



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-281**

## **Appeal M-9300173**

### **Simcoe County Board of Education**



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# ORDER

## BACKGROUND:

The Simcoe County Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all personal information held by the Board which related to the requester, his wife and their two children.

The Board responded to the request by identifying 12 categories of records responsive to the request and providing copies of 11 of the record categories to the requester. Access was denied to one record, a 43-page report dated May 1, 1991 described as Record 7-5, pursuant to section 12 of the Act (solicitor-client privilege).

The requester appealed the Board's decision, adding that, in his view, additional records responsive to the request should exist. During the mediation of the appeal, the Board issued a further decision letter in which it disclosed the cover page and nine pages of Record 7-5 in their entirety, along with portions of 14 other pages. The Board also indicated that it would be relying on sections 14, 38(a) and (b) to deny access to the remainder of the record. The record remaining at issue in this appeal consists of 34 pages of Record 7-5 either in whole or in part.

Further mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the Board, the appellant and 15 persons whose interests might be affected by the disclosure of Record 7-5. Representations were received from the Board, the appellant and two of the affected persons.

During the inquiry stage of the appeal, the Board located and granted access in full to a further 56 pages of documentation which had not previously been referred to in the decision letters. The appellant maintains, however, that further records responsive to his request exist.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemptions found in sections 12 and 38(a) of the Act apply to the record.
- C. Whether the search for additional records was reasonable in the circumstances of this appeal.

## SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act defines "personal information", in part, as follows:

"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,
- ...
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

In its representations, the Board agrees that the information contained in the record qualifies as "personal information" within the meaning of section 2(1) of the Act. After a careful review of the record, I find that Record 7-5 contains the personal information of the appellant, his children and a number of other identifiable individuals.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemptions found in sections 12 and 38(a) of the Act apply to the record.**

Section 12 of the Act provides that:

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).

[Orders M-2, M-52 and M-61]

It has been established in a number of previous orders that, for the litigation privilege aspect of the exemption to apply, the record must have been created or obtained especially for the lawyer's brief for existing or contemplated litigation (Orders 49, M-2 and M-19).

In its representations, the Board states that:

The information was gathered by Board officers for the sole purpose of obtaining legal counsel on the matters of (1) Board response to civil action by the appellant, and (2) what internal measures might appropriately be undertaken by the Board to reassure students of their security, and ensure that order was maintained in the school environment.

The Board also submitted an affidavit from its Legal Counsel stating that his office had been contacted by the Board concerning the subject matter which gave rise to the creation of the record only after the Board was informed by the appellant's solicitor that legal action was being commenced by the appellant against the Board. Contact between the Board and its counsel occurred prior to the creation of Record 7-5. The Board further submits that the record at issue was reviewed by the Board's solicitor before he gave legal advice to the Board regarding the matter in dispute.

Having reviewed the record and the representations of the parties, I find that the Board has established that Record 7-5 was "created or obtained especially for a lawyer's brief", which is a necessary component of the "litigation privilege" part of the exemption. Accordingly, I find the record qualifies for exemption under the second part of Branch 1 of the section 12 exemption.

The fact that the litigation contemplated at the time Record 7-5 was created has been resolved does not undermine the purpose for which the record was originally prepared, and the continued application of the exemption to the record (Order P-624).

As I have found that Record 7-5 contains the personal information of the appellant and other identifiable individuals, I must consider the application of section 38(a) of the Act, which states:

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

**[IPC Order M-281/March 8,1994]**

if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

This provision gives the Board the discretion to disclose an individual's own personal information in situations where one of the enumerated exemptions would apply. I have reviewed the representations of the Board on the exercise of its discretion and find nothing improper in the manner in which this determination was made, accordingly, I would not alter it on appeal.

**ISSUE C: Whether the search for additional records was reasonable in the circumstances of this appeal.**

In its representations, the Board describes in detail the three separate searches which it undertook to locate records responsive to the appellant's request. An affidavit sworn by the individual who conducted the searches was included with the Board's representations, in which a detailed description of the location and results of each search are outlined. I have carefully reviewed the representations of the Board, including the affidavit submitted in support of the Board's position and I am satisfied that the Board's searches for responsive records were reasonable in the circumstances of this appeal.

**ORDER:**

I uphold the Board's decision.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ March 8, 1994