



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-466

Appeal M-9400458

Nipissing Board of Education



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester, an employee of the Nipissing Board of Education (the Board), was involved in a sensitive matter which resulted in a disciplinary letter being placed in his personnel file. As a result, the requester initiated grievance proceedings against the Board and requested access to his personnel records as well as any documentation relating to the requester's involvement in this matter. Access to records responsive to the request was denied and an appeal to the Commissioner's office was filed.

The appeal resulted in the issuance of Order M-327 in which Inquiry Officer Anita Fineberg upheld the Board's decision to deny access to ten records and ordered the Board to disclose two records. The Board was also ordered to provide the appellant with a decision on access to those records identified as being contained in a "grievance file" relating to the appellant which was not addressed in its earlier decision.

The Board complied with the terms of Order M-327 by issuing a decision letter to the requester in which it granted access to 12 of 16 responsive records contained in the requester's grievance file. The Board denied access to the remaining four records claiming the application of the following exemptions contained in the Act:

- solicitor-client privilege - sections 12 and 38(a)
- closed meeting - sections 6(1)(b) and 38(a)
- invasion of privacy - sections 14 and 38(b).

The requester appealed the Board's decision. A Notice of Inquiry was provided to the appellant and the Board. Representations were received from both parties. In its representations, the Board raises the issue of the authority of the Commissioner under the Municipal Act to delegate certain decision-making powers to his staff.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION

The Board claims that Records 13, 15 and 16 are exempt from disclosure under both branches of section 12 of the Act. Section 12 provides the Board 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 Board 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.

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are 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.

The Board submits that Record 13, a type-written chronology of events, was prepared by a Board employee specifically for use by counsel in preparation for the appellant's grievance arbitration.

Record 15 is a handwritten note made by the Board's Director of Education following a meeting with the appellant conducted under the grievance procedure mandated by the collective agreement governing the appellant's employment. The Board indicates that the note was prepared in the course of grievance litigation, reflects settlement discussions and was then used to obtain legal advice from the Board's solicitors. It adds that this document will be used in preparing the Board's solicitor for the arbitration hearing which is to follow.

Record 16 is a handwritten note prepared by the Board's Superintendent following a telephone conversation between the Superintendent, the Director of Education and a representative of the appellant's union. This note was prepared shortly after the initiation of the grievance proceeding by the appellant and reflected an effort on the part of the Board and the union to define the issues in the matter and to determine how the grievance would be resolved.

I find that Records 13, 15 and 16 do not qualify for exemption under part 1 of Branch 1 of section 12. The communication reflected in the notes and chronology did not take place between a client and his legal advisor. However, I accept the Board's submission that Record 13 was created specifically for the lawyer's brief for the existing grievance litigation involving the appellant. Accordingly, I find that Record 13 qualifies for exemption from disclosure under the second part of Branch 1 of the section 12 exemption.

I will now turn to the application of Branch 2 of section 12 to Records 15 and 16. I find that at the time the records were created, grievance litigation was indeed contemplated by the Board employees who made the notes. I cannot agree, however, that either Record 15 or 16 were prepared for counsel. The notes may have formed the basis for some further discussion or seeking of legal advice from counsel but, strictly speaking, were not records prepared for counsel within the meaning of section 12 of the Act. Accordingly, I find that Records 15 and 16 do not qualify for exemption under section 12. As no other exemptions have been claimed for these records, they should be disclosed to the appellant.

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.

The Board concedes, and I agree, that Record 13, which I have found to qualify for exemption under section 12, contains the personal information of the appellant.

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. One of the exemptions mentioned in section 38(a) is the solicitor-client privilege exemption in section 12. As I have found that Record 13 qualifies for exemption under section 12, it is properly exempt from disclosure under section 38(a).

CLOSED MEETING/DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION

The Board claims the application of section 6(1)(b) of the Act to Record 14. In order to qualify for exemption under section 6(1)(b), the Board must establish that:

- 1. a meeting of the board or a committee of the Board took place; and**
- 2. that a statute authorizes the holding of this meeting in the absence of the public; and**

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

The first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held and that it was held in camera. I am satisfied that an in camera meeting of the Board, sitting as a Committee of the Whole, was held on December 1, 1992 and that section 207(2) of The Education Act authorizes holding a meeting in the absence of the public.

In addition, I find that the disclosure of Record 14 would reveal the actual substance of the deliberations of the meeting of the Committee of the Whole. As all three parts of the test enunciated above have been met, I find that Record 14 qualifies for exemption from disclosure under section 6(1)(b) of the Act.

Record 14 contains the personal information of the appellant and another identifiable individual. 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. One of the exemptions mentioned in section 38(a) is the closed meeting exemption in section 6. As I have found that Record 14 qualifies for exemption under section 6, it is properly exempt from disclosure under section 38(a) and it is unnecessary for me to address the application of section 38(b) to this record.

DELEGATION OF DECISION-MAKING POWER

In its representations, the Board questions the authority of a delegate of the Commissioner to issue a decision under the Act. The Board points out that section 43(1) of the Act expressly authorizes the Commissioner to make an order disposing of the issues in an appeal. The Board argues that the Municipal Freedom of Information and Protection of Privacy Act does not contain a counterpart to section 56 of the Freedom of Information and Protection of Privacy Act (the provincial Act) which permits the Commissioner to delegate his decision making powers to other individuals. Accordingly, in the Board's view, orders made under the Act may only be rendered by the Commissioner, and not his delegate.

This argument was addressed by Mr. Justice O'Leary of the Ontario Court (General Division) Divisional Court on February 8, 1995 in Corporation of the City of Hamilton v. Tom Wright, Information and Privacy Commissioner et al. In his endorsement, Mr. Justice O'Leary held that:

The Office of the Privacy Commissioner is created by the Freedom of Information and Protection of Privacy Act. By section 4(1) of that Act, the Commissioner's powers and duties are those prescribed by that Act and any other act.

The Freedom of Information and Protection of Privacy Act by section 56 empowers the Commissioner to delegate a power or duty vested in him to an officer employed by the Commissioner (except for certain powers not relevant here). In our view, the right to delegate power to an officer applies to the powers of the Commissioner under the Municipal Freedom of Information and Protection of Privacy Act. The Privacy Commissioner thus had the authority to delegate his power to determine appeals to the Inquiry Officer in this case, as he did on October 1, 1992.

I received a delegation of identical decision making powers from the Commissioner on September 20, 1993. Accordingly, I find that I have the power to determine appeals under both the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

ORDER:

1. I order the Board to disclose Records 15 and 16 to the appellant within fifteen (15) days of the date of this order.
2. I uphold the Board's decision to deny access to Records 13 and 14.
3. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 21, 1995