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

INTERIM ORDER M-1044

Appeal M_9600296

Kent County Board of Education

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BACKGROUND:

A student took a multiple choice Biology test in December 1994 at a high school run by the Kent County Board of Education (the Board). After the test was marked by her teacher, it was returned to the student, at which time it was taken up in class. Following the class, the student advised the teacher that the test contained several marking errors and returned the test to the teacher.

The teacher subsequently alleged that the student had cheated while the answers to the test were taken up in class. Following this accusation, the student claimed that the teacher falsely altered the test answers.

The Board retained the original test paper and at some later date had the paper examined by a handwriting expert. The expert prepared a report which was favourable to the Board and teacher's position.

NATURE OF THE APPEAL:

Counsel for the student and her parents (the appellants) submitted the following three-part request to the Board under the Municipal Freedom of Information and Protection of Privacy Act (the Act):

> Part 1 The original answer sheet for a multiple choice test, page I for [the student], dated December 9, 1994;
>
> Part 2 An original answer page for a test marked "Essay Questions and Problems" (page 12) for [the student] dated 1994 12;
>
> Part 3 An answer sheet (photocopy) for a multiple choice test (page I) for [the student] dated December 9, 1994.

Counsel indicated that he was requesting these records for the purpose of having them examined by an expert of the appellants' choice.

The Board located the records which it considered to be responsive to the request and granted access to a copy of the record responsive to Part 3. The Board denied access to the originals requested in Parts 1 and 2 pursuant to section 23(2) of the Act, on the basis that release of the original documents would not be reasonably practicable. The Board did not claim that any exemptions in sections 6 through 15 apply and indicated that arrangements could be made for the appellants to view the original documents at the Board's solicitor's offices.

In appealing this decision, the appellants' counsel contends that it is essential that his clients have the opportunity to have the original test papers examined by a handwriting expert of their choice to determine which individual altered the answers on it. Counsel indicates further that it is necessary that the documents be examined at the offices of the handwriting expert due to the nature of the technical examination and the equipment which is required by the expert. The

appellants provided a letter written by the expert in which he explains why he cannot remove his equipment from his premises to the Board's offices and thus would be unable to conduct a full examination of the records. Counsel also indicates that the request contemplated that the documents be sent directly by the Board to his clients' expert and returned directly to the Board by the expert upon completion of his analysis.

During mediation, the appellants' counsel indicated that the copy of the answer sheet, which was provided to the appellants in response to Part 3 of the request, was not responsive to the request. He clarified that this part of the request was for the particular photocopy of the answer sheet made by the teacher directly after the test was marked. Counsel states that this record is referred to as document K3 on page 2 of the report dated March 1, 1996, prepared for the Board by its handwriting expert.

A Notice of Inquiry was provided to the appellants and the Board. Representations were received from both parties. During this stage, the appellants and the Board agreed to exchange representations. Following the initial exchange, both parties provided supplemental representations to this office.

RECORDS:

The records at issue in this appeal consist of the original answer sheets referred to in Parts 1 and 2 of the request, as well as the specific photocopy of the answer sheet referred to in Part 3, as clarified above.

With respect to Part 3 of the request, the Board was asked to confirm whether it has the particular document referred to by counsel in its custody or control. If the Board does have a copy of the original photocopy made by the teacher, it was asked whether its decision regarding the method of access (ie. a copy of the original copy) similarly applies to this record.

In its representations, the Board indicates that it has conducted a search for this particular document and has been unable to locate it. The reasonableness of the Board's search for records was not raised as an issue in this appeal, and accordingly, I will not consider this issue further.

ISSUES:

Two issues are raised in connection with this appeal. The first relates to the authority of the Commissioner's office to review the head's decision to require examination on-site of an original record. The second issue concerns whether the Board's decision to deny the appellant an opportunity to examine the records in the manner requested was in accordance with the Act.

DISCUSSION:

AUTHORITY OF COMMISSIONER TO REVIEW THE HEAD'S DECISION UNDER SECTION 23 OF THE ACT

In its representations, the Board submits that the Commissioner does not have the authority to review the head's decision with respect to access to the original documents, in response to the appellants' request to examine the records off-site. The Board argues that the Commissioner cannot order the Board to relinquish control over the documents by permitting the appellants' expert to take possession of them for the purposes of examination.

The Board refers to section 1 of the Act, and states that the central purpose of the Act is, in part, to provide "a right of access to **information**" [emphasis added]. The Board submits that section 23 of the Act sets out two methods by which a requester has a right to obtain access to information. Section 23 of the Act reads:

> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
>
> (2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.
>
> (3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

In this regard, the Board states that it must either (1) **give** a copy of the record to the requester (subject to the limitations contained in the section) [emphasis added], or (2) grant the requester an opportunity to examine the original. In this case, the Board states that it has given a copy of the record to the appellant. With respect to the second method of access, the Board submits that section 23(2) only permits the appellant to look at and review the original record. It does not create an additional right for the requester to take possession of the record.

The Board refers to section 41(6) of the Act, which provides that the head of an institution may require that the examination of a record by the Commissioner during an inquiry be of the original record at its site. The Board argues that to interpret the right of examination conferred upon an individual as greater than the right to examination conferred upon the Commissioner would create an absurd consequence, with a requester having greater rights than the Commissioner.

Finally, the Board refers to section 2(2) of Regulation 823 enacted pursuant to the Act, which states:

> A head may require that a person who is granted access to an original record examine it at the premises operated by the institution.

I do not agree with the Board that I am without authority to review the head's decision.

In my view, the provision of the Act requiring the Commissioner to view the record on site does not advance the Board's position, since the purpose for the Commissioner's viewing of the record and the requester's examination of the record are entirely different. The Commissioner views the record for the purpose of independent adjudication and the requester in examining the original is exercising rights of access under the Act.

In considering the jurisdiction of the Commissioner to determine this issue, I have taken into account several sections of the Act.

In particular, section 1 provides that it is a principle of the Act that decisions should be reviewed by the Commissioner, independently of government. This is an especially important factor in determining the scope of the review, in that the independent review and other provisions of the Act providing for a wide-ranging appeal, including the consideration of fresh evidence would appear to be inconsistent with a limited appeal on the record.

Moreover, under section 39(1):

> A person may appeal any decision of a head under this Act to the Commissioner if,
>
> (a) the person has made a request for access to a record under subsection 17(1);
>
> (b) the person has made a request for access to personal information under subsection 37(1);
>
> (c) the person has made a request for correction of personal information under subsection 36(2); or
>
> (d) the person is given notice of a request under subsection 21(1).

Therefore, the scope of the appeal is not limited to issues of law, nor to the applicability of claimed exemptions. In my view, "any decision" includes any decision having an impact on the decision responding to the request. In this case, that decision relates to the method of access to be granted to the appellants.

It is the duty of the Commissioner to interpret the provisions of the Act and apply those interpretations to the facts. Her interpretations must be made in light of the purposes and scheme of the Act. In the case at issue, the decision of the head impacts on the purpose of the Act, which is access to information and rights under the Act. Therefore, the decision of the head is reviewable by the Commissioner as "any decision". In my view, this is not a decision for the head alone to make, immunized from review by the Commissioner (Order 22).

Accordingly, it is within my jurisdiction to review the method of access to an examination of the original record.

METHOD OF ACCESS

The second issue concerns whether the Board's decision to deny the appellant an opportunity to examine the records in the manner requested was in accordance with the Act.

As noted above, section 23(2) of the Act states:

> If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

The term "examine" is not defined in the Act. The Concise Oxford Dictionary, 8th ed. (The Oxford Dictionary) defines this term, in part, as:

> ... inquire into the nature or condition etc. of ... look closely or analytically at ...

Further assistance in interpreting the meaning of "examine" is found in the definition of the term "examination", which is defined in the Oxford Dictionary, in part, as:

> ... the act or an instance of examining ... a detailed inspection ...

Black's Law Dictionary, 6th ed. defines the term "examination" as:

> An investigation; search; inspection ...

In my view, examining a record within the meaning of section 23(2) would include the act of analysing or conducting a detailed inspection or investigation of the nature or condition of a document.

In the circumstances of this case, the interpretation of section 23(2) of the Act should not be restricted to the mere viewing of the original record, but rather should be expanded as far as to permit the actual testing of the document.

This section must be read in conjunction with section 2(2) of Regulation 823 enacted pursuant to the Act, however, which states:

> A head may require that a person who is granted access to an original record examine it at the premises operated by the institution.

The appellants submit that section 23 requires that the Board give them the opportunity to examine the records, and that section 2(2) of the Regulation is permissive, that is, the Board has the discretion to allow the records to be examined off the Board's premises. In the circumstances of this appeal, the appellants argue that the Board should exercise its discretion to allow their expert to examine the records at the expert's premises.

The Board argues that it is not "reasonably practicable" to grant possession of the records to the appellants' expert for the purposes of examination at his office. The Board refers to Order 6 in which former Commissioner Sidney B. Linden emphasized that:

> ...the security and integrity of the record will always be of paramount importance in determining whether or not a record should leave the institution's offices... Adequate security provisions must exist from the time the record leaves the institution's offices until it is returned after viewing.

It is important to note that in Order 6, the issue was not whether the records could be released to the possession of an expert, but rather, whether the records could be "viewed" at a different government location. In my view, however, this reasoning is equally applicable to the "examination" of the records.

In the circumstances of this appeal, the Board submits that the security of the records is of even greater concern because of the litigation between the parties where the identity of the handwriting on the test is a relevant issue in the proceedings. I note, however, that this is also relevant to the appellants in the circumstances, because the Board currently has custody of the student's test paper (which she voluntarily relinquished to the teacher at the teacher's request).

The Board submits further that the circumstances of this appeal raise enforcement issues which also relate to the security and integrity of the records. In this regard, the Board states that irrespective of the undertaking that the appellants' expert is willing to provide to ensure the safe return of the record, once a record leaves the Board's possession, there is no statutory enforcement mechanism under the Act which would allow it to recover a released original record should the appellant refuse to return it.

The Board states that:

> [T]he Act establishes the office of Commissioner and empowers him/her to regulate the actions and decisions of government institutions. The Act does not establish rules or guidelines with respect to the time that an individual requester may keep such a document. It does not give the Commissioner the express authority to order a requester to relinquish original documents.

The Board submits that the Commissioner has no jurisdiction over the actions of the appellants, and therefore, could not make a condition that the appellants do or refrain from doing anything with the records once they are released from the Board's custody (ie. return the records to the Board).

The appellants submit that the Board's security concerns have been addressed in that the appellants do not request that possession be given to them personally. Rather, the appellants indicate that they are prepared to have the Board send the records directly to their handwriting expert for examination. Upon completion of the examination, the expert is to return the records directly to the Board. The appellants have provided an undertaking from the expert to do so. With respect to the qualifications of the expert, the appellants indicate that:

> He is a duly qualified and certified handwriting expert. He carries on business in the field of handwriting analysis and has done so for many years. Indeed, he has been retained by the Board's solicitors in the past in connection with handwriting

> issues in other matters. Therefore, presumably, he is well-qualified and has been so qualified to the satisfaction of the Board's solicitors in the past.

I have carefully considered the submissions of both parties, which present diametrically different views as to the interpretation to be given to section 23(2) and section 2(2) of Regulation 823, and the manner in which these sections should be applied to the factual circumstances in this appeal.

First, with respect to the question of whether these sections can be interpreted as permitting off_site examination of a record, I conclude that they do.

In this regard, I refer to section 23(2), which provides that the head may permit examination of the original where it is reasonably practicable to do so. In my view, this section does not limit the examination in any other way. However, section 2(2) of the Regulation requires the head to take care of the security of the record, and so any decision that examination of the record is reasonably practicable must take security into consideration. Section 2(2) also provides that the head may require examination on the institution's premises. The head is not required to decide that examination must be on site. In my view, this means that the head, if satisfied that security concerns are met, has the discretion to grant off-site examination, and this is contemplated by the Act.

Section 23(2) is permissive, that is, the head is required to exercise his/her discretion in determining whether it is reasonably practicable to permit examination of the original.

In my view, a proper exercise of discretion under the Act must be made in full appreciation of the facts of the case, and upon application of proper legal principles. Provided that discretion has been exercised in accordance with established legal principles, it should not be disturbed on appeal (Order 58).

In Order P-344, Assistant Commissioner Tom Mitchinson considered the question of the proper exercise of discretion. He stated:

> ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.
>
> In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

Order P-344 concerns the exercise of discretion with respect to a claim that a discretionary exemption applies. In my view, however, the reasoning in Order P-344 is equally applicable to the exercise of discretion under section 23(2) of the Act.

I will next determine whether the Board has properly exercised its discretion. In doing so, I will first consider whether it is reasonably practicable to grant access in the manner requested. In Order 6, former Commissioner Linden stated:

> In keeping with the overall principles of the Act, I believe it is the responsibility of a head to demonstrate that the means of viewing suggested by a requester is not reasonably practicable.

In the circumstances of this appeal, this statement can similarly be read as referring to the "means of examining".

In my view, it is not necessary that an institution have custody of the record in order to have control over it. Even when another person has possession of the record, the institution may still have control, which is not necessarily relinquished by permitting it to be loaned for examination on a temporary basis.

In my view, it is not necessary for the institution's maintenance of control that the Commissioner have the power under the Act to order return of the record. Control at law may lie in the party's power to demand the record and enforce its return by court order. The Board appears to acknowledge that this route is open to it. Based on the representations of the parties, I am of the view that the undertaking of the appellants' expert to return the record within a specified time acknowledges the control of the Board over the record, and is sufficient evidence of the Board's control.

Moreover, in my view, the Board has not adequately explained why or how the expert's undertaking does not address its security concerns. I am not persuaded by the Board's arguments that, by simply allowing the appellants' expert to examine the record off the Board's premises, the integrity of the record will be compromised in any way. In my opinion, therefore, the Board has not established that it is not reasonably practicable to provide access to the record in the manner requested.

In conclusion, I find that lending the record for examination would not impair the Board's control over the record. Further, in my view the Board's representations do not adequately establish that the security or integrity of the record would be placed at risk by this method of access in the circumstances. Accordingly, the Board should revisit its decision and re-exercise its discretion in light of the above discussion, and in consideration of the purposes of the Act.

I will, therefore, return this matter to the Board so that it may reconsider its exercise of discretion on the basis of the considerations enunciated above. In this regard, I am of the view that the following facts and considerations are particularly relevant to the exercise of discretion by the Board in determining whether the method of access requested by the appellants should be granted:

- the fact that the record contains the test written by one of the appellants;
- the fact that there are no exemptions which have been claimed with respect to the record;
- the fact that the daughter provided the record to the Board;

- the undertaking given by the appellants' expert that he will maintain the record in a secure manner and will return the record to the Board upon completion of his examination;
- the fact that the Board has had the opportunity to have the record tested by its own expert and the fairness to the appellants' in allowing them the same opportunity;
- my finding that off-site examination of the record is permitted under section 23(2); and
- my views that the security and integrity of the record will not be compromised by such a method of access in the circumstances of this appeal.

ORDER:

1. I order the Board to re-exercise its discretion in refusing to grant the appellants' access to the records in the manner requested in accordance with the principles of the Act and the considerations referred to above.

2. I order the Board to provide a decision to the appellants by **December 15, 1997**.

3. I order the Board to provide me with a copy of the correspondence referred to in Provision 2 by **December 20, 1997**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: November 25, 1997
Laurel Cropley
Inquiry Officer