



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

ORDER M-71

Appeal M-910422

Nipissing Board of Education



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INTERIM ORDER

BACKGROUND:

The Nipissing Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act), from an individual acting as his wife's agent, for access to four Board motions relating to his wife. The wording of the request was very specific and also asked that the Board inform the requester if no such motions exist.

The Board responded by informing the requester that it could only process a request for access to personal information from the individual to whom the information relates. However, the Board went on to state that any responsive records were exempt under sections 6(1), 7(1) and 12 of the Act. The requester's wife appealed the decision.

Mediation was not possible, and notice that an inquiry was being conducted to review the Board's decision was sent to the Board, and the appellant. Representations were received from both parties.

The Board's representations make no reference to section 7(1) of the Act. Because section 7(1) is a discretionary exemption, I find that the Board has failed to establish the requirements of the exemption, and it is no longer at issue in this appeal.

PRELIMINARY ISSUES:

Before I consider the application of the exemptions to the records, I will address two preliminary issues raised by the Board.

In its representations, the Board states that there are "inherent dangers" in the Commissioner processing appeals from a head's refusal to disclose information requested "by third parties without appropriate confirmation of authority".

I agree that proper authorization to act as agent in a situation where personal information has been requested is a legitimate concern for both the Board and the Commissioner's office. However, it should be noted that the Act does not prohibit an individual from using an agent, nor does it require that the authorization to act as agent be provided in a specific form. In my view, it is the Board's responsibility to take whatever steps are required to confirm that a person who purports to be acting as agent for another individual has the requisite authority to act in this capacity. If proper authorization can not be obtained, and the Board has concerns that release of the requested information might constitute an unjustified invasion of privacy then, in my view, the Board has an obligation under section 21 of the Act to notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations prior to any decision by the Board regarding disclosure of any relevant records.

In the circumstances of this appeal, a written authorization from the requester's wife was provided to the Board. If the Board was not satisfied with this evidence of agency, it could have taken steps to confirm the authorization. However, for the purposes of this appeal, I feel that I have been provided with sufficient evidence to establish that the appellant's husband was duly authorized to act as her agent.

In its representations the Board also states that it "cannot confirm or deny the existence of the records requested" because to respond to the request would provide the very information the appellant is seeking.

Section 22(2) of the Act states:

A head who refuses to confirm or deny the existence of a record as provided in subsection 8(3) (law enforcement) or subsection 14(5) (unjustified invasion of personal privacy) shall state in the notice given under section 19,

- (a) that the head refuses to confirm or deny the existence of the record;
- (b) the provision of this Act on which the refusal is based;
- (c) the name and office of the person responsible for making the decision; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

In responding to the original request, the Board did not raise section 22(b); rather, it made an objection regarding the status of the requester, and went on to raise sections 6(1), 7(1) and 12 of the Act as the grounds for denying access. The Board's concern regarding confirmation of the existence of records was not raised until the inquiry stage of this appeal, and has never been communicated to the appellant, as required by section 22(2).

In addition, the Board has not claimed either section 8 or 14 as a basis for denying access, and these are the only exemptions contained in the Act which entitle an institution to refuse to confirm or deny the existence of records. In my view, the Board's attempt to refuse to confirm or deny the existence of records responsive to the request must fail and, accordingly, I confirm that records exist which are responsive to paragraphs 2 and 4 of the request, and that no records exist which are responsive to paragraphs 1 and 3 of the request.

The responsive records consist of two Board motions contained in the minutes of a meeting of a committee of the whole Board held in camera on December 6, 1988 (Record 1) and May 2, 1989 (Record 2).

ISSUES/DISCUSSIONS:

The issues arising in this appeal are as follows:

- A. Whether any of the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to the records.
- C. Whether the discretionary exemption provided by section 12 of the Act applies to the records.
- D. If the answer to Issue A and Issues B and/or C is yes, whether the Board properly exercised its discretion under section 38(a) of the Act in denying access to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

In my view, the information contained in both records relates to the appellant's previous employment with the Board and, as such, qualifies as the personal information of the appellant under section 2(1) of the Act.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right to access is not absolute. Section 38 provides a number of exemptions to this general right of access, including section 38(a), which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information [emphasis added];

In this appeal the institution claims that sections 6(1) and 12 of the Act apply to the records, and I will now consider the application of these exemptions.

ISSUE B: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to the records.

Section 6(1)(b) of the Act reads as follows:

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.

The Board claims that section 6(1)(b) applies to the records because the meetings of the committee of the whole board were authorized to be held "in camera" under sections 207(2)(b) and (e) of the Education Act. These sections reads as follows:

- (2) 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,
 - (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
 - (e) litigation affecting the board.

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]

I have reviewed the records and, in my view, they both satisfy the requirements of the test for exemption under section 6(1)(b). The records make reference to the fact that meetings of the committee of the whole Board of Education took place; section 207(2)(e) of the Education Act authorizes the committee of the whole Board to meet in-camera when the subject matter under consideration involves litigation; the minutes establish that the issue under consideration at the two meetings involved litigation between the Board and the appellant; and the content of the minutes establishes that disclosure of the records would reveal the actual substance of deliberation of this in-camera meeting, in the circumstances of this case.

I must now determine whether section 6(2)(b) of the Act applies to the records. This section reads as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1) (b), the subject matter of the deliberations has been considered in a meeting open to the public;

I have not been provided with any evidence to indicate that the subject-matter of the records has been considered in a meeting open to the public, and I find that section 6(2)(b) does not apply to the records.

Therefore, I find that Records 1 and 2 both qualify for exemption under section 6(1)(b) of the Act.

Because I have found that both records qualify for exemption under section 6(1)(b), it is not necessary for me to consider the possible application of section 12.

ISSUE D: If the answer to Issue A and Issues B and/or C is yes, whether the Board properly exercised its discretion under section 38(a) of the Act in denying access to the records.

I found under Issue A that the contents of the records qualify as the personal information of the appellant, and under Issue B, that both records qualify for exemption under section 6(1)(b). Therefore, section 38(a) gives the Board the discretion to exempt the records from disclosure.

In my view, a proper exercise of discretion under section 38(a) must be made in full appreciation of the facts of the case, and upon application of proper legal principles. Provided that discretion has been exercised in accordance with established legal principles, it should not be disturbed on appeal [Order 58].

In its representations, the Board submits:

The fact that the person requesting the information is the subject matter of the motion is, respectfully, not the determining factor in deciding whether discretion has been exercised in accordance with recognized legal principles.

Where a Board of Education, sitting as a committee of the whole, exercises its statutory discretion under section 207 of the Education Act, there is no authority for a head of an institution as defined by the Act to override that discretion. ... There is no evidence, and in fact none exists, that the decision of the committee of the whole Board to sit in camera to discuss these matters was made arbitrarily, capriciously or for irrelevant reasons. In the absence of such evidence, we respectfully submit that the Commissioner must uphold the decision of the head of the institution.

I do not feel that the Board has properly exercised its discretion in the circumstances of this appeal.

I considered the question of the proper exercise of discretion in Order P-344. At page 1 of that order, I made a number of points which I feel are relevant in the context of this appeal.

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

In her representations, the appellant states:

Clearly, my situation has been discussed by the Board (ie. a group of publicly elected trustees) in camera, in the presence of their Administrators but without my presence, on numerous occasions. As a result of these discussions, motions were passed and actions taken that dramatically affected me and me alone.

And further:

Equally disturbing is the fact that the Institution obviously feels it has the right to pass such motions in secret without obligation to inform the individual who is the subject of the motion. This is impossible for me to accept.

In my view, the Board has failed to properly exercise its discretion under sections 6(1)(b) and 38(a) of the Act, and must do so before this appeal can be resolved.

ORDER:

1. In this order, I have disclosed the existence of records which are responsive to the appellant's request. Because the Board may apply for judicial review, I have released this order to the Board in advance of the appellant. The purpose for doing this is to provide the Board with an opportunity to review this order and determine whether to apply for judicial review.
2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, this order will be released to the appellant.
3. I uphold the Board's decision that the records qualify for exemption under section 6(1)(b) of the Act.
4. I order the Board to properly exercise discretion under section 38(a) of the Act, and to provide me with further representations concerning this exercise of discretion within twenty days (20) days of the date of this order.

5. These representations should be submitted to Norma Thorney, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

December 10, 1992