ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-010

May 10, 2001

CALGARY BOARD OF EDUCATION

Review Number 1970

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Summary: The Applicants made an access request to the Calgary Board of Education for a copy of a complaint against one or both of them. The Board refused access to the complaint under sections 16, 17 and 23(1) of the Act. The Commissioner partially upheld the decision to refuse access, but ordered the Board to release most of the complaint to the Applicants.

Statutes Cited: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, as amended, ss. 1(1)(e), 1(1)(n), 9(1), 15(1), 16, 17(1)(a), 18(1), 23(1)(a) and (b), 38, 67(2), 68, 86(1)(c); *School Act* S.A. 1988 c. S-3.1, as amended, s. 17, *School Councils Regulation*, A.R. 171/98.

Authorities Cited: AB: Orders 96-003, 96-006, 96-021, 97-007, 97-010, 2000-003, 2000-029

I. BACKGROUND

[para. 1.] On June 21, 2000, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Calgary Board of Education (the "Board") for a copy of a complaint against the Applicant or his spouse by a school council member. I will refer to the Applicant and his spouse jointly as the "Applicants." The Applicants named the author of the complaint, as during a Board investigation of the underlying dispute the investigator had accidentally disclosed the identity of the author to the Applicants.

[para. 2.] On July 12, 2000, the Board denied access to the record.

[para. 3.] On July 21, 2000, the Applicants requested that I review the Board's response.

[para. 4.] Mediation was authorized, but failed.

[para. 5.] A Notice of Inquiry was issued on November 10, 2000. The Notice identified both the School Council and the President of the School Council as affected third parties (jointly, the "Third Parties").

[para. 6.] An oral inquiry was held in Calgary on March 1 and 2, 2001. The Board attended with counsel, as did the Third Parties. The Applicants represented themselves. After receiving and reviewing written undertakings from the Board, I concluded the inquiry on March 20, 2000.

II. RECORD AT ISSUE

[para.7.] The Board produced a 4-page complaint letter, which is the record at issue.

III. PRELIMINARY ISSUES

[para. 8.] Several preliminary issues arose at inquiry and were quickly addressed with the cooperation of counsel. The Board confirmed that it had abandoned its arguments under section 17(3) and section 23(1)(d) of the Act. I ruled that portions of the inquiry would be heard in camera, so that I could hear sensitive evidence. I reserved the right to refuse to hear in camera evidence that was not sensitive. During the inquiry, I decided to disclose non-controversial evidence relating to the processing of the request given by the FOIP Coordinator.

[para. 9.] After hearing the arguments of the parties, I ruled that sections 9(1), 15 and 18 were to be added as issues to the inquiry. I also ruled that the Applicants' other request for records to the Board would not be added as an issue to this inquiry.

[para. 10.] The issue of whether the Board had produced all responsive records was dealt with in camera. At my request the Board produced attachments to the complaint for my review. I find that these attachments are incorporated by reference into the body of the complaint. They are functionally part of the complaint and are responsive records. I will order their release, subject to any severing required under the Act.

[para. 11.] The Applicant questioned whether the School Council had properly appointed the legal counsel representing it. I gave that counsel the opportunity to respond to this concern. I indicated that I was satisfied that the counsel was properly attending on behalf of the School Council, subject to any evidence to the contrary. None was presented during the inquiry.

IV. ISSUES

[para. 12.] There are seven issues to deal with in this inquiry:

A. Does section 15(1) apply to the record?

B. Did the Board properly apply section 18(1) to the record?

C. Did the Board properly apply section 23(1)(a) or (b) to the record?

D. Did the Board properly apply section 17(1)(a) to the record?

E. Does section 16(1) of the Act apply to the record?

F. Did the Board violate section 38 of the Act?

G. Did the Board discharge its section 9(1) duty to the Applicants?

V. DISCUSSION OF THE ISSUES

[para. 13.] I will begin by considering the sections of the Act the Board applied to sever the entire record.

Issue A. Does section 15(1) apply to the record?

(i.) The law

[para. 14.] The relevant provisions of section 15 read:

> 15(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
> …
> (ii) …labour relations…information…of a third party
>
> (b) that is supplied, explicitly or implicitly, in confidence, and
> (c) the disclosure of which could reasonably be expected to
> …
> (iv) reveal information supplied to, or the report of …a person…appointed to resolve or inquire into a labour relations dispute.

(ii.) Discussion

[para. 15.] The Board claimed that the record contains confidential "labour relations information" under section 15. The applicable test is: 1) the information is "labour relations information"; 2) the information was supplied explicitly or implicitly in confidence; and 3) disclosure of the information could reasonably be expected to reveal information supplied to a person or body appointed to resolve or inquire into a labour relations dispute.

(a.) Is the information in the record "labour relations information"?

[para. 16.] The Board, supported by the Third Parties, argued that the record is confidential and describes a labour relations dispute between the Applicants and School Council members, all of who ought to be considered "employees" of the Board under section 1(1)(e) of the Act. The record was sent to the Chief Superintendent so that she could understand the dispute and resolve it through mediation or arbitration. The complaint is therefore labour relations information.

[para. 17.] The Applicants argued that the Board wrongly characterized the record as relating to labour relations: "the Record is not a report, brief, or labour grievance report. This Record is a complaint letter." They argued that none of the definitions of "labour relations" discussed in Order 2000-003 fits the relations described between the Applicant and the School Council members, as the School Council is not a business or industrial organization, and the volunteers are not labourers.

[para. 18.] In Order 2000-003, I adopted the definition of labour relations found in Arthur Mash's *Concise Encyclopedia of Industrial Relations*. I held that under the Act "labour relations" includes collective relations like collective bargaining and related activities, such as the processing of harassment grievances under a collective agreement, between a public body and its employees.

[para. 19.] A school council is created under section 17 of the *School Act* and is regulated by the *School Councils Regulation*. As a delegate, a school council and its members have significant discretion and a degree of autonomy that cuts against the Board's general argument that school council members are Board employees. For example, section 17(4)(a) of the *School Act* gives a school council the unilateral discretion to "advise" a school principal and a school board "respecting any matter relating to the school." Section 17(4)(e) of the *School Act* says a school council may "do anything it is authorized under the regulations to do."

[para. 20.] I note too that the Minister may make regulations respecting the "election or appointment of the members of a school council" and school council powers, duties and responsibilities: sections 17(9)(a) and (b). The reference to the election of executive members of a school council is significant. A school council is a civic organization designed to permit greater parental and community participation in the education process, and is governed by internal by-laws and legislation.

[para. 21.] The Board did not present a persuasive factual or legal basis for its argument that the School Council members were volunteer "employees" of the Board under the Act. The School Council members were functioning in their own right as Council members, not as Board employees. Simple conflict within a school council is grassroots civic conflict, not a labour relations dispute. Information in the record about the dispute is not "labour relations information" under the Act. The Board's claim fails to satisfy the first element of the section 15 test.

(iii.) Conclusion under section 15(1)

[para. 22]. After considering the evidence and the submissions of the parties, I find that the information in the record is not "labour relations information" under section 15(1)(a) of the Act. Therefore, section 15(1) cannot apply to the record.

Issue B. Did the Board properly apply section 18(1) to the record?

(i.) The law

[para. 23.] The relevant provisions of section 18 read:

> 18(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body …when the information is provided, explicitly or implicitly, in confidence.

(ii.) Discussion

[para. 24.] The Board, supported by the Third Parties, built upon the employee claim argued under section 15. It submitted that the record fell within section 18(1), since the "…[r]ecord was evaluative of the Applicants' suitability for continued participation in the activities of the Council and was in part directed to a consideration of whether the legally available steps should be pursued to prevent the further involvement of the Applicant[s] in the affairs of the Council." The Applicants argued that the section did not apply, because school council membership is not a job, contract or benefit awarded by the Board. School council members are not Board employees under the Act.

[para. 25.] After considering the submissions and evidence, I find that the Board has failed to establish that this section applies. The Board did not prove that school council membership is employment, or a contract or benefit awarded by the Board. The Board also did not prove that it had the power to evaluate or control school council membership. I note that the Third Parties supplied a copy of the applicable school council by-laws, which show that a member can be directly removed by the School Council itself.

(iii.) Conclusion under section 18(1)

[para. 26.] I find that section 18(1) does not apply to the record.

Issue C. Did the Board properly apply section 23(1)(a) or (b) to the record?

(i.) The law

[para. 27.] The relevant provisions of section 23(1) read:

> 23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body…
(b) consultations or deliberations involving
    (i) officers or employees of a public body…

(ii.) Discussion

section 23(1)(a)

[para. 28.] The Board, supported by the Third Parties, argued that the complaint was "advice" or an "analysis" developed for the Board.

[para. 29.] I find that much of the complaint amounts to a factual summary of events, or evidence supporting that factual summary. Section 23(1)(a) does not apply to purely factual information in a record: see Orders 96-021 and 97-007.

[para. 30.] Section 23(1)(a) goes to advice that will be accepted or rejected by the recipient of the advice during a deliberative process. It does not apply where the record shows that a decision or a course of action has been arrived at: see Order 97-010. The record discloses that the recipient of the complaint (the Chief Superintendent of Schools) had identified a course of action when the record was created. The evidence presented in the inquiry bears this out. Therefore, section 23(1)(a) does not apply to the information in the record.

section 23(1)(b)

[para. 31.] The Board, supported by the Third Parties, argued that the complaint contains deliberations involving employees under section 23(1)(b).

[para. 32.] A "consultation" under 23(1)(b) occurs when the views of one or more employees of a public body are sought as to the appropriateness of a specific proposal or potential action: see Order 96-006. A "deliberation" for the purposes of section 23(1)(b) is a discussion of the reasons for and against a future action by an employee or officer of a public body: see Order 96-006. Again, the provision is intended to protect information created in the course of decision-making, not information supplied after a decision has been made, or a course of action identified. The evidence shows that the information (the complaint) was supplied to the Chief Superintendent after she had identified a course of action. The evidence confirms that the Chief Superintendent pursued the outlined course of action.

[para. 33.] After reviewing the evidence, I find that none of the information in the record amounts to a "consultation" or "deliberation" under section 23(1)(b). Therefore, section 23(1)(b) does not apply to the information in the record.

(iii.) conclusion under section 23(1)

[para. 34.] I find that neither section 23(1)(a) or section 23(1)(b) appl7 to the record.

Issue D. Did the Board properly apply section 17(1)(a) to the record?

(i.) The law

[para. 35.] The relevant provisions of section 17(1) read:

> 17(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health

(ii.) Discussion

[para. 36.] Order 96-003 established the test for harm under section 19, which I have also applied to claims under section 17. The test is: 1) there must be a reasonable expectation of probable harm; 2) the harm must constitute damage or detriment, and not mere inconvenience; and 3) there must be a causal connection between disclosure and the anticipated harm. There must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or record. As this is a discretionary provision, the exercise of discretion must be reasonable.

[para. 37.] The Board argued that it did not disclose the complaint because of its concerns about potential harm to the health of the Third Party. The Third Party testified in camera about the potential adverse effects of disclosure upon her health. The Third Party also submitted in camera evidence in support of that claim.

[para. 38.] I accept the evidence that the Third Party's health could be harmed by disclosure of information in the record. I also accept that this concern was a relevant and significant consideration that was considered by the Board in deciding to apply section 17(1)(a). The evidence supports a reasonable exercise of discretion against disclosure of some information in the records.

[para. 39.] However, I have said repeatedly that section 17 must be narrowly interpreted and applied on a line-by-line basis. Section 17 directs the withholding of information, not of a record that may contain sensitive information. I find that section 17(1)(a) applies to the passages highlighted by the Board at page 1, other than the references to the Minister and the subject matter of the correspondence relating to the third and fourth attachments; to the first highlighted passage at page 2; to the second, third, fifth and sixth highlighted passages at page 3; and the passages highlighted at page 4, other than the first highlighted passage. Section 17(1) does not authorize the severing of non-controversial information already in the possession of the Applicants, including non-controversial personal information of the Applicants found in the rest of the record.

(iii.) Conclusion under section 17(1)

[para. 40.] I find that the Board properly severed information in the record under section 17(1)(a) of the Act. The provision applies to the passages highlighted by the Board at page 1, other than the references to the Minister and the subject matter of the correspondence relating to the third and fourth attachments; to the first highlighted passage at page 2, to the second, third, fifth and sixth highlighted passages at page 3, and the passages highlighted at page 4, other than the first highlighted passage. Section 17(1) does not authorize the withholding of non-controversial information already in the possession of the Applicants, including non-controversial personal information of the Applicants found in the record. The Board erred when it severed the rest of the record under this provision.

Issue E. Does section 16(1) of the Act apply to the record?

(i.) Discussion

[para. 41.] Section 16(1) is a mandatory ("must") section of the Act that directs the head of a public body to refuse to disclose the personal information of a third party to an applicant if that disclosure would be an unreasonable invasion of a third party's personal privacy. It reads:

> 16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 42.] I note that section 16(1) cannot apply to the personal information of the Applicants, who are not third parties for the purposes of section 16. Section 1(1)(r) of the Act defines "third party" as a "person, a group of persons or an organization other than an applicant or a public body."

(a.) Does the record contain "personal information" of a third party?

[para. 43.] The Board claimed in the alternative that section 16 applied to some highlighted information in the record. I will examine that claim for the information not properly severed under section 17(1)(a). The first issue is whether that information is "personal information" of a third party under the Act. "Personal information" is defined in a non-exhaustive fashion in section 1(1)(n) of the Act. The relevant provisions read:

> 1(1) In this Act ...
>
> (n) 'personal information' means recorded information about an identifiable individual, including
>
> (i) the individual's name...
> …
> (iii) the individual's age, sex, marital status or family status...
> …
> (vi) information about the individual's health and health care history, including information about a physical or mental disability…
> (vii) information about the individual's educational, financial, employment … history…

(viii) anyone else's opinion's about the individual…

[para. 44.] "Personal information" also includes any recorded information about an identifiable individual, including facts and events discussed, observations made, and the circumstances in which information is given, as well as the nature and content of the information.

[para. 45.] After reviewing the record and the submissions, I find that the record contains third party personal information.

(b.) Would disclosure of the personal information be an unreasonable invasion of the third party's personal privacy?

[para. 46.] The relevant provisions of section 16(4) applied by the Board are these:

> 16(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...
>
> ….
>
> (f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,
>
> (g) the personal information consists of the third party's name when
>
> (i) it appears with other personal information about the third party, or
>
> (ii) the disclosure of the name itself would reveal personal information about the third party…

[para. 47.] After reviewing the record, I find that the Board correctly determined that sections 16(4)(f), (g)(i) and (ii) applies to the highlighted information in the record, other than the fourth highlighted passage at page 3 that contains a third party's opinion about the Applicants. That opinion is the Applicants' personal information. I will order the disclosure of that information.

(c.) What relevant circumstances did the Board consider under section 16(5)?

[para. 48.] The relevant provisions of section 16(5) read:

> (5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record request by the applicant..

[para. 49.] When making a determination if a presumption in section 16(4) applies, the head of a public body must look to all relevant considerations, including those specifically set out in section 16(5) of the Act.

[para. 50.] I accept the evidence of the Board's FOIP Coordinator concerning the relevant circumstances the Board considered that weighed against disclosure. Section 16(5)(e) was applied, since the Board knew of the health concerns of the Third Party. Section 16(5)(f) applied, since the personal information in the record was supplied in confidence by the Third Party at the request of the Chief Superintendent. Section 16(5)(h) was applied, since the Board felt that disclosure could unfairly damage the reputation of third parties mentioned in the record.

(d.) Did the Applicants meet the burden of proof under section 67(2)?

[para. 51.] Section 67(2) of the Act provides that if the record or part of the record that the applicant is refused access to contains personal information of a third party, the applicant must prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

[para. 52.] The Applicants argued that the complaint letter could not be confidential, and should not be confidential. Even if this is so, I find that the other relevant circumstances weigh against disclosure and overcome that argument. Therefore, I find that the Applicants did not meet the burden of proof under section 67(2).

(ii.) Conclusion under section 16

[para. 53.] I find that section 16(1) applies to the record, and the Board correctly refused to disclose the highlighted third party personal information under section 16(1) of the Act, other than the fourth highlighted passage at page 3 of the records. Section 16(1) does not apply to that passage.

ISSUE F. Did the Board violate section 38 of the Act?

[para. 54.] The Applicants argued that the Board had in effect breached section 38 of the Act by disclosing the complaint to the Director of their Collaborative Learning Community, as well as to the secretary of the Director. The Applicants also alleged that the complaint may have been disclosed to other persons once it was in the possession of the Board.

[para. 55.] The Board admitted the disclosure, but denied that it had breached section 38 of the Act.

[para. 56.] Since the Director and his secretary are Board employees, the Applicants' allegations raise section 38(1)(g), which reads:

> 38(1) A public body may disclose personal information only
>
> …
>
> (e) to an officer or employee of the public body…if the information is necessary for the performance of the duties of the officer or employee…

[para. 57.] The evidence I heard indicated that the Director was told of the existence of the complaint by the Board, and that all matters relating to the Applicants were to be handled by the Chief Superintendent. The disclosure was necessary to properly inform the Director that he was to pass on certain matters to others at the Board. The evidence also discloses that the complaint was disclosed to a Board investigator. There was no evidence that the Board had disclosed the existence or contents of the complaint to other persons who were not Board employees.

[para. 58.] I find that the Board did not violate section 38.

Issue G. Did the Board discharge its section 9(1) duty to the Applicants?

[para. 59.] Section 9(1) reads:

> 9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para. 60.] The Applicants argued in effect that the Board had not met its section 9(1) duty, since it did not disclose to them that the Third Party wrote in an official capacity with the School Council. The Applicants argued that if they had been given that information, they would have sought a copy of the complaint from the School Council record.

[para. 61.] The evidence shows that the Board responded to the Applicants in a timely fashion, kept them informed, and did an adequate search for records, satisfying the section 9(1) duty. The Board cannot be faulted under the Act for not disclosing the capacity in which the Third Party wrote.

[para. 62.] After considering all of the evidence, I find that the Board discharged its section 9(1) duty toward the Applicants.

Closing comments

[para. 63.] I have issued a number of Orders recently on confidentiality agreements. Public bodies whose records are subject to the Act cannot promise blanket confidentiality to any party that supplies it with information. A promise of confidentiality may be a relevant consideration under the Act, but it cannot be a decisive circumstance. Nor can a promise made by a public body circumvent the operation of this Act. In fairness to persons such as the Third Party, public bodies should qualify any promise of confidentiality by reminding informants that any information provided is subject to the Act. To do otherwise would lead to more inquiries such as this one.

[para. 64.] The Applicants submitted documentation showing that the Board attempted to draw the Applicants into a private arbitration process "to solve the FOIP questions … on a full and final basis" one month prior to the inquiry. Ironically, the Board relied upon Order 2000-003, where I discuss the fact that parties cannot contract out of the Act, or do an "end run" around the Act. See also Order 2000-029. An offer to privately arbitrate a

dispute to circumvent an inquiry under the Act is contrary to the Act. It has no legal effect. In other circumstances I would have consulted with the Minister of Justice about whether such conduct amounted to obstruction under section 86(1)(c) of the Act.

VI. ORDER

[para. 65.] I make the following Order under section 68 of the Act:

1. I find that section 15(1) does not apply to the record, or to information in the record.

2. I find that the Board did not properly apply section 18(1) to the record, or to information in the record.

3. I find that the Board did not properly apply section 23(1)(a) or (b) to the record, or to information in the record.

4. I find that the Board properly applied section 17(1)(a) to: the passages highlighted at page 1, other than the references to the Minister and the subject matter of the correspondence relating to the third and fourth attachments; the first highlighted passage at page 2; the second, third, fifth and sixth highlighted passages at page 3; and the passages highlighted at page 4, other than the first highlighted passage. I uphold the decision of the Board not to release that information.

5. I find that the Board did not properly apply section 17(1)(a) to the rest of the information in the record. I order the Board to release that information to the Applicants, subject to the remaining provisions of this Order.

6. I find that section 16(1) applies to the remaining information in the record for which it was claimed, other than the fourth highlighted passage at page 3 of the records. I order the Board to release that passage at page 3 to the Applicants, but not to release the information covered by section 16(1) to the Applicants.

7. I find that the Board did not violate section 38 of the Act.

8. I find the Board discharged its section 9(1) duty to the Applicants.

9. I order the Board to release to the Applicants all of the attachments to the record, subject to any severing required or permitted under the Act. I further order the Board to provide me with notice that it has complied with numbers 5, 6 and 9 of this Order within 50 days of receipt of this Order.

Robert C. Clark
Information and Privacy Commissioner