



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

ORDER M-559

Appeal M-9500026

Carleton Board of Education



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Carleton Board of Education (the Board) received a request from a parent for access to numerous files, documents and correspondence related to her daughter, who had been a student at five Board schools. The daughter, who is now over eighteen, authorized her mother to act on her behalf.

The Board provided the requester with some documentation. The requester appealed this decision on the basis that several enumerated records had not been released to her.

During mediation the appellant narrowed the scope of her appeal to six categories of records. The Board subsequently located and released additional records to the appellant. The Board denied access to some records on the basis of section 12 of the Act (solicitor-client privilege).

A Notice of Inquiry was sent to the Board and the appellant. As the records at issue appeared to contain the personal information of the daughter, the parties were asked to comment on the application of section 38(a) of the Act. Representations were received from both parties.

In its representations, the Board indicated that two groups of records could now be disclosed to the appellant. One group of records consists of those for which the Board no longer claims the application of section 12 of the Act. The second group consists of records which the Board had previously indicated would be provided to the appellant but is uncertain if this disclosure has actually taken place. Both groups of records are listed in Appendix "A" to the Board's submissions.

So there is no doubt about the identification of these documents and their status, I am ordering the Board to disclose these records to the appellant. For greater certainty, I have listed them in Appendix "A" to this order.

Accordingly, there are two issues which I will address in this order: (1) whether the records listed in Appendix "B" are exempt from disclosure; and (2) whether the Board's search for responsive records was reasonable in the circumstances of this appeal.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Board submits, and I agree, that the five records at issue contain the personal information of the appellant's daughter.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. One of these exemptions is that of solicitor-client privilege (section 12 of the Act).

Section 12 consists of two branches, which provide an institution 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 July 1994, the daughter filed a complaint with the Ontario Human Rights Commission (the OHRC) against the Board, several former and current Board staff and a former Board trustee, alleging that the Board discriminated against her because of her learning disability and failed to accommodate her disability. This complaint is still outstanding.

The Board submits that Records 1, 2 and 3 are exempt pursuant to Branch 2 of section 12 in that they were prepared for the Board's counsel in contemplation of litigation and, in particular, to prepare the Board's response and defence to the daughter's OHRC claim.

The Board indicates that when it was served with the OHRC complaint on July 28, 1994, its solicitor requested a meeting with staff to discuss the allegations. This meeting was held on September 9, 1994. The Board states that in preparation for this meeting, three staff met the day before to review the daughter's school records to assist the solicitor in compiling information relevant to the OHRC complaint. Record 1 was written by the staff who attended this meeting and, in fact, contains references to the specific paragraphs of the OHRC complaint. In addition, Record 2 was prepared by another teacher to respond to certain allegations in the complaint. Two of the staff who attended this September 8 meeting have sworn affidavits describing these meetings and stating that Records 1 and 2 were delivered to the Board solicitor at the meeting held on September 9, 1994.

Based on the above, I am satisfied that Records 1 and 2 were prepared for counsel retained by the Board for giving legal advice, and in contemplation of and for use in the Board's defence of the daughter's OHRC claim. In addition, I believe that Record 3, the Notice of the Meeting, was prepared in contemplation of

litigation in that it indicates that staff were to provide information to the solicitor for the case. It has been established in previous orders that "litigation" for the purposes of section 12 of the Act includes proceedings before administrative tribunals (Order M-162). Thus, I find that Records 1, 2 and 3 qualify for exemption pursuant to Branch 2 of section 12 of the Act.

The Board relies on both Branches 1 and 2 of section 12 to exempt Records 4 and 5 from disclosure.

As part of its representations, the Board has provided an affidavit of the Board superintendent who authored Record 4. In the affidavit, the superintendent states that he sent the memorandum to the Board's solicitor. In the memorandum, the superintendent sets out certain information and requests that the solicitor provide him with his "comments". The solicitor's response is contained in Record 5 which consists of the superintendent's notes of his telephone conversation with the solicitor.

Based on this information, I am satisfied that Records 4 and 5 represent confidential communications between the solicitor and his client, the superintendent representing the Board, directly related to the seeking and giving of legal advice. I find, therefore, that these records qualify for exemption pursuant to Branch 1 of section 12.

The Board has provided submissions on the application of section 38(a) to Records 1-5 and, in particular, why it decided not to disclose them at this time. Having reviewed these representations, I am satisfied that section 38(a) applies to exempt Records 1-5 from disclosure.

REASONABLENESS OF THE SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that such a record does not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that the requested records exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

As part of its representations, the Board has provided affidavits sworn by numerous Board staff involved in the processing of this request. The affidavit of the secretary of the Board outlines the steps taken by the Board and its staff to locate the records responsive to the six categories of the narrowed request. The Board's position with respect to its searches for the six record categories may be summarized as follows:

- (1) Identification and Placement Review Committee (IPRC) Summary Sheets: If these records existed, they would be located in the Special Services files or the Ontario Student Record (OSR). These files were reviewed twice, but a document entitled "IPRC Summary Sheet" could not be located.

- (2) Personal files, including minutes of meetings conducted with three named individuals: Two of these individuals indicated that they never met with the appellant so had no meeting minutes. The third individual provided a copy of notes taken during his personal meetings with the appellant. All three individuals indicated that any other documents they had, had already been provided to the appellant (as they were located in other files), or were documents already in her possession, i.e. correspondence they wrote to her.
- (2a) Formal Minutes of November 14, 1994 IPR meeting with a list of the attendees: As the hearing was never completed, no formal minutes were kept. One individual who attended the meeting provided the appellant with a copy of her handwritten notes. In a letter dated March 8, 1995 the Board advised the appellant of the five individuals present at the meeting.
- (2b) Items containing quotations made in defence to the daughter's OHRC claim: The Board states that any quotations were excerpted from documents either written by the appellant or contained in documents already provided to her.
- (2c and 3):
Items containing results of personal testing or teacher comments and all correspondence and letters:
The Board indicates that when the request was first received, some responsive records were in the solicitor's office to assist him in the preparation of the OHRC defence. The Board later discovered the existence of these documents, reviewed them and disclosed some of them to the appellant on March 8, 1994. (The Board notes that some documents which inadvertently had not been released to the appellant were disclosed to her at this time as well).
- (2d): Personal notes of Superintendents, Trustees or Special Education staff: The Board indicates that it undertook additional inquiries of these individuals with respect to such documents and released information responsive to this part of the request on March 8, 1995.
- (4) Attendance Sheets from a named Secondary School: The Board indicates that, if these records existed, they would be located in the OSR. Accordingly, the Board reviewed this file again but could not locate the attendance sheets. The Board then states that "... further searching was conducted ..." and the attendance sheet was "recreated". This is one of the records included in Appendix "A" to this order which is to be disclosed to the appellant.
- (5) The "AT Risk" Questionnaire and Other material from another Secondary School: The Board indicates that the questionnaire was destroyed in accordance with the Ministry of Education and Training's OSR Management Guidelines as it "... did not provide any information of value to the improvement of [the daughter's] education".

- (6) Assessments from the [Alternate] Site: The Board states that the Co-ordinator of the site confirmed that no records responsive to this part of the request existed because no assessment report was undertaken. The Board notes that subsequently the daughter's assignment book was subsequently located and provided to the appellant.

The appellant accepts the Board's position with respect to Item 4. With respect to the remainder of the record categories, the appellant maintains that she has yet to receive all the information she has requested. She points to the fact that, with respect to several items, the Board initially advised her that the records could not be located or had been destroyed. The Board subsequently located certain of the records and then, with respect to the section 12 records, denied access to them. As is apparent from the Board's explanation provided above, some of the documents which it subsequently located were in the possession of its solicitor when it first received the request.

I can appreciate the appellant's concerns that she has yet to receive all the information she has requested with regard to her daughter. It appears that the record-keeping systems of the Board and/or some of its schools are not organized in such a manner so as to make such documents easily retrievable. I understand how the appellant might maintain that additional records must exist when, as here, an institution locates additional records upon undertaking additional searches. Moreover, as the Board itself acknowledges in its submissions, there is uncertainty as to whether all the documents the Board intended to release to the appellant have, in fact, been disclosed to her (some of the Appendix "A" records). It appears to me that at least some of these records may be responsive to the outstanding portions of the appellant's request.

I have carefully reviewed the representations of both parties as well as the affidavits provided by the various Board staff. At this time, I am satisfied that the Board has taken all reasonable steps to locate the records responsive to the appellant's request. Should the Board subsequently locate additional documentation for use in the OHRC proceedings, the appellant will have the opportunity to address the matter in that forum.

ORDER:

1. I uphold the decision of the Board to deny access to Records 1-5.
2. I uphold the decision of the Board with respect to the search for responsive records.
3. I order the Board to disclose to the appellant the records listed in Appendix "A" to this order within fifteen (15) days of the date of this order.
4. I order the Board to remove the personal information of the other students contained in Record 32 in Appendix "A" prior to disclosing it to the appellant.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to

Provision 3 of this order.

Anita Fineberg
Inquiry Officer

July 7, 1995

APPENDIX "A"

Records which Should be Disclosed to the appellant:

- (1) Undated Handwritten notes entitled "Review/Meeting Prep. (7 pages)
- (2) Letter dated September 30, 1993 from the appellant to school principal (1 page)
- (3) Letter dated September 7, 1993 from the appellant to the school principal (1 page)
- (4) Letter dated September 20, 1993 from the appellant to two individuals (1 page)
- (5) Undated letter with customer receipt stamp dated October 27, 1993 from school principal to the appellant (1 page)
- (6) Undated handwritten notes about daughter covering September 15 - October 5 (3 pages)
- (7) Handwritten notes dated October 19, 1993 about daughter (3 pages)
- (8) Mini-alternative program for appellant's daughter (2 pages)
- (9) Undated memorandum from mini-alternative program about appellant's daughter (2 pages)
- (10) Undated memorandum from mini-alternative program about daughter (2 pages)
- (11) Cooperative Education Student Training Plan evaluation of daughter (4 pages)
- (12) Handwritten letter dated December 21, 1993 re: daughter's placement (1 page)
- (13) Handwritten letter dated December 21, 1993 re: daughter's placement (2 pages)
- (14) Copy of daughter's mid-term English test dated October 23, 1993 (3 pages)
- (15) Memorandum dated November 28, 1993 from school principal re: daughter's English course with attached handwritten notes (2 pages)
- (16) Memorandum dated October 24, 1993 re: daughter's school attendance (1 page)
- (17) Memorandum dated November 3, 1993 re: daughter's school attendance (2 pages)
- (18) Handwritten notes about daughter (7 pages)
- (19) Handwritten notes about daughter (2 pages)

- (20) Memorandum dated November 5, 1992 re: daughter (1 page)
- (21) Daughter's computer project dated June 3, 1991 (3 pages)
- (22) Timetable options re: daughter (1 page)
- (23) Daughter's Co-operative Education Student Evaluation Report for September 20, 1993-October 21, 1993 (6 pages)
- (24) Co-operative Program "Daily Tasks" For October 12-October 15, 1993 (2 pages)
- (25) Co-operative Program "Daily Tasks" for October 18-October 27, 1993 (2 pages)
- (26) Co-operative Program "Daily Tasks" for October 25-October 29 and November 1-November 5, 1993 (4 pages)
- (27) Memorandum dated September 10 from principal re: daughter (2 pages)
- (28) Handwritten anecdotal record dated September 21, 1993 about daughter (2 pages)
- (29) Letter dated November 17, 1993 from principal to placement re: daughter (1 page)
- (30) Handwritten notes dated October 6 re: placement (1 page)
- (31) Typed notes dated December 1993 re: daughter (1 page)
- (32) Typed notes commencing with Interview dated June 1, 1993 with appellant and husband (5 pages)
- (33) Daily attendance Registers for October 6, December 2 and 23, 1993 (3 pages) (daughter's information only)
- (34) Memorandum dated December 2, 1993 re: daughter (2 pages)
- (35) Parent Message form (1 page)
- (36) Permit (1 page)
- (37) Daughter's attendance card (1 page)
- (38) Handwritten note (1 page)

APPENDIX "B"

- (1) Undated handwritten notes (9 pages)
- (2) Letter dated September 8, 1994
- (3) Notice of Meeting dated September 9, 1994 (1 page - 2 copies)
- (4) Memorandum and facsimile cover sheet dated October 25, 1993 from School superintendent to solicitor
- (5) Handwritten notes dated October 26, 1993