



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

# ORDER P-858

Appeal P-9400361

Ministry of Education and Training



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## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Education and Training (the Ministry) received a request for access to a mediation report prepared under section 305(3) of the Education Act for the Languages of Instruction Commission of Ontario (the Commission).

The Commission was established to help resolve disputes over the provision of education programs in the language of a minority group. The Commission intercedes in and attempts to mediate conflicts between school boards and their language advisory committees or groups of ratepayers. The Minister of Education also may refer to the Commission any matter relating to instruction in the language of the minority group.

The record was requested by a board of education (the Board) and relates to a dispute over transportation of French-language students to a public school at the expense of the Board. The Ministry granted partial access to the record, relying on the following exemptions to deny access:

- advice to government - section 13
- third party information - section 17
- economic and other interests - section 18
- invasion of privacy - section 21

A Notice of Inquiry was sent to the Board, the Ministry and the person who wrote a letter to the Minister of Education which launched the Commission's intervention in the dispute (the affected person). Representations were received from the Board and the Ministry only.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

The test for exemption under section 17(1)(a), (b) or (c) is as follows:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

The Ministry submits that disclosure of the record would reveal commercial information regarding the Board's French Language Advisory Committee's existing organization, mandate and operational objectives. Previous orders have determined that commercial information is information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493). In my view, the information contained in the record does not fit within this definition.

Further, the Ministry has not indicated whether it is claiming section 17(1)(a), (b), (c) or (d), but submits that disclosure of the record could "undermine [the Committee]'s effectiveness" and "result in questions about the validity of [the Committee]'s functions". The Ministry also submits that the record contains information relating to "an intended business strategy" the disclosure of which could enable other parties to "prepare or take counter-action which could result in harm to [the Committee] in terms of planning its strategy." Having carefully reviewed the Ministry's representations, I am not satisfied that the "harms" described are within the meaning of those described in the sections of section 17(1). Accordingly, I find that section 17(1) does not apply to the record.

#### **ECONOMIC AND OTHER INTERESTS:**

The Ministry submits that sections 18(1)(e) and (g) apply to the record.

In order to qualify for exemption under section 18(1)(e), the Ministry must establish that:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

The Ministry submits that the record contains positions, plans and instructions prepared by the mediator for the Commission, which were intended to assist the Commission in making a recommendation to the Board in order to resolve the matter in dispute. The Commission has made a recommendation to the Board, but the recommendation was rejected. The Ministry submits that while a temporary solution has been adopted to address the matter, further negotiations between the Board and its new French Language Advisory Committee regarding a permanent solution would commence following the 1994 municipal elections.

By the Ministry's own description, the information provided by the mediator was not intended to be applied to negotiations. Rather, it was intended to assist the Commission to make a recommendation to the Board,

as the mediator had failed to reach a negotiated settlement. As such, I find that part two of the above test has not been established, and section 18(1)(e) does not apply.

In order to qualify for exemption under section 18(1)(g), the Ministry must establish that a record:

1. contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
  - (i) premature disclosure of a pending policy decision, or
  - (ii) undue financial benefit or loss to a person.

The Ministry makes no mention of the potential for undue financial benefit or loss to a person, and the second part of Part 2 of the above test is not considered relevant in the circumstances of this appeal.

The Ministry submits that the record contains advice and recommendations of the mediator which, if ultimately recommended by the Commission, may result in government policy affecting all school boards in Ontario. In Order M-182, I discussed the interpretation of the words "pending policy decision" as found in section 11(g) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent of section 18(1)(g) of the Act. I interpreted this phrase as follows:

... the term "pending policy decision" contemplates a situation where a decision has been reached, but has not as yet been announced, rather than a scenario in which a policy matter is simply before an institution for consideration.

Having reviewed the record, it is my opinion that it does not contain any evidence of an intention by the Commission or the Ministry to implement a particular policy decision. It is apparent from the Ministry's representations that no policy decision with respect to the matters considered by the mediator in his report has yet been made. Accordingly, disclosure of the information in the record cannot reasonably be expected to result in premature disclosure of a pending policy decision. The Ministry has failed to satisfy the first part of Part 2 of the section 18(1)(g) test and, therefore, the exemption does not apply.

## **ADVICE TO GOVERNMENT**

The Ministry submits that the record was prepared for the purpose of advising the Commission on a specified course of action to resolve the dispute and contains the advice and recommendations made by the mediator to the Commission, which it considered prior to making a recommendation to the Board. The Ministry submits that although the actual advice and recommendations statements are listed on pages 14, 15 and 16 of the record, the disclosure of the analysis found on pages 11 through 17 would provide enough information to allow one to draw accurate inferences about the nature of the actual advice and

recommendations statements. The Ministry indicates that the facts analyzed and discussed during the formulation of the advice and recommendations have, in most cases, been noted and disclosed to the Board in the earlier pages of the record. However, for those facts which are unique and have not been disclosed earlier, the Ministry submits that these facts are so interwoven with the advice and recommendations that they cannot reasonably be severed and that the exemption applies to all of this information.

It has been established in a number of previous orders that advice for the purposes of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356 and P-402). "Recommendations" should be viewed in the same vein (Orders 161, P-248, P-348, P-356 and P-402). "Concerns" do not qualify as "advice or recommendations" pursuant to section 13(1) of the Act as they do not contain a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Additionally, where opinion or factual material would not reveal the recommended course of action, the material is not covered by this exemption.

Having reviewed the pages of the record to which the Ministry has applied this exemption, I find that certain parts do contain information which may be exempted under section 13(1) of the Act. I have highlighted this information in yellow on the copy of the record being forwarded to the Ministry with this order. The information which is not highlighted on this copy of the record does not qualify for exemption under section 13(1) of the Act.

## **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 Ministry submits that there are references to and information about a number of individuals throughout the report, which qualify as the personal information of each individual.

The Board submits that it is questionable whether all of the exempted portions of the record actually contain personal information, as the parties involved were acting in their professional capacities (whether by employment or election) in providing the information contained in the record.

Having reviewed the record, I find that parts of it do contain personal information. I have highlighted this information in blue on the copy of the record being sent to the Ministry with this order.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Sections 21(2), (3) and (4) of the Act

provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy.

The Board raises the application of section 21(2)(a) of the Act. In order for section 21(2)(a) to apply in the circumstances of an appeal, it must be established through evidence provided by the Board and a review of the record that disclosure of the personal information found in the record is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny.

In this regard, the Board submits that the outcome of this matter warrants a high degree of public scrutiny because it has serious implications for all school boards in Ontario, and any change to the current practice would cost a considerable amount of public funds to implement. The Board indicates that there has been considerable public interest in this case -- the facts have been reported on by the press on several occasions and it was the subject of a public discussion and debate on the French television network.

In my view, an adequate level of public scrutiny respecting the mediator's report can be achieved without disclosing the name or other identifying information of the individuals mentioned in the record, and section 21(2)(a) is not a relevant consideration in this appeal.

I have considered all of the circumstances in this appeal and find that there are no other factors weighing in favour of disclosure of the personal information. Having found that the record contains personal information, and in the absence of any other factors weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception to the exemption contained in section 21(1)(f) does not apply. Accordingly, the information is properly exempt from disclosure under section 21(1) of the Act.

## **PUBLIC INTEREST IN DISCLOSURE**

The Board maintains that there exists a compelling public interest in disclosure of the record under section 23 of the Act. The Board submits that the issue has been previously reported on by the media on several occasions, and there has been considerable public interest in this case. The Board submits that the outcome of this dispute warrants a high degree of public scrutiny, because any statutory amendment or ministerial direction altering the current practice could affect all school boards in Ontario, and could involve a considerable amount of public funds.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

As a result of this order, a significant portion of the record previously withheld from disclosure will be disclosed to the Board. In my view, the disclosure of these parts of the report will provide the Board with sufficient information to adequately address the public interest concerns which it has expressed. The remainder of the report which has been held to be exempt relates to specific individuals in their personal

capacity and recommendations which led to recommendations which were rejected by the Board itself. On this basis, I find that there does not exist a compelling public interest in the disclosure of the remaining information which clearly outweighs the purpose of the sections 13 and 21 exemptions. Therefore, section 23 does not apply in the circumstances of this appeal.

**ORDER:**

1. I order the Ministry to disclose to the appellant those portions of the record which are **not** highlighted on the copy of the record forwarded to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order within thirty-five days (35) of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
2. I uphold the decision of the Ministry not to disclose those portions of the record which **are** highlighted on the above-mentioned copy of the record.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ February 7, 1995