



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

# **ORDER M-91**

**Appeal M-9200003**

**Lincoln County Board of Education**



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# ORDER

## BACKGROUND:

The Lincoln County Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to an "intellectual assessment" of a student. The student and her parents all signed the request. The Board released some responsive records, but denied access to three records - the answer booklet for the intelligence test, a document entitled "Creativity Measure", and an "information checklist for referral for giftedness assessment" - pursuant to section 11(h) of the Act. The requesters appealed the Board's decision.

During mediation, the following occurred:

- (1) The Board agreed to release the document entitled "Creativity Measure";
- (2) The Board notified the Canadian distributor of the intelligence test, and the distributor indicated that it objected to the disclosure of the test;
- (3) The Board raised section 10(1) as a new exemption claim for the intelligence test answer booklet;
- (4) The appellants narrowed the scope of the request to include only the student's answers and scores and the examiner's comments, and not the test questions, the suggested correct answers or the "information checklist for referral for giftedness assessment".

Further mediation was not successful, and notice that an inquiry was being conducted to review the Board's decision was sent to the appellants, the Board, the distributor of the test, and the Ministry of Education. Written representations were received from the Board, the appellants and the distributor.

The record which remains at issue in this appeal consists of portions of 14 pages from the student's test answer booklet. (The complete intelligence test consists of 40 pages, but the student was assessed only for "giftedness", which involves only 14 of the 40 pages). The answer booklet contains the student's answers and scores, the examiner's comments, and the suggested correct answers. Since the appellants have narrowed the scope of the request to include only the student's answers and scores and the examiner's comments, the suggested correct answers are outside the scope of this appeal.

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 11(h) of the Act applies to the record.
- B. Whether the mandatory exemption provided by section 10(1) of the Act applies to the record.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the discretionary exemption provided by section 11(h) of the Act applies to the record.**

Section 11(h) states:

A head may refuse to disclose a record that contains,

questions that are to be used in an examination or test for an educational purpose;

The Board submits that disclosure of the suggested correct answers would indirectly reveal the questions, and that a student could memorize the answers or use them to study for the test, and the scores would be affected.

As noted above, the suggested correct answers portion of the answer booklet has been removed from the scope of the appeal. The only portions of the record which remain at issue are those which contain the student's answers and scores and the examiner's comments. In my view, these remaining portions of the record do not contain "questions that are to be used in an examination or test ...", and I find that section 11(h) does not apply in the circumstances of this appeal.

**ISSUE B: Whether the mandatory exemption provided by section 10(1) of the Act applies to the record.**

Section 10(1) of the Act states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
  - (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
  - (c) result in undue loss or gain to any person, group, committee or financial institution or agency;
- ...

Each part of the following three-part test must be satisfied in order for a record to be exempt from disclosure under sections 10(1)(a), (b) or (c) of the Act:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of section 10(1) will occur.

[Orders 36 and M-10]

### **Part One of the Test**

Neither the distributor nor the Board identify which of the various types of information listed in section 10(1) they feel are contained in the record. Their representations appear to suggest that the test questions are trade secrets, and focus on the rationale for denying access to test questions, and the ability to infer these questions from release of the suggested correct answers. Because neither the questions nor the suggested correct answers to the questions are at issue in this appeal, it is not necessary for me to consider whether the suggested correct answers qualify as a trade secret for the purposes of section 10(1). The student's answers to the questions and the examiner's comments are clearly not trade secrets, and I find that the portions of the record which remain at issue in this appeal do not contain any of the types of information listed in section 10(1).

Because all three parts of the sections 10(1)(a), (b) and (c) exemption test must be satisfied in order for a record to qualify for exemption, I find that this exemption does not apply to the record.

**ORDER:**

1. I order the Board to disclose the portions of the record which include the student's answers and scores and the examiner's comments to the appellants within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order. I have attached a highlighted version of the record with the copy of this order sent to the Board which identifies the portions of the record which fall outside the scope of the appeal and should be severed by the Board and **not** disclosed.
2. I order the Board to disclose the document entitled "Creativity Measure" to the appellants within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellants pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ March 2, 1993