



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

# **ORDER M-605**

Appeal M\_9500269

Board of Education for the City of Hamilton



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/Téléc: 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). In September 1994 the appellant submitted a request to the Board of Education for the City of Hamilton (the Board), in several parts. The part of the request under consideration in this order was for a "... copy of my file from [the Board's] legal services department or legal office working for [the Board]".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She is also involved in two ongoing disputes with the Board before the Ontario Labour Relations Board.

In its initial response to this part of the request, the Board indicated that no responsive records existed. The appellant filed an appeal of this decision with the Commissioner's office. This aspect of the Board's decision was dealt with in Order M-491, which I issued. In that order, I indicated that records in the custody of the Board's solicitors which are, in law, the property of the Board would be subject to the Board's control, and would thus be subject to the Act. I ordered the Board to conduct an additional search, and to include records in the Board's control which are in the custody of its solicitors.

The Board did so, and located eight responsive records. Five of these have been disclosed, and the remaining three records, consisting of correspondence between the Board and its solicitors, remain at issue in this appeal.

The Board has denied access to these three records in full, claiming that they are exempt from disclosure under the following exemptions in the Act:

- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12.

The appellant filed an appeal of this denial of access with the Commissioner's office, and this appeal is the subject of this order. During mediation, the appellant agreed that the issues in this appeal are limited to whether the Board's denial of access is justified, based on the exemptions claimed.

A Notice of Inquiry was sent to the appellant and the Board. Representations were received from both parties.

Because the records appeared to contain the appellant's personal information, the Notice of Inquiry raised the possible application of section 38(a) of the Act (discretion to refuse requester's own information).

## **DISCUSSION:**

### **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.

I have reviewed the three records at issue. All of them mention legal issues between the Board and the appellant, and for this reason, I find that all three records at issue contain her personal information.

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. This section 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)

In order to determine whether this exemption applies, I will analyse whether the records qualify for exemption under section 7(1) or 12 of the Act.

### **SOLICITOR-CLIENT PRIVILEGE**

The Board claims that all three of the records at issue qualify for exemption under section 12 of the Act because they are subject to solicitor-client privilege. 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.

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 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).

Two of the records at issue are letters from the Board's solicitors to the Board. They are dated February 1, 1994 and May 29, 1995. The third record is a handwritten note from a Board employee to the Board's solicitors dated February 22, 1994.

In my view, all three of these letters are confidential written communications between a solicitor and client, and all three are directly related to the seeking or giving of legal advice. Therefore, the requirements to qualify for exemption under the first part of Branch 1 have been met. For this reason, I find that all three records qualify for exemption under section 12. Accordingly, I find that they are all exempt under section 38(a).

The appellant submits that the Board "... has notoriously hidden information in the guise of legal issues ...". In my view, this submission does not contradict the application of the exemption to the three records at issue. Section 12 of the Act provides a solicitor-client privilege exemption, and section 38(a) expressly provides that this exemption can apply to records containing the requester's personal information. I see nothing improper in the Board's decision to exempt these records. I also note that the Board has voluntarily disclosed a number of records for which it initially intended to claim this exemption.

Because of the way I have resolved this issue, it is not necessary for me to consider whether the records qualify for exemption under section 7(1).

I note that the Board's representations contain argument to the effect that this appeal is frivolous and vexatious. This issue is currently being considered in another appeal. Because of the finding I have made in this case, I am of the view that it is not necessary for me to consider this issue in this order.

**ORDER:**

I uphold the Board's decision.

Original signed by: \_\_\_\_\_ September 28, 1995  
John Higgins  
Inquiry Officer