiry to the Board and received representations on the various issues. I then sent the Notice to the appellant, together with the Board’s representations, and received representations in response.

RECORDS:

The record contains the minutes of an *in camera* meeting of the Board held on November 9, 1998.

DISCUSSION:

JURISDICTION

Sections 52(3)2 and 3 and 52(4) read as follows:

> (3) 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:
>
> > 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.

(4) 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.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act*.

To fall within the scope of section 52(3)2, the Board must establish that:

1. the records were collected, prepared, maintained or used by the Board or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the Board; **and**

3. these negotiations or anticipated negotiations took place or will take place between the Board and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[See Orders M-861 and PO-1648]

To qualify under section 52(3)3, the Board must establish that:

1. the records were collected, prepared, maintained or used by the Board 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 employment-related matters in which the Board has an interest.

[Order P-1242]

Requirement one - sections 52(3)2 and 3

The Board submits that the record was collected, prepared, maintained and used by the Board. I concur, and find that the first requirement of sections 52(3)2 and 3 has been established.

Requirement two - section 52(3)2

As far as the second requirement of section 52(3)2 is concerned, the Board submits that the record was prepared and used in relation to the labour relations negotiations carried on between the Board and the Teachers Federation in 1998. The Board indicates that the record at issue reflects an action taken by the Board at an *in camera* meeting, based on recommendations provided by its Negotiations Advisory Committee. This committee was involved in ongoing negotiations with the Teachers Federation at that time.

I accept the Board's submissions that the matters discussed at the *in camera* meeting were properly considered negotiations for the purposes of section 52(3)2 of the *Act* . However, the existence of these negotiations, and the fact that they took place, is not sufficient to satisfy the second requirement of section 52(3)2.

The Commissioner's Office has given section 52(3) [and its equivalent provision, section 65(6), in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)] an interpretation which accords with the wording and accommodates the purposes of both the *Act*s and the amendments which subsequently incorporated sections 52(3)/65(6) within the statute (the Bill 7 amendments). The subject matter of the sections 52(3)/65(6) exclusions – "proceedings or *anticipated* proceedings", "negotiations or *anticipated* negotiations" and "employment-related matters in which the institution *has* an interest" - demonstrates that the legislature intended to protect the confidentiality of records which have the capacity to affect the *current or future conduct* of an institution in the employment and labour relations context. This interpretation protects the confidentiality of past information about concluded proceedings, negotiations or other employment-related matters, provided: (1) the institution can establish that the information contained in the

records reasonably relates to current or future anticipated proceedings or negotiations; or (2) that its labour relations or employment interests in the information are otherwise currently engaged, or there is a reasonable prospect that such interests will be engaged in the future.

In Order P-1618, I examined the general application of section 65(6) of the provincial *Act* and outlined the approach that must be taken in applying this section in light of the stated intent and goal of the Bill 7 amendments. I found the following:

> In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the *Act* - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions.

I then went on to apply this approach to the specific provisions of section 65(6)1 of the provincial Act, which deal with "proceedings or anticipated proceedings", and determined that:

> When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

My findings in Order P-1618 were upheld on judicial review in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.).

In my view, the approach outlined in Order P-1618 and other similar orders can and should be applied in considering the specific requirements of section 52(3)2. In order for section 52(3)2 to apply, the Board must establish that the "negotiations or anticipated negotiations" which are the subject of the record are current or in the reasonably proximate past so as to have some continuing potential impact on any ongoing labour relations issues which may be directly related to the record.

The record at issue in this appeal deals with a negotiation strategy used by the Board at a time of active and ongoing negotiation - November 1998. The negotiation approach taken by the Board at the November 9, 1998 *in camera* meeting is public knowledge; the request itself refers to the actual decision taken at the meeting, and the negotiation strategy was in fact implemented over the course of the following two days. After implementation, the strategy was also the subject of considerable public debate. I have been provided with the Board's information release dated November 11, 1998,

in which the Board identifies the decision it made in the November 9, 1998 meeting, and confirms the reasons underlying the decision. Furthermore, the negotiations between the Board and the Teachers Federation, which were the subject of these strategies, were concluded a few weeks after the November 9, 1998 meeting.

It is clear that the labour relations negotiations between the Board and the Teachers Federation, which are the subject matter of the record, are not current or in the reasonably proximate past - they were fully resolved in 1998. The specific strategy reflected in the record, which would appear to have no ongoing relevance beyond the negotiations taking place at that time, was made public by the Board within two days of the November 9, 1998 meeting, and is widely known by the appellant and others. For these reasons, I find that disclosure of the record could not reasonably have an impact on any labour relations issues directly related to this record, and the second requirement of section 52(3)2 has not been established.

Requirement two - section 52(3)3

I am satisfied that the record was prepared and used in relation to meetings, consultations, discussions or communications taking place in the context of the labour relations negotiations taking place in 1998, thereby satisfying the second requirement of section 52(3)3.

Requirement three - section 52(3)3

Section 52(3)3, requires that the meetings, consultations, discussions or communications must be "about labour relations or employment-related matters".

It is clear that the record relates to a labour relations matter, having been prepared and used in the context of ongoing labour relations negotiations involving the Board and the Teachers Federation. The only remaining issue is whether this is a labour relations matter in which the Board "has an interest".

In this regard, the Board submits:

> We certainly "have an interest" as a vote to lock out elementary teachers meant our teaching staff were refused access to the workplace rendering [the Board] able only to provide a very limited service to students and parents.

When I sent the Notice of Inquiry to the Board, I identified the specific requirements of section 52(3)3, including numerous references to previous orders which have addressed the issue of what constitutes an "interest". None of these requirements were addressed in the Board's representations.

The appellant, in responding to the Board's representations, submits:

> In summation I do not see, nor more importantly do I see in the Board's representations, how a lockout which was ended almost two years [ago], which involves a contract which expired on August 31, 2000 has a legal interest which is current or has a reasonable prospect of being engaged in future.

An "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect the Board's legal rights or obligations (see Orders M-1147 and P-1242).

A number of orders have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution 's "legal interest" being engaged (see, for example, Orders P-1575, P-1586, M-1128, M-1161, PO-1718, PO-1782, PO-1797 and PO-1814). Specifically, this line of orders has held that an institution must establish an interest, in the sense that the matter has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. As referred to earlier, Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning, were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.).

For the same reasons outlined with respect to the second requirement of section 52(3)2, I find that the third requirement of section 52(3)3 has not been established. The negotiations which were the subject of the record took place in November of 1998, and the negotiation strategy adopted by the Board was fully implemented and publicly disclosed at that time. I find that labour relations matter which is the subject of the record is not current or in the reasonably proximate past, and I find that the passage of time and the conclusion of the labour relations dispute between the Board and the Teachers Federation remove any legal interest in the matter. Accordingly, I find that the Board has not demonstrated that it has sufficient legal interest in the record to bring it within the ambit of section 52(3)3 of the *Act*.

Therefore, I find that the record falls with the scope of the *Act*

CLOSED MEETING

Section 6(1)(b) of the Act states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to qualify for exemption under section 6(1)(b), the Board must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**

2. that a statute authorizes the holding of this meeting in the absence of the public; **and**

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting. (Order M-64)

The first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held by the Board **and** that it was properly held *in camera* (Order M-102).

The Board and the appellant are both in agreement that the special meeting of the Board was held on November 9, 1998, and that it was held in private. The record itself reflects the fact that the meeting was a private meeting.

The Board refers to its authority under section 207(2)(d) of the *Education Act* as the statute which authorizes the holding of the meeting in the absence of the public.

Section 207(2)(d) of the *Education Act* provides:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,
>
> decisions in respect of negotiations with employees of the board;

As discussed above, the subject-matter of the meeting was labour relations negotiations as referred to in section 207(2)d of the *Education Act*. I am satisfied that section 207(2) of the *Education Act* authorizes the holding of meetings in the absence of the public, and that an *in camera* meeting to deal with negotiation strategies was held by the Board on November 9, 1998. Therefore, the first and second requirements of the test have been established.

To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). "deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385)

The Board submits that:

> ... it was our choice to apply the exemption and deny access ... despite the lack of real information value within the record in question.
>
> There simply wasn't much information in the record to deny but there was a great loss to the Board should it have to allow access to records traditionally protected under methods that ensure the highest degree of privacy and confidentiality.

The Board does not specifically address the third part of the test in its representations. It appears to take the position that the fact that the meeting was held *in camera* and that the Board was authorized to hold the meeting *in camera* is sufficient to support the section 6(1)(b) exemption claim.

It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting. The Board voices no concern that the actual negotiation strategy would be identified through disclosure of the record. In fact, the Board itself disclosed its strategy two days after adopting it at the November 9, 1998 meeting. Rather, the Board objects to the fact that disclosure of the record would reveal information not previously disclosed. Specifically, the Board states:

> ... Those [the withheld] information elements are protected under the Education Act and subsequently by [the *Act*] such as the names of the Trustees in attendance, the approval of the agenda, the recommendation and the action and the mover and seconder for each. This is what is normally recorded during in camera meetings. Because voting to lock out striking teachers is a very sensitive matter and because of the requirements under both acts to treat such matters with utmost confidentiality, this board saw no other alternative but to deny access to this record.

The British Columbia Information and Privacy Commissioner David Loukidelis recently dealt with a similar issue involving the decision by a local Police Board to deny access to the entire minutes of certain *in camera* meetings (Order 00-14). Commissioner Loukidelis discussed the meaning of the phrase the "substance of deliberations" in section 12(3)(b) of the British Columbia statute, which reads as follows:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act

> authorizes the holding of that meeting in the absence of the public.

Commissioner Loukidelis made the following comments:

> The discretionary s. 12(3)(b) exception is not as broad as the Board would have it. It protects only information - not "records' - the disclosure of which would reveal the "substance of deliberations" of an *in camera* Board meeting. Section 12(3)(b) does not necessarily allow the Board to refuse to disclose records because they "refer to matters discussed" *in camera*. Nor does s. 12(3)(b) allow a local public body to "withhold *in camera* records", whatever they may be. The section does not create a class-based exception that excludes records of, or related to, *in camera* meetings. There is a clear distinction between "information" and the "records" in which information is found. The duty under s. 4(2) of the Act to sever records, and disclose information not covered by one of the Act's exceptions, applies to records which contain information protected by s. 12(3)(b).
>
> ...
>
> In this case, certainly, s. 12(3)(b) does not authorize the Board to refuse to disclose the meeting minutes in their entirety. The Board withheld every iota of information, right down to the names of the Board members attending each meeting, the dates and times of each meeting, the location of each meeting, and so on. Disclosure of the identities of those attending a meeting, or details as to its time and location, would not - absent evidence to the contrary in a given case - reveal the "substance" of the "deliberations" of the meeting.
>
> Nor would disclosure of the subjects dealt with at the Board meetings here in question - regardless of whether a matter was presented to the Board for information or for discussion and action - reveal the substance of the Board's deliberations on those subjects. There may be cases where disclosure of a subject of an *in camera* meeting would, of itself, reveal the substance of the deliberations of the governing body. It may be possible, for example, to combine knowledge of the subject matter with other, publically available, information, such that disclosure of the subject matter itself amounts to disclosure of the "substance of deliberations". The Board has not supplied any evidence or argument that would permit me to decide that this is the case here.
>
> ...
>
> Apart from the scheduling, attendance and subject matter information discussed above, however, the information in the records qualifies for protection under s. 12(3)(b). The balance of the information conveys which Board members made what motions, the debate on various matters, and the Board's decisions on specific issues.

> The rest of the records would, if disclosed, clearly reveal the "substance of deliberations" of the *in camera* meetings. ...

Although section 12(3)(b) of the British Columbia statute refers to the non-disclosure of "information" that would reveal the substance of the deliberations, and section 6(1)(b) of the *Act* refers to the non-disclosure of a "record", it is important to consider the section 6(1)(b) exemption claim in the context of the severance requirements of section 4(2) of the *Act*, which reads as follows:

> 4(2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15, the head shall disclose as much of the record as can reasonably be severed without disclosing the **information** that falls under one of the exemptions. (emphasis added)

The effect of section 4(2) of the *Act* is to require the Board to deny access only to the information which falls under the exemption in section 6(1)(b) of the *Act*, and for this reason the findings of Commissioner Loukidelis are relevant. The Board in this appeal must review the record and determine what information would reveal the substance of the deliberations and, subject to the other requirements being met, it may exclude those portions from disclosure. The Board may not, however, apply the exemption to information which does not disclose the substance of the deliberations.

The record at issue in this appeal identifies the date of the special Board meeting, the trustees who attended and those who sent regrets, and the three subjects dealt with at the meeting. The first and third subjects are the standard agenda approval and adjournment items normally associated with meetings of this nature, whether held *in camera* or otherwise. The remaining subject concerns with the recommendation received from the Board's Negotiations Advisory Committee.

Applying the reasoning outlined by Commissioner Loukidelis, I find that disclosure of the top portion of the record containing the date and those attending and not attending the meeting, as well as the headings listing the three subjects discussed at the meeting, would not disclose the substance of the deliberations of the Board at this meeting, and do not qualify for exemption under section 6(1)(b). The other information contained under the first and third subject headings falls outside the scope of the appellant's request.

The information remaining under the second subject heading is: (1) the mover and seconder of a motion; (2) the content of a motion dealing with the recommendation of the Negotiations Advisory Committee; and (3) the outcome of the motion. The minutes do not reflect any discussions related to the recommendation, nor are the voting records of individual Trustees identified. I find that disclosing the information falling under categories (2) and (3) would not reveal the substance of any deliberations taking place in that context, and this information does not qualify for exemption under section 6(1)(b). I should also note that the content of the recommendation and the outcome of the

motion dealing with it have been made public by the Board and are known to both the appellant and others.

Disclosure of the names of the movers and seconders of motions were found by Commissioner Loukidelis to reveal the substance of deliberations of the *in camera* meetings at issue in his appeal. Similarly, I find that the disclosure of the identity of the Trustees who moved and seconded the motion concerning the recommendation of the Negotiations Advisory Committee would reveal the position these individuals took on the recommendation, and this is sufficient to bring their identities within the scope of section 6(1)(b). I recognize that there are instances where movers and seconders vote in opposition to a motion, but this is clearly not the norm. In my view, absent evidence to the contrary, it is reasonable to conclude that the individuals moving and seconding a motion are active supporters of the content of the motion itself, and that disclosure of their identities would disclose the fact that their active support was a part of the deliberations which took place at the meeting.

As far as section 6(2)(b) is concerned, although some of the details discussed at the *in camera* meeting were subsequently announced to the public, I have been provided with no evidence that the subject matter of this meeting was discussed at a public meeting of the Board, as required in order to fall within the scope of this exception. As far as the identity of the mover and seconder of the motion dealing with the Negotiation Committee recommendation is concerned, the appellant does not suggest, nor is there any evidence to establish, that this information was considered or revealed at a public meeting. Accordingly, I find that section 6(2)(b) has no application in the circumstances of this appeal.

The Board refers to the discretion it exercised in considering whether or not to release the record to the appellant. The Board's representations focus on its view that disclosure would set a "problematic precedent", and that:

> There simply wasn't much information in the record to deny but there was a great loss to the Board should it have to allow access to records traditionally protected [by] methods that ensure the highest degree of privacy and confidentiality.

As pointed out by Commissioner Loukidelis, section 6(1)(b) does not create a class-based exemption. Records created in the context of a valid *in camera* meeting are not automatically exempt simply because of the nature of the meeting. The Board must examine the actual information contained in a specific record, determine whether it reveals the substance of deliberations which took place at the meeting and, if so, determine whether the discretionary exemption claim should be applied in the particular circumstances.

In this appeal, the Board has provided representations which satisfy me that the identities of the mover and seconder of the motion were of particular sensitivity as indicators of how these Trustees voted. I am satisfied that the Board has properly exercised its discretion as far as the names of the mover and seconder are concerned in the circumstances of this appeal. However, I would remind the Board that the exercise of the discretion to release or not to release a record in a particular

circumstance does not bind the Board in future decisions, and my decision in this appeal should not be interpreted to mean that the identity of movers and seconders of motions at *in camera* meetings would always qualify for exemption under section 6(1)(b) of the *Act*.

In his representations, the appellant states:

> I also think there is an argument to be made that these records should be disclosed under [section] 5(1) of the Act. The Board in its representations clearly raises, as they did to the public through the media, the question of public, in this case student, safety. In their words the Board was motivated because they could not "assure student safety or effectively support and provide services". On this basis alone the record should be revealed.

Without getting into a discussion of the whether section 5(1) can be considered in the context of an appeal, I will simply state that section 5(1) simply has no relevance in the context of this appeal. The record would clearly not contain "a grave environmental, health or safety hazard to the public", as required in order to fall within the scope of this section of the *Act*.

ORDER:

2. I order the Board to disclose the top portion of the record identifying the date of the meeting and those trustees attending and not attending the meeting, the three headings identifying the subjects dealt with at the meeting, and the motion and outcome for the second item. I have attached a highlighted version of the record with the copy of this order sent to the Freedom of Information Co-ordinator at the Board which identifies the portions that should be disclosed. Disclosure must take place by **October 20, 2000.**

3. I uphold the Board's decision to deny access to the remaining parts of the record.

4. In order to verify compliance with the terms of Provision 1 above, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant.

Original signed by: October 4, 2000
Tom Mitchinson
Assistant Commissioner