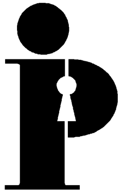

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-328

Appeal M-9300118(2)

Nipissing Board of Education

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ORDER

BACKGROUND:

The Nipissing Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the requester's personnel file as well as to any documentation related to a particular issue or the requester's involvement with that issue during a specified time frame.

The Board granted the requester partial access to his personnel file. It identified 12 further records as being responsive to the request and denied access to them in their entirety on the basis of the exemptions in sections 12, 14, 38(a) and (b) of the Act. The Board also refused to confirm or deny the existence of any additional records pursuant to sections 8(3) and 14(5) of the Act. The requester appealed.

Mediation was not possible, and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant and the Board. Representations were received from both parties.

In Order M-327, I dealt with the issues arising in the appeal of the Board's decision to deny access to the 12 identified records. Accordingly, this order will address only that part of the Board's decision in which it refused to confirm or deny the existence of any additional records pursuant to sections 8(3) and 14(5).

In its representations, the Board states that if additional records of the nature requested existed, access to them would be denied pursuant to section 8(1)(d) of the Act [for the section 8(3) claim] and sections 14(2) and (3) of the Act [for the 14(5) claim].

PRELIMINARY MATTER:

In an appeal from a decision to refuse to confirm or deny the existence of a record, the correctness of the decision is an issue to be determined on appeal (Order M-46). In this appeal, I have reached the conclusion that sections 8(3) and 14(5) of the Act are not applicable and I feel that it would be useful to state this conclusion at the beginning, so that I might provide a fuller explanation of the reasons for my decision.

Accordingly, I confirm that an additional 33 records which are responsive to the appellant's request do in fact exist. These records are described in Appendix "A" to this order.

In its representations, the Board claims the application of other exemptions to the records to which it has applied sections 8(3) and 14(5). It submits that sections 6, 7, 12, 38(a) and (b) of the Act would apply to exempt these records from disclosure. In order that I may issue a Final Order in this matter, where necessary, I will address all of the Board's submissions.

ISSUES:

For ease of reference, I have divided the issues arising in this appeal into two parts:

PART I - REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF THE RECORDS

A. Whether records responsive to the appellant's request contain "personal information" as defined in section 2(1) of the Act.

B. Whether the head properly exercised his discretion under section 14(5) of the Act in refusing to confirm or deny the existence of further responsive records.

C. Whether records of the nature requested, if they existed, would qualify for exemption under section 8(1)(d) of the Act.

D. Whether section 8(3) of the Act applies in the circumstances of this appeal.

PART II - APPLICATION OF THE EXEMPTIONS

E. Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply.

F. Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 35 and 38.

G. If the answer to Issue A is yes, and the records contain the personal information of individuals other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.

H. If the answer to Issue A is yes, and the records contain the personal information of the appellant and other identifiable individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.

Because of my decision under Issue H, I need not consider the application of section 6(1) of the Act to Record 31.

PART I - REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF THE RECORDS

ISSUE A: Whether records responsive to the appellant's request contain "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual ...".

In its representations, the Board submits that none of the information contained in the records qualify as the personal information of the appellant as his only involvement was in his professional capacity.

The appellant states that his involvement with the incident as documented in the records at issue cannot be separated from his personal information as he has been reprimanded as a result of his actions.

I have carefully reviewed the 33 records the existence of which the Board has refused to confirm or deny. Records 2, 6, 14, 21, 29 (the top part only), 33, 36, 37 and 38 contain solely the personal information of other individuals. Records 5, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29 (the bottom part only), 30, 31, 32, 34 and 35 contain the personal information of both the appellant and other individuals.

ISSUE B: Whether the head properly exercised his discretion under section 14(5) of the Act in refusing to confirm or deny the existence of further responsive records.

Under Issue A, I found that all the records contain the personal information of identifiable individuals other than the appellant. Therefore, I may consider the application of section 14(5) of the Act which states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

In Order P-339, issued under the provincial Freedom on Information and Protection of Privacy Act, Assistant Commissioner Tom Mitchinson discussed the application of section 21(5), the equivalent to section 14(5) of the Act, as follows:

> A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which, in my view, should be exercised only in rare cases.
>
> In my view, an institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

I agree with Assistant Commissioner Mitchinson and adopt this approach for the purposes of this appeal.

In its representations, the Board states that the individuals referred to in the records at issue had always expected that the details of the incident would be kept confidential. The Board further submits that individuals mentioned in the records have already been subjected to ridicule in the community as a result of rumours and speculation about the information contained therein.

In my view, the head, by confirming that further records exist, is not confirming that any identifiable individual was involved in that incident. The head is only confirming that records associated with such an occurrence exist, without indicating the parties involved.

By simply confirming that records responsive to the appellant's request exist, without indicating the nature of these records or the parties involved with any particular record, the Board would not be compromising the privacy interests of any individual.

I find that the head has not provided sufficient evidence to establish that disclosure of the mere existence of additional records responsive to the appellant's request would convey information to the appellant which would constitute an unjustified invasion of personal privacy. Therefore, I find that the requirements of section 14(5) have not been met.

ISSUE C: Whether records of the nature requested, if they existed, would qualify for exemption under section 8(1)(d) of the Act.

The Board submits that section 8(1)(d) of the Act applies to Record 32 which is a confidential memorandum to the Board. Section 8(1)(d) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

In order for the record to be considered for exemption under this section, the matter which generated the record must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act, which reads:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction

could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b);

The Board, in its representations, states that the information contained in Record 32 was provided in confidence and disclosure of the information would reveal a confidential source in respect of an investigation that could lead to proceedings in a court.

The Board cites sections 72(3) and (4) of the Child and Family Services Act and section 264(1)(c) of the Education Act in support of its position that the information contained in this record is in respect of a "law enforcement" matter. The Board further indicates that it was investigating to determine whether any Criminal Code offences or breaches of the Human Rights Code had occurred.

In my view, Record 32 can be properly characterized as part of an investigation relating to internal administrative decision which does not satisfy the requirements of the definition of **"law enforcement"** contained in section 2(1). In my view, this investigation was conducted to provide the Board with information required to make a decision relating to disciplining one of the individuals involved in the incident. An investigation for disciplinary purposes does not constitute a "law enforcement" investigation for the purposes of the Act, even if the employee should subsequently grieve any discipline imposed (Orders 157 and 170).

Furthermore, neither the Children's Aid Society nor the Police investigated this matter and none of the records, including Record 32, were forwarded to either agency. In my view, given the facts of this case, any investigation which "could lead to proceedings in a court or tribunal" would have had to have been conducted by either the Children's Aid Society or the Police. The Board investigation itself did not and could not lead to proceedings in a court or tribunal where a penalty or sanction could be imposed.

As a result, I find that the matter which gave rise to the investigation does not meet the definition of **"law enforcement"** in section 2(1) of the Act. Therefore, Record 32 does not qualify for exemption under section 8(1)(d).

Section 8(3) of the Act states:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

As I have indicated, I have rejected the Board's claim that section 8(1)(d) applies to Record 32 on the basis that the matter which gave rise to the investigation and the creation of this record does not meet the section 2(1) definition of law enforcement. Accordingly, section 8(3) of the Act cannot apply and I find that it was improperly claimed by the Board. Therefore, I need not consider Issue D.

PART II - THE APPLICATION OF THE EXEMPTIONS

Having confirmed the existence of the 33 records described in Appendix "A", I will now consider the application of the exemptions claimed by the Board in the alternative to deny access to these records.

ISSUE E: Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply.

The Board claims that section 12 of the Act applies to Records 2, 5, 6, 7, 10-25, 28, 30 (A and B), 34 and 37.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. A record this 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 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]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 have been satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

> 1. the record must have been prepared by or for counsel employed or retained by an institution; **and**
>
> 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.
>
> [Order 210]

In its representations, the Board states:

> Please note that all of the communications were of a confidential nature. The Board retained counsel in this matter because [a named individual] threatened to sue the Board for breach of fiduciary duty, discrimination etc...

I find that Records 2, 6, 11, 12, 13, 15, 17, 20, 21, 22, 23 and 24 consist of communications between the Board and its solicitor directly related to the seeking and/or giving of legal advice. Accordingly, they qualify for exemption under Branch 1 of the section 12 exemption. Further, I find that Records 14, 16, 18 and 25 consist of documents prepared either by or for the Board's solicitor for use in giving legal advice or in contemplation of litigation. This second group of records qualify for exemption under Branch 2 of the section 12 exemption.

Records 5, 10 and 19 are notes made by a Board employee relating to certain named individuals. Records 7 and 30 (A and B) are notes of meetings between the Board and certain named individuals. Record 28 is a chronology prepared by the Board. Record 34 is a memorandum from the appellant while Record 37 consists of notes of a discussion with the appellant. In my view, the Board has provided insufficient evidence that these records are either subject to the common law solicitor-client privilege or were prepared for counsel employed or retained by the Board for use in giving legal advice or in contemplation of or for use in litigation.

I have reviewed the Board's submissions on its exercise of discretion in refusing to disclose Records 2, 6, 14 and 21. I find nothing improper in the manner in which it was exercised and would not alter it on appeal.

Under Issue A, I found that Records 11, 12, 13, 15, 16, 17, 18, 20, 22, 23, 24 and 25 contain the personal information of the appellant. Section 36(1) of the Act gives individuals a right of access to their personal information in the custody or under the control of an institution, subject to certain exceptions. One of the exceptions is contained in section 38(a) which 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]

The Board has exercised its discretion under section 38(a) to deny access to the records enumerated above. Having reviewed its submissions on this point, I am satisfied that this discretion was exercised properly.

ISSUE F: Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 35 and 38.

The Board claims that Records 35 and 38 are exempt pursuant to section 7(1) of the Act which states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by the institution.

It has been established in a number of previous orders that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

In my view, neither Record 35 nor Record 38 contain information which qualifies as advice or recommendations as described above. They both outline comments made about the status of particular events and relationships by the appellant and other individuals. Therefore, I find that section 7(1) of the Act does not apply to exempt these records from disclosure.

ISSUE G: If the answer to Issue A is yes, and the records contain the personal information of individuals other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.

Under Issue A, I found that, of the records remaining at issue, Records 29 (the top part), 33, 36, 37 and 38 contain the personal information of individuals other than the appellant. However, all of these records consist of correspondence that was either written by or sent to the appellant or consists of notes of a discussion with the appellant. In these circumstances, I am of the view that disclosure would not constitute an unjustified invasion of the personal privacy of the individuals referred to in the records. They should, therefore, be disclosed to the appellant.

ISSUE H: If the answer to Issue A is yes, and the records contain the personal information of

the appellant and other identifiable individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.

The records remaining at issue, Records 5, 7, 10, 19, 26, 27, 28, 29 (the bottom part), 30 (A and B), 31, 32, 34 and 35, contain the personal information of both the appellant and other identifiable individuals.

Another exception to section 36(1), (an individual's right to access his or her own personal information in the custody or under the control of an institution), is section 38(b) which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As has been stated in a number of previous orders, section 38(b) introduces a balancing principle. The Board must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their personal privacy. If the Board determines that the release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 38(b) gives the Board the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his own personal information, the only situation under section 38(b) in which he can be denied access to the information is if it can be determined that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Record 30A (except for the note at the end of page 2 of this record) consists of notes of an interview with the appellant. Both Records 34 and 35 were written by the appellant. In my view, disclosure of the information contained in these three records would not result in an unjustified invasion of the personal privacy of other individuals. Accordingly, these records should be disclosed to the appellant.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. I find that none of the personal information at issue falls within the ambit of section 14(4).

Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Board submits that the presumptions in sections 14(3)(a), (b) and (d) apply to the information contained in the records containing the personal information of both the appellant

and others. These sections of the Act state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (d) relates to employment or educational history;

I am of the view that none of these presumptions apply to the personal information at issue. The information in Record 10 relating to an individual's medical/psychological situation is too vague to be considered to fall within the section 14(3)(a) presumption. There are portions of Records 5 and 7 that relate to an individual's employment situation with the Board at the time of the creation of the records. This does not constitute employment "history" for the purposes of section 14(3)(d). For the reasons expressed in my discussion under Issue C, I do not find that the investigation which generated Records 26, 27, 28, 29 (the bottom part), 30B, 31 and 32 can be characterized as one into a "possible violation of law".

Section 14(2) provides some criteria for the head to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The Board maintains that the personal information is highly sensitive and that some of it was supplied to the Board by the individuals to whom it relates in confidence (sections 14(2)(f) and (h)).

The appellant, on the other hand, submits that a fair determination of his rights (section 14(2)(d)) supports the release of the personal information contained in the records.

Because of the manner in which I have disposed of this issue, I need not consider the application of section 14(2)(h).

Sections 14(2)(d) and (f) provide:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(f) the personal information is highly sensitive;

I shall first consider the Board's submission that the personal information contained in Records 5, 7, 10, 19, 26, 27, 28, 29 (the bottom part), 30B, 31 and 32 is highly sensitive.

In order for the Board to successfully rely on section 14(2)(f) (that the personal information is "highly sensitive"), it must establish that disclosure of the information would cause excessive personal distress to the affected persons (Order P-434).

Following a careful review of the Board's representations and the records themselves, I find that the information contained therein can be properly characterized as "highly sensitive", and that this is a relevant consideration in this case. This factor weighs in favour of privacy protection.

The appellant submits that the release of the records is relevant to a fair determination of his rights (section 14(2)(d)). He maintains that non-disclosure of this information will deprive him of the right to a fair and impartial arbitration and/or litigation.

In order for section 14(2)(d) to apply to the facts of this case, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**

(3) the personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question; **and**

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

I have carefully considered the appellant's representations. In my view, the appellant has not provided sufficient evidence to indicate how the personal information contained in the records would have some bearing on the legal rights which he is attempting to advance. On this basis, I find that section 14(2)(d) is not a relevant factor in the circumstances of this appeal.

Therefore, I have found that there are no factors in section 14(2) which favour disclosure and one factor, the highly sensitive nature of the personal information (section 14(2)(f)), which favours the protection of privacy. I, therefore, need not consider the application of section 14(2)(h).

Having considered all the circumstances of this appeal, I find that disclosure of Records 5, 7, 10, 19, 26, 27, 28, 29 (the bottom part), 30B, 31 and 32 would result in the unjustified invasion of the personal privacy of the individuals mentioned in the records.

Therefore, section 38(b) of the Act applies and the personal information should not be released.

I have reviewed the Board's exercise of discretion under section 38(b) in refusing to disclose this information. I find nothing improper in the manner in which it was exercised in the circumstances of this appeal.

ORDER:

1. I do not uphold the Board's decision to refuse to confirm or deny the existence of the records.

2. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to the Board in advance of the appellant in order to provide the Board with an opportunity to review this order and determine whether to apply for judicial review with respect to the issue of the existence of the records.

3. If I have not been served with a Notice of Application for Judicial Review with respect to the issue of the existence of the records within fifteen (15) days of the date of this order, I will release this order to the appellant, within five days following the expiration of the 15-day period.

4. In accordance with the requirements of section 43(4) of the Act, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Board.

5. I uphold the Board's decision to deny access to Records 2, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 (the bottom part only), 30A (the "note" at the end of page 2 of this record), 30B, 31 and 32.

6. I order the Board to disclose Records 29 (the top part only), 30(A) (except for the "note" at the end of page 2 of this record), 33, 34, 35, 36, 37 and 38 to the appellant within thirty (30) days of the date of this order.

7. In order to verify compliance with this order, I order the Board to provide me with a copy of the records disclosed to the appellant in accordance with Provision 6, **only** upon request.

Original signed by: June 7, 1994
Anita Fineberg
Inquiry Officer

APPENDIX "A"

RECORD NUMBER	DESCRIPTION	DECISION
2	Handwritten notes	Section 12
5	Handwritten notes	Section 38(b)
6	Handwritten notes	Section 12
7	Handwritten notes	Section 38(b)
10	Typed notes	Section 38(b)
11	Typed notes	Sections 12 and 38(a)
12	Draft Letter	Sections 12 and 38(a)
13	Typed notes	Sections 12 and 38(a)
14	Handwritten notes	Section 12
15	Letter with typed notes in the Margin	Sections 12 and 38(a)
16	Draft Letter	Sections 12 and 38(a)
17	Fax from Board's solicitor	Sections 12 and 38(a)
18	Copy of Letter from Board's solicitor	Sections 12 and 38(a)
19	Handwritten notes	Section 38(b)
20	Letter from the Board's solicitor	Sections 12 and 38(a)
21	Fax from Board's solicitor	Section 12
22	Fax from Board's solicitor with draft	Sections 12 and 38(a)

RECORD NUMBER	DESCRIPTION	DECISION
	letter attached	
23	Letter from Board's solicitor with draft letter attached	Sections 12 and 38(a)
24	Fax from Board's solicitor with draft letter attached	Sections 12 and 38(a)
25	Handwritten notes	Sections 12 and 38(a)
26	Correspondence to the Board	Section 38(b)
27	Correspondence to the Board	Section 38(b)
28	Chronology prepared by Board employee	Section 38(b)
29	Letter	Top part - Disclose Bottom part - Section 38(b)
30A 30B	Interview notes (appellant) Interview notes (appellant and others)	Disclose all except for "note" Section 38(b)
31	Letter to the Board	Section 38(b)
32	Handwritten memorandum	Section 38(b)
33	Letter from School Association to the Board	Disclose
34	Memorandum	Disclose
35	Memorandum	Disclose
36	Letter	Disclose
37	Handwritten notes	Disclose
38	Letter	Disclose