



Information and Privacy  
Commissioner/Ontario

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

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# INVESTIGATION REPORT

## INVESTIGATION I95-110M

### A Public Board of Education

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**April 2, 1996**



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# INTRODUCTION

## Background of the Complaint

This investigation was initiated as a result of a complaint concerning a public Board of Education (the Board).

The complainant is the mother of one of the Board's former students. The child is autistic, and had participated in the Board's special education program for exceptional students. The complainant had received copies of records about the child from the Board, which included anecdotal notes about the child prepared by school staff.

The complainant was of the view that this information had been collected without her knowledge or consent, and that the information was outdated and inaccurate. She stated that she had attempted to have the information removed from the child's file by making a written request to the school principal, but she did not receive a reply from the Board. At the time the privacy complaint was filed with the IPC, the child was about to transfer to another school board, and the complainant was concerned that the information would be transferred to the local separate school board with the child's Ontario Student Record (OSR).

Prior to the preparation of this report, the complainant advised our office that she had obtained a copy of the Ministry of Education OSR Guideline 1989 which states that disclosure [of the OSR] to the new school board is within the law. The Board indicated that the anecdotal notes had not been transferred to the new school board. Accordingly, this report will not address the issue of whether the transfer of the OSR was in compliance with the Municipal Freedom of Information and Protection of Privacy Act (the Act).

## Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information in question "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Was the personal information collected in compliance with section 28(2) of the Act?
- (C) Did the Board provide notice of collection of the personal information in compliance with section 29(2) of the Act?
- (D) Was the personal information retained in compliance with section 5 of Ontario Regulation 823/90?

- (E) Did the Board take reasonable steps to ensure the personal information was accurate and up to date before using it, in compliance with section 30(2) of the Act?

## **RESULTS OF THE INVESTIGATION**

**Issue A: Was the information in question “personal information”, as defined in section 2(1) of the Act?**

Section 2(1) of the Act states in part, that "personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- ...
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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 information in question was contained in a series of handwritten notes prepared by school staff recording observations about the child's behaviour and attendance at school, between September 1993 and January 1994.

In our view, the information in these notes met the requirements of paragraphs (a),(b),(g), and (h) of the definition of “personal information” in section 2(1) of the Act.

**Conclusion:** The information in question was “personal information”, as defined in section 2(1) of the Act.

**Issue B: Did the Board collect the personal information in compliance with section 28(2) of the Act?**

The complainant was of the view that the anecdotal notes had been collected without her knowledge or consent. However, the Board indicated that the complainant had provided her consent for Area Team Services, giving her permission for one or more members of the Area Team to become involved in helping program for her child. A covering letter attached to the consent form states:

By signing your consent on page three of this booklet, one or more staff will become involved in helping program for your child.

Under the Act, no person can collect personal information on behalf of an institution unless the collection meets one of the conditions given in section 28(2). The consent of the individual is not one of those conditions.

Specifically, section 28(2) of the Act states:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or **necessary to the proper administration of a lawfully authorized activity** [emphasis added]

The Board submitted that the collection of the personal information was necessary to the proper administration of a lawfully authorized activity. In this case, the activity the Board was engaged in was providing a special education program for an exceptional student.

Section 11(1) of the Education Act states in part:

Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations in respect of schools or classes established under this Act, or any predecessor of this Act, and with respect to all other schools supported in whole or in part by public money,

....

5. governing the provision, establishment, organization and administration of,

i. Special education programs

ii. Special education services, and

iii. Committees to identify exceptional pupils and to make and review placements of exceptional pupils

....

Since section 11(1) of the Education Act provides for the establishment of special education programs for exceptional students, we are of the view that the activity of providing special education programs for exceptional pupils is a lawfully authorized activity.

We next considered whether the collection of the personal information was necessary to the proper administration of this activity.

The Board stated that anecdotal notes are recorded to assist with ongoing assessment and evaluation as well as to develop appropriate programming for the student.

The Ministry of Education Special Education Information Handbook 1984 makes reference to the collection of data, at pages 49 and 50, as follows:

... the major focus in this process is on the teacher's ability to observe the pupil's behaviour and synthesize pertinent assessment data into meaningful acceptable educational objectives...

The primary purpose of collecting educational data is to provide specific information in order to develop programs to meet each child's needs, interests, and levels of functioning...

The data are acquired through a variety of means. While the classroom teacher's observations are an integral component of data collection, formal and informal testing will include diagnostic and achievement tests.

Taking the above into account, it is our view that there exists an expectation on the part of the Ministry of Education that specific educational data will be collected by Boards to develop programs for exceptional students, and that this data will be collected, in part, through the teacher's observations of the child. In this case, some of the information was recorded by an Educational Assistant. The Board provided a copy of its role description for Educational Assistants. This description lists "DATA COLLECTION (e.g. collecting, observing, and recording programme data)" as one of the programming areas addressed by the Educational Assistant.

Given that information about the student is expected to be recorded in the administration of a special education program, it is our view that collecting the personal information would be necessary to properly administer the programme. Without recording and retaining their observations about the student, school staff would have to rely upon memory alone to assist with ongoing assessment and evaluation, and to develop programming for the student.

Accordingly, we are of the view that the Board's collection of the personal information was necessary to the proper administration of a lawfully authorized activity (i.e providing a special education program) and thus, was in compliance with section 28(2) of the Act.

**Conclusion:** The personal information was collected in compliance with section 28(2) of the Act.

**Issue C: Did the Board provide notice of collection of the personal information in compliance with section 29(2) of the Act?**

Section 29(2) of the Act provides that if personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

- (a) the legal authority for the collection;
- (b) the principal purpose or purposes for which the personal information is intended to be used; and

- (c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

The Board provided no evidence to show that it had provided a notice of collection of personal information for the anecdotal notes. In our view, receiving the consent of the parent for Area Team Services was not the equivalent of providing notice of collection under section 29(2) of the Act. Therefore, we conclude that the Board did not provide proper notice of collection of the personal information, in compliance with section 29(2) of the Act.

**Conclusion:** The Board did not provide notice of collection of the personal information in compliance with section 29(2) of the Act.

**Issue D: Was the personal information retained in compliance with section 5 of Ontario Regulation 823/90?**

Ontario Regulation 823/90, section 5, states:

Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

The complainant made a request to the Board to have the anecdotal information removed from the child's file in September, 1994. However, she stated that the Board did not respond to her request.

A formal process under the Education Act allows a parent to request the removal of information from a child's OSR. However, according to the Board, the information in question did **not** form part of the child's OSR. Therefore, it is our view that the provisions of the Education Act respecting removal of information from the OSR would not apply.

The Board acknowledged that it had not replied to the complainant's request, and submitted that the Board had retained the information because it was required for pending litigation with the complainant. In the Board's view, destroying the information would have been "tantamount to 'suppressing evidence' for an upcoming legal case."

The Board provided no evidence to show that it had passed a resolution establishing a retention period of less than one year for the type of records in question. Therefore, it is our view that the minimum one year retention period set out in the above Regulation would apply to the anecdotal notes. In this case, the information was collected between September 1993 to January 1994, and remains in the Board's possession to date.

In our view, the complainant's request for removal of the records would have been a "consent to its earlier disposal", as contemplated in section 5 of the Regulation. Had the Board destroyed the

information at the request of the complainant, in our view, there would have been no infringement of this Regulation.

Although the Regulation provides for a minimum retention period, there are no restrictions on the **length** of retention periods. Therefore, the Board's retention of the records beyond the one year minimum retention period would also not be an infringement of this Regulation. The Board is currently retaining the personal information for use in preparing for pending litigation. The Board is required under the Regulation to retain the personal information for a minimum of one year **after it is used**.

Therefore, we are of the view that the personal information was retained in compliance with section 5 of Ontario Regulation 823/90.

**Conclusion:** The personal information was retained in compliance with section 5 of Ontario Regulation 823/90.

**Issue E: Did the Board take reasonable steps to ensure the information in question was accurate and up to date before using it?**

The complainant was of the view that the personal information was outdated and inaccurate. She noted that the information had been collected over a short timespan (September 1993-January 1994) and was out of date at the time the child transferred schools in 1996. She also questioned the fact that the information had been collected by an Educational Assistant, an individual whom in her view, was not necessarily trained in autistic behaviour management. In raising this issue, the complainant appears to be questioning the accuracy of the information itself.

Section 30(2) of the Act states:

The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

The only issue regarding accuracy that is addressed in this report is whether the Board took reasonable steps to ensure that the personal information was accurate and up to date before using it. Whether the information, itself, was accurate and up to date, is **not** an issue that we have addressed.

The anecdotal notes contain detailed descriptions of the child's behaviour and attendance over the course of different school days and weeks. We found that the Board had taken the following steps: The Board had collected the personal information directly from the child, through the observations of staff to whom this responsibility had been assigned. The Board had also dated each note. The Board indicated that the classroom teacher and Educational Assistants work in co-operation, both keeping notes to ensure that their observations are compatible. The Board stated that one experienced Educational Assistant had been working exclusively with the student, constantly updating the assessment on a day-to-day basis.

The determination of whether reasonable steps had been taken hinges on the meaning of "reasonable" in section 30(2) of the Act. Black's Law Dictionary defines reasonable as:

"Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view ... Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable."

Thus, for reasonable steps to have been taken would not have required a standard so high as to necessitate that every possible step be pursued to ensure accuracy.

In our view, the steps identified above are consistent with Black's definition of reasonable -- appearing to be fair and suitable under the circumstances.

Therefore, it is our view that the Board took reasonable steps to ensure that the personal information was accurate and up to date, in accordance with section 30(2) of the Act, before using it.

**Conclusion:** The Board took reasonable steps to ensure that the personal information was accurate and up to date before using it.

## **Other Matters**

### **Complainant's Request for Removal of Personal Information**

It is our understanding that the complainant has been granted access to the records in question under the access provisions of the Act. That being the case, the complainant is entitled to avail herself of the provisions allowing her to request correction of the personal information and to attach a statement of disagreement to the records, under section 36(2) of the Act, if the Board refuses to make the correction. The Board's decisions in this matter may be appealed to our office.

## **SUMMARY OF CONCLUSIONS**

- The information in question was "personal information", as defined in section 2(1) of the Act.
- The personal information was collected in compliance with section 28(2) of the Act.
- The Board did not provide notice of collection of the personal information in compliance with section 29(2) of the Act.
- The personal information was retained in compliance with section 5 of Ontario Regulation 823/90.
- The Board took reasonable steps to ensure that the personal information was accurate and up to date before using it.



## RECOMMENDATION

We recommend that the Board provide notice of collection of personal information to parents of students involved in its special education programs. We suggest that such notice be provided to the parent at the same time parental consent for the program is provided by the parent.

In our draft report, we stated that the Board should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation. In response to the draft report, the Board submitted that it had already revised its special education form to include the appropriate notice of collection.

Original Signed by: \_\_\_\_\_  
Susan Anthistle  
Compliance Review Officer

April 2, 1996 \_\_\_\_\_  
Date