



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-327**

**Appeal M-9300118(1)**

**Nipissing Board of Education**



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# 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) for access to the requester's personnel file as well as to any documentation related to a particular issue or the requester's involvement with that issue during a specified time frame.

The Board granted the requester partial access to his personnel file. It identified 12 further records as being responsive to the request and denied access to them in their entirety on the basis of the exemptions in sections 12, 14, 38(a) and (b) of the Act.

The Board also refused to confirm or deny the existence of any **additional** records pursuant to sections 8(3) and 14(5) of the Act. The requester appealed.

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

This order will address only that part of the Board's decision regarding access to the 12 identified records. These records are described in Appendix "A" to this order. I will consider the Board's decision to refuse to confirm or deny the existence of any additional records in Order M-328.

In its decision, the Board also cited section 54(c) of the Act. It submitted no representations on this section and, in my view, it has no application in the circumstances of this appeal. Accordingly, I will not consider section 54(c) in this order.

## PRELIMINARY ISSUES:

During mediation of this appeal, the appellant maintained that other records responsive to his request existed. He specifically indicated that the Board had in its custody three "personnel-type" files relating to him and that the Board had identified only two of these files as being responsive to his request and made a decision on access to those records under the Act.

The Board subsequently acknowledged that it did, in fact, have custody of a third file related to the appellant, a "grievance" file. The Board did not make a decision on access to the records contained in this file as it maintained that the documentation in the file was not responsive to the request. Counsel to the Board provided the Appeals Officer with a general description of the records contained in this "grievance" file.

Given the very broad nature of the appellant's request, I am satisfied that the records contained in the "grievance" file are responsive to the request. The Board has not yet made a decision under the Act on access to these records. So as not to delay the resolution of this appeal, this will be a Final Order with respect to the records on which the Board has made a decision. Order M-328 considers those records whose existence the Board has refused to confirm or deny.

However, the Board will be required to make a decision on access to the records contained in the "grievance" file in accordance with the provisions of the Act.

## ISSUES:

The remaining issues arising in this appeal are:

- A. Whether 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 12 of the Act applies.
- C. If the answer to Issues A and B is yes, and the personal information relates to the appellant, whether the discretionary exemption provided by section 38(a) of the Act applies to Records 2, 4 and 12.
- D. If the answer to Issue A is yes, and the personal information relates to individuals other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.
- E. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.

## SUBMISSIONS/CONCLUSIONS:

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

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual ...".

In its representations, the Board submits that none of the information contained in the records qualify as the personal information of the appellant as his only involvement in the matters described in the records was in his professional capacity.

The appellant states that his involvement with the incident as documented in the records at issue cannot be separated from his personal information as he has been disciplined as a result of his actions.

In my view, Records 1, 2, 4, 7 and 12 contain the personal information of the appellant and other individuals. These records document the appellant's involvement in the incident and qualifies as his personal information, as the appellant's actions during the course of his employment responsibilities have been called into question and he was reprimanded as a result.

Record 1 is a letter authored by the appellant. In these circumstances, I find that there will be no unjustified invasion of the personal privacy of the individuals referred to in the letter if it is disclosed to the appellant.

Records 5, 6, 8, 9, 10 and 11 constitute the personal information of other individuals only and do not relate to the appellant. Record 3 contains no personal information.

**ISSUE B: Whether the discretionary exemption provided by section 12 of the Act applies.**

The Board claims that section 12 of the Act applies to exempt Records 2, 3, 4, 5, 8, 9, 10 and 12 from disclosure.

This section states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
  - (b) the communication must be of a confidential nature, **and**
  - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
  - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49. See also Orders M-2 and M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In its representations, the Board states:

Please note that all of the communications were of a confidential nature. The Board retained counsel in this matter because [a named individual] threatened to sue the Board for breach of fiduciary duty, discrimination, etc., ...

I have carefully reviewed the records for which the Board has claimed section 12 of the Act.

Records 2, 4, 5, 10 and 12 are either notes of conversations between the Board and its solicitor for the purposes of obtaining legal advice (Branch 1), or letters written on the Board's behalf by the Board's solicitor in contemplation of litigation (Branch 2).

In my opinion, these records qualify for exemption under section 12 of the Act.

Record 3 is a telephone message from the Board's solicitor taken by a Board employee. Record 8 consists of notes made by an employee of the Board relating to certain named individuals. Record 9 consists of notes of meetings between the Board and certain named individuals.

In my view, the Board has provided insufficient evidence that Records 8 and 9 were prepared as communications between a client and a legal advisor for the purposes of seeking, formulating or giving legal advice or prepared for counsel for the Board for use in giving legal advice or in contemplation of or for use in litigation. In addition, Record 3 contains no legal advice so as to qualify for exemption pursuant to section 12 (Order 210).

Accordingly, I find that these records are not exempt under section 12. As section 12 was the only exemption

claimed by the Board to apply to Record 3 and no mandatory exemptions apply, this record should be disclosed to the appellant.

With respect to Records 5 and 10, I have reviewed the Board's submissions on the head's exercise of discretion and I have found nothing improper that should be disturbed on appeal.

**ISSUE C: If the answer to Issues A and B is yes, and the personal information relates to the appellant, whether the discretionary exemption provided by section 38(a) of the Act applies to Records 2, 4 and 12.**

Under Issue A, I found that Records 2, 4 and 12 contain the personal information of the appellant. Section 36(1) of the Act gives individuals access to their personal information in the custody or under the control of an institution subject to certain exceptions. One exception is found in section 38(a) of the Act which states:

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]

Under Issue B, I found that section 12 of the Act applies to Records 2, 4 and 12.

I have reviewed the Board's submissions on the exercise of its discretion in refusing to disclose these records to the appellant. I find nothing improper and would not disturb this on appeal.

**ISSUE D: If the answer to Issue A is yes, and the personal information relates to individuals other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.**

Of the remaining records at issue, I found that Records 6, 8, 9 and 11 contain only the personal information of individuals other than the appellant.

Once it has been determined that a record contains personal information, section 14 of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 14(1)(f) reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information. In order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. I find that none of the personal information at issue falls within the ambit of section 14(4).

Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Board submits that the presumption in section 14(3)(b) applies to exempt all four records from disclosure. It maintains that section 14(3)(a) applies to Record 11. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation;

In my view, that portion of Record 11 which describes some medical symptoms is not specific enough to attract the section 14(3)(a) presumption.

The Board cites sections 72(3) and (4) of the Child and Family Services Act and section 264(1)(c) of the Education Act in support of its position that section 14(3)(b) applies to the personal information contained in the records. The Board further indicates that its employees were investigating to determine whether any Criminal Code offences or breaches of the Human Rights Code had occurred.

In my view, it is not accurate to characterize the investigation which generated these records as being one "into a possible violation of law". The evidence provided by the Board and the records themselves indicate that the Board investigated the contravention of the Education Act in order to see if any employees should be disciplined. An investigation for disciplinary purposes does not constitute a "law enforcement" investigation for the purposes of the Act, even if the employee should subsequently grieve any discipline imposed (Orders 157 and 170).

Furthermore, neither the Children's Aid Society nor the Police investigated this matter and none of the records were forwarded to either agency. In my view, given the facts of this case, any investigation which might have been

characterized as one into a "possible violation of law" would have to have been conducted by either the Children's Aid Society or the Police. Accordingly, I find that the presumption in section 14(3)(b) of the Act does not apply to the personal information in Records 6, 8, 9 and 11.

Section 14(2) provides some criteria for the head to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

The Board maintains that the personal information is highly sensitive and was supplied to the Board by the individuals to whom it relates in confidence (sections 14(2)(f) and (h)).

The appellant, on the other hand, submits that a fair determination of his rights (section 14(2)(d)) supports the release of the personal information contained in the records.

Because of the manner in which I have disposed of this issue, I need not consider the application of section 14(2)(h). Sections 14(2)(d) and (f) provide:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;

I shall first consider the appellant's submission that the release of the records is relevant to a fair determination of his rights. He maintains that non-disclosure of this information will deprive him of the right to a fair and impartial arbitration and/or litigation.

In order for section 14(2)(d) to apply to the facts of this case, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question; **and**



- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

I have carefully considered the appellant's representations. In my view, the appellant has not provided me with sufficient evidence to indicate how the personal information contained in the records would have some bearing on the legal rights which he is attempting to advance. On this basis, I find that section 14(2)(d) is not a relevant factor in the circumstances of this appeal.

In order for the Board to successfully rely on section 14(2)(f) (that the personal information is "highly sensitive"), it must establish that disclosure of the information would cause excessive personal distress to the affected persons (Order P-434).

Following a careful review of the Board's representations and the records themselves, I find that the information contained therein can be properly characterized as "highly sensitive", and that this is a relevant consideration in this case.

Therefore, I have found that there are no factors in section 14(2) which favour disclosure and one factor, the highly sensitive nature of the personal information (section 14(2)(f)), which favours the protection of privacy. Having considered all the circumstances of this appeal, I find that the disclosure of Records 6, 8, 9 and 11 would result in the unjustified invasion of the personal privacy of the individuals mentioned in the records. Therefore, the mandatory exemption provided by section 14(1) of the Act applies.

**ISSUE E: If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.**

Record 7 is the only record remaining at issue in this appeal. Under Issue A, I found that it contains the personal information of the appellant as well as that of other identifiable individuals.

Another exception to section 36(1), (an individual's right to access his or her personal information in the custody or under the control of an institution) is section 38(b) which states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) of the Act introduces a balancing principle. The Board must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the Board determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Board the discretion to deny the requester access to his/her own personal information (Orders M-3 and M-22).

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

As I have indicated in my discussion of Issue D, sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of an individual's personal privacy.

Under Issue D, I concluded that there were no factors listed under section 14(2) which weigh in favour of releasing the personal information of other individuals. I also accepted the Board's argument that the records at issue contained highly sensitive information and that this was a relevant consideration in favour of non-disclosure of the personal information of other individuals. This consideration also applies to the personal information contained in Record 7.

I have considered all the circumstances of this appeal and find that the disclosure of Record 7, containing both the personal information of the appellant and other individuals, would also constitute an unjustified invasion of the personal privacy of these individuals. Therefore, section 38(b) of the Act applies and the personal information should not be released.

I have reviewed the Board's representations on the head's exercise of discretion and I find nothing improper that should be disturbed on appeal.

## **ORDER:**

1. I order the Board to disclose Records 1 and 3 to the appellant within fifteen (15) days of the date of this order.
2. I uphold the Board's decision not to disclose Records 2, 4, 5, 6, 7, 8, 9, 10, 11 and 12 to the appellant.
3. In order to verify compliance with the order, I order the Board to provide me with a copy of the records which are disclosed to the appellant in accordance with Provision 1, **only** upon request.
4. I order the Board to make a decision on access to the records identified by its counsel as being contained in

the "grievance" file of the appellant. I order this decision to be made and forwarded to the appellant within thirty (30) days of the date of this order in accordance with sections 19 and 22 of the Act, without recourse to a time extension.

5. I order the Board to provide me with a copy of the decision letter provided to the appellant pursuant to Provision 4 of this order, within thirty-five (35) days of the date of this order. This copy of the decision letter should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ June 7, 1994

## APPENDIX "A"

<b>RECORD NUMBER (Order Reference)</b>	<b>DESCRIPTION</b>	<b>DECISION</b>
1	Letter dated August 26, 1992 from appellant	Disclose
2	Handwritten notes dated April 22, 1992	Sections 12 and 38(a)
3	Handwritten notes dated February 24	Disclose
4	Handwritten notes dated March 10, 1992	Sections 12 and 38(a)
5	Handwritten notes dated January 30, 1992	Section 12
6	Handwritten notes dated December 23, 1991	Section 14(1)
7	Handwritten notes dated February 4, 1992	Section 38(b)
8	Handwritten notes dated February 10, 1992	Section 14(1)
9	Handwritten notes dated March 3, 1992	Section 14(1)

10	Handwritten notes, undated	Section 12
11	Handwritten notes dated January 10, 1992	Section 14(1)
12	Handwritten notes dated January 20, 1992	Sections 12 and 38(a)