



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

ORDER 3

Appeal 880031

Ministry of Education



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This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the Act) which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 9, 1988, the Ministry of Education (the Institution) received a request from the Appellant for access to "a study on the Sacred Heart Roman Catholic School in Sioux Lookout" prepared by consulting engineers Keewatin_Aski Limited.
2. On February 24, 1988, the Institution denied access to the report pursuant to subsections 17(1)(c) and 18(1)(d) of the Act.
3. On March 6, 1988, the Appellant appealed the denial of access. Notice of the appeal was duly given by the Commissioner to the Institution.
4. Between March 6, 1988 and April 18, 1988, efforts were made by an Appeals Officer and the parties to settle the appeal. A narrowing of the issues was achieved, in that the Appellant indicated his interest was confined solely to

information contained in the report about asbestos and fire safety problems present in the school. Consequently, the subject of this inquiry is the portion of the report in which those issues are addressed.

5. On April 18, 1988, notice that the Commissioner was conducting an inquiry to review the decision of the head was sent to the Institution and the Appellant.
6. By letter of the same date, the Commissioner notified an affected party, the Director of Education, Dryden District Roman Catholic Separate School Board (the School Board), of the inquiry in order to give the School Board an opportunity to make representations pursuant to subsection 52(13) of the Act. The letters of April 18, 1988 requested written representations from the parties by May 3, 1988.
7. Written representations were received from the Appellant, the Institution and the School Board.
8. On May 16, 1988, I requested further written representations from the Institution with respect to three matters.

9. On May 27, 1988, the Institution forwarded a letter which addressed the questions posed and an additional letter dated June 6, 1988, was received from the Institution which elaborated on the matters referred to above.

It should be noted at the outset that the purpose of the Act as defined in subsection 1(a) is "to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public, that necessary exemptions from the rights of access should be limited and specific". Further, section 53 of the Act provides that the burden of proof that the record or a part of a record falls within one of the specified exemptions in this Act lies upon the head.

I have considered the Federal Court decision in Maislin Industries Limited v. Minister for Industry, Trade and Commerce, et al [1984] 1 F.C. 939 (T.D.) which addresses the issue of burden of proof. At page 943, Mr. Justice Jerome states that "the burden of persuasion must rest upon the party resisting disclosure". In this case, the Institution has a burden of proof as specified in section 53 of the Act. The School Board, as an affected party seeking to rely on an exemption from

disclosure also bears an onus of proving an exemption relied upon applies to the portion of the record in issue.

The issues arising in this appeal are as follows:

- A. whether the report is in the custody or under the control of the Institution as required by subsection 10(1);
- B. whether the portion of the report at issue falls within the subsection 17(1)(c) exemption; and
- C. whether the portion of the report at issue falls within the subsection 18(1)(d) exemption.

ISSUE A:

As a preliminary matter, it must be determined whether the report in question falls within the scope of the Act. Pursuant to subsection 10(1) "every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22."

(emphasis added)

The report was submitted by the School Board to the Institution in support of a request for an allocation under the Institution's Capital Grant Plan. This Plan provides funding to school boards for renovations, alterations and construction of schools. The Institution's submissions indicate an expectation that the School Board will obtain a professional opinion in order to meet the requirements of all other Ministries' codes. In addition, the Institution submits that "it is unlikely that a request for money for work to be done on a school would be considered without an engineer's report." This being the case, I am satisfied that the report is in the custody or under the control of the Institution.

ISSUE B:

The Institution submits that the report should be exempted from disclosure under subsection 17(1)(c) because it is third party information supplied to the Institution in confidence. Subsection 17(1)(c) provides that "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, where the disclosure could reasonably be expected to result in

undue loss or gain to any person, group, committee or financial institution or agency."

In order to fall within the exemption claimed, the portion of the record at issue must meet a three_fold test. First, the record must contain information which falls within one of the specified categories of third party information. Second, the information must have been supplied in confidence, either implicitly or explicitly. And finally, it must be shown that disclosure of the information could reasonably be expected to cause the type of injury specified in the subsection.

The first question to be addressed is whether the information contained in the portion of the report which is at issue in this appeal fits within one of the categories of information set out in subsection 17(1) of the Act? The portion of the report at issue is an assessment of the structural and internal features of the school as they relate to asbestos and fire safety. The information is of a technical nature and as such, I am satisfied that the information fits within one of the categories of information set out in subsection 17(1).

The next question to be addressed is whether the report was supplied to the Institution in confidence, implicitly or

explicitly? The School Board submits that it received the report at an in camera session on September 22, 1987. The School Board has not released the report to the public. The Institution submits that "since...[the report] was kept in confidence by the board and sent...[to the Institution] as supporting information,...[the Institution] felt that...[it] should respect the board's wishes and hold it in confidence."

As set out in subsection 17(1) of the Act, the confidentiality claimed need not be explicit. Indeed, in this case, there is no indication that the report was explicitly supplied in confidence. However, after an examination of the circumstances surrounding the creation and use of the report, I find that the report was supplied to the Institution in confidence implicitly.

The final question to be addressed is will there be any undue loss or gain suffered by disclosure of the portion of the report requested? On reviewing the submissions of both the Institution and the School Board, I am not satisfied that disclosure of the portion of the report dealing with asbestos and fire safety could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. In fact, I note that by a letter to parents with children enrolled in Sacred Heart School dated January 27, 1988, the

School Board made available "all reports which...[it has] received" addressing the issue of the presence of asbestos in the Sacred Heart School. The reports referred to did not include the Keewatin_Aski engineering report. There is no evidence of any undue loss or gain resulting from the disclosure of information contained in any of these other reports dealing with the same subject matter as the report in issue under this appeal.

I find, therefore that neither the Institution nor the School Board has satisfied the requirements of the exemption claimed under subsection 17(1) (c).

ISSUE C:

The Institution submits that the report should be exempted from disclosure pursuant to subsection 18(1) (d). Subsection 18(1) (d) states that "a head may refuse to disclose a record that contains information where the disclosure could reasonably be expected to be injurious to the financial interest of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario."

After reviewing both the submissions of the Institution and the School Board and the record at issue, I find that there is insufficient evidence to conclude that the disclosure of the portions of the report dealing with asbestos and fire safety could reasonably be expected to be injurious to the financial interests of the Government of Ontario, and that the requirements of the exemption claimed under subsection 18(1)(d) have not been met.

SUMMARY

I find that neither the Institution nor the School Board have discharged the onus of proving that the requested portion of the report falls within one of the specified exemptions in the Act.

I therefore order that the Institution grant the Appellant access to those portions of the report dealing with asbestos and fire safety (namely pages 10, 11, 12, 13, 14, 15 and recommendations 2 and 3 on page 42) within 20 days of the date of this Order. The balance of the report is not at issue and need not be released.

While I have no direct authority over the School Board, it is my understanding that it has taken steps to address the presence of

asbestos and the fire safety concerns in the Sacred Heart School. The School Board may wish to consider releasing any information relating to these efforts.

Original signed by: _____
Sidney B. Linden
Commissioner

June 21, 1988