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

ORDER M-1147

Appeal M-9800002

Waterloo Region District School Board

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BACKGROUND:

The appellant is the parent of a child attending a public school operated by the Waterloo County Board of Education, now the Waterloo Region District School Board (the Board). The appellant has been involved in a dispute with the Board since early 1996 regarding a teacher (the teacher) at the school. The appellant has taken a number of actions on school property which have resulted in trespass charges being brought against him. In addition, the appellant is currently involved in a civil action initiated by the teacher.

NATURE OF THE APPEAL:

The appellant submitted a request to the Board under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all documents about himself with respect to these matters. The Board identified 220 responsive records, and provided partial access to them. The Board denied access to the remaining 80 records on the basis of the following sections of the Act:

- closed meeting - section 6(1)(b);
- law enforcement - section 8(1)(b);
- third party information - section 10;
- solicitor-client privilege - section 12; and
- invasion of privacy - section 14(1).

The appellant appealed the Board's decision to deny access to the records.

This office provided a Notice of Inquiry to the appellant and the Board. As the records may contain the appellant's personal information, sections 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy) of the Act were also raised in the Notice.

Further, some of the records consist of communications between the teacher, the Federation of Women Teachers Association of Ontario and the Board regarding the teacher's employment with the Board. Accordingly, the Notice asked the parties to address the possible application of section 52(3) of the Act.

Representations were received from both parties.

RECORDS:

The records at issue consist of correspondence. They are described in an index prepared by the Board, which was forwarded to the appellant.

DISCUSSION:

JURISDICTION:

The interpretation of sections 52(3) and (4) is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry. These sections read:

(3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record specific and fact specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Board claims that paragraphs 1 and 3 of section 52(3) apply to Records 1, 3, 4, 5, 11, 12, 15, 17, 19, 20, 70, 79 - 82, 85, 86, 88, 89,101, 108, 111, 118, 119, 121, 128, 132, 133, 136 - 139, 141 - 146, 148, 150 - 157, 160, 176, 218 and 220. The Board alludes to the application of paragraph 3 of section 52(3) for Records 113 and 162. Upon review of the records, I note that Records 83, 109 and 112 also contain information similar to that in the above noted records. Although the Board has not claimed the

application of section 52(3) for these two records, I will consider them in the ensuing discussion. I will begin with section 52(3)3.

Section 52(3)3

In order for a record to fall within the scope of paragraph 3 of section 52(3), the Board must establish that:

1. the record was collected, prepared, maintained or used by the Board or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Board has an interest.

[Order P-1242]

Record 1 is a letter to a collection agency regarding an outstanding account. Record 113 is a letter to the Board from the President of the Waterloo County Principals' Association concerning the behaviour of the appellant at a Board meeting. Record 162 is a letter from the principal of the school at which the appellant's children are registered to the Board relating to issues of concern for the school. Although this record alludes to the actions of the appellant, it is not specifically directed toward those issues.

Records 3, 4, 5, 11, 12, 15, 17, 19, 20, 70, 79 - 83, 85, 86, 88, 89,101, 108, 109, 111, 112, 118, 119, 121, 128, 132, 133, 136 - 139, 141 - 146, 148, 150 - 157, 160, 176, 218 and 220 all consist of correspondence between the Board, the teacher's lawyer, the Crown and counsel for the Federation of Women Teachers Association of Ontario. The Board submits that the substance of this correspondence is discussions between these individuals concerning the protection of the physical and mental well-being of the teacher in her employment as a teacher.

In reviewing these records it is clear that, with the exception of Records 1, 113 and 162, they were all collected and/or used by the Board in relation to communications and discussions regarding the employment-related responsibilities of the teacher and the obligations of the Board in providing a safe working environment for the teacher and its other employees. Accordingly, I find that the first two requirements of section 52(3)3 have been met for these records. I will address Records 1, 113 and 162 later in this discussion.

The records ultimately stem from allegations made by the appellant concerning the teacher's ability to teach, as well as other actions taken by the appellant against the teacher and the school at which she teaches. As such, I find that they are about employment-related matters concerning the teacher, which include health and safety issues at her place of employment.

An "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect the Board's legal rights or obligations (Order P-1242). The Board's obligations in providing a safe work environment for the teacher arise from the provisions of the Occupational Health and Safety Act, section 265(m) of the Education Act, The School Boards and Teachers Collective Negotiations Act and the collective agreement. Therefore, I find that the discussions and communications are about employment-related matters in which the Board has an interest, and the third requirement has been met for these records.

The provisions of Section 52(4) do not apply to the records in the circumstances of this appeal. Accordingly, I find that Records 3, 4, 5, 11, 12, 15, 17, 19, 20, 70, 79 - 83, 85, 86, 88, 89,101, 108, 109, 111, 112, 118, 119, 121, 128, 132, 133, 136 - 139, 141 - 146, 148, 150 - 157, 160, 176, 218 and 220 meet all three requirements of section 52(3)3 and are thus excluded from the jurisdiction of the Act.

In my view, Records 1, 113 and 162 do not relate to the employment-related matters pertaining to the teacher which are at issue in the other records. Record 1 rather, pertains to matters between the Board and the appellant arising from the appellant's actions. Record 113 concerns the views of the author about the appellant, and Record 162 relates to administrative matters concerning the school. Accordingly, I find that these three records fail to meet the third requirement referred to above. Therefore, I find that they do not fall within the application of section 52(3)3. Nor does section 52(3)1 apply to Record 1 as this section also requires that the record relate to the employment of a person by the Board. As these three records fall within the jurisdiction of the Act, I will consider the other exemptions claimed by the Board in the alternative.

The Board has claimed the application of sections 6(1)(b) and 8(1)(b) to records which I have found to fall outside the jurisdiction of the Act. Therefore, these two sections are no longer at issue and I will not consider them further.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the remaining records at issue and I find that the following records contain the appellant's personal information: Records 1, 29, 60, 63, 113, 117, 123, 135, 162, 186, 189, 190, 213 and 219. The following records contain the personal information of individuals other than the appellant: Records 117, 123, 165 - 169, 172, 173, 180, 182, 183 - 185, 186, 189, 190 and 213.

The Board claims that Records 113, 135 and 162 also contain the personal information of individuals other than the appellant. I have reviewed these records and I find that Record 113, which is a letter from the President of the Waterloo County Principals' Association to the Board, contains information about the author of the letter in his official capacity as President of the Association. Record 162 is a letter from the principal of the appellant's childrens' school to the Board regarding administrative needs of the school. In my view, this letter was written in the principal's official employment capacity. Similarly, Record 135 makes reference to two individuals in their official or employment capacities.

Many past orders of this office have determined that information which identifies an individual in his or her employment, professional or official capacity is not generally regarded as the "personal information" of these individuals. This approach also applies to opinions developed or expressed by an individual in an employment, professional or official capacity, and information about other normal activities undertaken in that context (see for example Orders P-157, P-270, M-113, P-1180 and P-1409). Accordingly, I find that these three records do not contain the personal information of other individuals.

I find that the following records do not contain any personal information: Records 28 and 94.

The Board claims that: section 14 applies to Records 117, 123, 165 - 169, 172, 173, 180, 182, 183 - 185, 186, 189, 190 and 213; that section 12 applies to exempt Records 1, 28, 29, 60 63, 94, 113, 117, 123, 135, 162, 213 and 219 from disclosure; and that section 10(1) applies generally to the records.

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary. I will determine whether section 38(b) applies to Records 117, 123, 186, 189, 190 and 213.

Where, however, the record only contains the personal information of another individual, section 14(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 14(1)(a) through (f). Of these, only section 14(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy." I will consider the application of section 14(1) to Records 165 - 169, 172, 173, 180, 182 and 183 - 185.

In both these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Board submits that the presumptions in sections 14(3)(a) (medical information) and (d) (employment history) apply to the personal information in the records. In my view the following factors should also be considered in analysing the application of this section:

section 14(2)(e) -	the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
section 14(2)(f) -	the personal information is highly sensitive; and
section 14(2)(h) -	the personal information has been supplied in confidence.

In his representations, the appellant advises that he and his wife are the defendants in a libel action. He indicates that he has made several allegations against the teacher and that he has been involved in 11 trespass incidents at the school. He states that he has only been convicted of trespass on one of these occasions. He believes that the Board is "conspiring" with the Teacher's Federation and the teacher to undermine and smear his credibility as a complainant. He also believes that the Board is "covering up" other information about the teacher that would support his allegations. He comments on records he has already received from the Board or to which he has otherwise obtained access:

> These documents are also barnburners in which I am falsely accused of being a physical threat to teachers and children.

The records themselves document the activities of the appellant and the manner in which they have affected a number of people involved with the school, including the teacher. I am satisfied, upon reading the records, that disclosure of any of the information in the records at issue in this discussion will expose the individuals referred to in them, or the authors of them, unfairly to unwanted contact with the appellant and his personal agenda. Accordingly, I find that the factor in section 14(2)(e) is relevant in the circumstances. I also find that, due to the highly charged atmosphere created by the circumstances of the dispute between the appellant and the teacher and the Board, any personal information of individuals other than the appellant contained in the records is highly sensitive (section 14(2)(f)). Moreover, a number of the records consist of letters written by parents of students at the school or other teachers at the school and contain personal reflections of the impact on them resulting from the appellant's actions. In my view, such correspondence is confidential in nature, and therefore, I find that the factor in section 14(2)(h) is also relevant.

In balancing the appellant's rights to access and the rights of the other individuals referred to in the records to protection of their privacy, I find that the factors weighing in favour of privacy protection are overwhelming. Accordingly, I find that Records 117, 123, 186, 189, 190 and 213 are properly exempt under section 38(b) and that Records 165 - 169, 172, 173, 180, 182 and 183 - 185 are properly exempt under section 14(1).

DISCRETION TO REFUSE TO DISCLOSE REQUESTER'S OWN INFORMATION

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, including sections 10(1) and 12, would apply to the disclosure of that personal information.

As I indicated above, the Board claims that section 12 applies to exempt Records 1, 28, 29, 60 63, 94, 113, 117, 123, 135, 162, 213 and 219 from disclosure; and that section 10(1) applies generally to the records. I found above that Records 117, 123 and 213 are properly exempt under section 38(b). Therefore, I will not consider these three records further.

THIRD PARTY INFORMATION

The Board submits that section 10(1) applies to information pertaining to the visitation protocol and health and safety plan. Section 10(1) of the Act reads, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under section 10(1) of the Act, the Board must satisfy each part of the following three-part test:

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 Board 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 harms specified in (a), (b) or (c) of section 10(1) will occur.

I have reviewed the information in the records and I find that none of it falls into the categories of information referred to in the first part of the section 10(1) test. Accordingly, as all three parts of the test must be met in order for a record to qualify for exemption under section 10(1), I find that it is not necessary to go further in my analysis under this section. I find that section 10(1) is not applicable in the circumstances of this appeal.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act 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 the Region 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.

[Orders 49, M-2 and M-19]

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 the Board; 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]

I have reviewed the records to which the Board has applied section 12. I note that all of the correspondence between the Board and its solicitors, regardless of its nature, is labelled "private and confidential". This, in and of itself, in my view, is insufficient to establish the application of section 12. In order for section 12 to apply to a particular record, it must contain information relating to the seeking or giving of legal advice, or there must be some evidence which connects the records to existing or contemplated litigation.

In my view, Records 29 and 219, which are communications between the Board and its counsel, are factual and administrative in nature. Accordingly, I find that they are not related to the seeking or giving of legal

advice. Nor do I find that they were prepared for use in giving legal advice. The Board does not argue that these two records were prepared for or obtained for any litigation. Therefore, they are not exempt under section 12. As no other exemptions have been applied to these two records, they should be disclosed to the appellant.

Records 28, 60 and 63 contain correspondence, or draft correspondence prepared by the Board's solicitors. Record 94 is a client update on issues of concern to the Board, prepared by counsel. I am satisfied that these four records contain confidential communications between the Board and its solicitors which are directly related to the formulating or giving of legal advice. Therefore, these records are exempt under Branch 1 of the exemption in section 12 of the Act. As Records 60 and 63 contain the appellant's personal information, they are properly exempt under section 38(a) of the Act.

With respect to the remaining four records (Records 1, 113, 135 and 162), the Board argues that they were prepared or obtained by its solicitors for use in anticipated or actual litigation, which includes both the civil matters between the teacher and the appellant and trespass charges. The Board submits that its disputes with the appellant are ongoing and that litigation can be reinitiated at any time. The appellant, on the other hand, indicates that there are no ongoing matters between himself and the Board and, therefore, any litigation privilege in the documents has terminated.

I am satisfied that these four records were prepared or obtained in contemplation of litigation, or for use in litigation. In considering the circumstances of this case, I am not persuaded that litigation issues between the Board and the appellant, to which the records relate, are complete. In my view, the Board's position that future litigation is anticipated is not unreasonable. Therefore, I find that the Board has established the application of the exemption under Branch 2 of section 12 for these four records. As Records 1, 113, 135 and 162 contain the appellant's personal information, they are properly exempt under section 38(a).

ORDER:

1. I order the Board to disclose Records 29 and 219 to the appellant by providing him with a copy of these records on or before **October 1, 1998**.

2. I uphold the Board's decision to withhold the remaining records from disclosure.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: September 10, 1998
Laurel Cropley

Adjudicator