



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1439

Appeal MA-000372-1

Limestone District School Board



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NATURE OF THE APPEAL:

The Limestone District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

copies of all general and personal correspondence relating to any and all complaints that I have made to the Board. This will include all documents, records, papers, correspondence, memos, internal or others and any other forms or means of information storing, and any other materials relating to these complaints, as well as any correspondence made to anyone with respect to my complaints.

The requester has been involved in a long-standing dispute with the Board over complaints about noise originating from the air conditioning unit on the roof of a school which is adjacent to the requester's property. The Board located 94 records responsive to the request and granted complete access to 50 of them. Access to the remaining 44 records was denied pursuant to the following exemptions contained in the *Act*:

- section 7 - advice or recommendations; and
- section 12 - solicitor and client privilege.

The requester, now the appellant, appealed the Board's decision. During the mediation stage of the appeal, the Board agreed to disclose an additional 13 records to the appellant. The Mediator assigned to the appeal by this office also identified the possible application of section 38(a) to some of the records, as they appeared to contain the personal information of the appellant. Further mediation was not possible and the appeal was moved to the adjudication stage of the process.

I decided to seek the representations of the Board initially, and provided it with a Notice of Inquiry. The Board made submissions, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant also made representations in response to the Notice.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines the term "personal information" to mean "recorded information about an identifiable individual, including "the individual's name if 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" [paragraph (h) of the definition].

Following my review of each of the records, I find that Records 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 26, 28, 29, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45 contain the personal information of the appellant, consisting of his name and other personal information relating to him and his noise complaints, thereby meeting the definition of that term contained in paragraph (h) of section 2(1).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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*, an institution has discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 7(1) and 12, would apply.

SOLICITOR-CLIENT PRIVILEGE

The Board has made submissions with respect to the application of the solicitor-client privilege exemption in section 12 to Records 7, pages 1 to 4 of Record 11, pages 1 and 2 of Record 12, Records 13, 26, 30, page 1 of Record 32, as well as Records 35, 38, 39, 40, 41, 43 and 44.

The Board implicitly recognizes in its representations that the section 12 exemption does not apply to the other records for which it was originally claimed. I have reviewed the contents of Records 1, 2, 4, 6, 8, 9, the last 3 pages of Record 11, pages 3, 4 and 5 of Record 12, page 2 of Record 13, Records 28, 29, 36, 37, 42 and 45 and find that they are not subject to exemption under section 12 or any mandatory exemptions. As a result, I will order that they be disclosed to the appellant.

Section 12 of the *Act* provides that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that 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.

The Board submits that the appellant has indicated in correspondence to it in December 2000 that he intends to commence a legal action against it. As a result, the Board takes the position that the records to which it has applied the section 12 exemption qualify as documents which are privileged as they are solicitor-client communications or were prepared in contemplation of litigation.

The appellant submits that, contrary to the assertion made by the Board and his expressed intention in December 2000, he is not contemplating pursuing any legal action against the Board. The appellant also disputes several factual assertions made by the Board in its representations.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has also been found to apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Bearing in mind the principles set out above, I find that the following records represent confidential communications between a solicitor and client made for the purpose of obtaining or receiving legal advice:

- Record 7 (letter dated September 7, 1999);
- page 3 of Record 11 (letter dated August 3, 1999) which is identical to page 2 of Record 12;
- page 1 of Record 13 (a second letter dated August 3, 1999);
- Record 26 (e-mail message dated April 27, 1999);
- Record 30 (a second e-mail message dated April 27, 1999);
- Record 32 (e-mail message dated April 26, 1999 to which is attached a draft letter dated April 27, 1999);
- Record 38 (a FAX cover sheet and a letter dated May 3, 2000 with an attachment);

- Record 40 (a FAX cover sheet dated July 14, 2000, a letter dated May 8, 2000 to which is attached a draft letter dated July 14, 2000);
- Record 41 (an e-mail dated June 1, 2000);
- Record 44 (a FAX cover sheet with message dated August 14, 2000)

Accordingly, each of these records qualify for exemption under section 12. With the exception of Record 30, each of these records also contain the personal information of the appellant. As such, they are exempt from disclosure under section 38(a).

In addition, Records 35, 39 and 43 describe the legal advice received by the Board from its solicitor. I find that these records also qualify for exemption under the solicitor-client communication privilege provided by section 12. As they also contain the personal information of the appellant, they are exempt under section 38(a).

ADVICE OR RECOMMENDATIONS

The Board has also claimed the application of section 7(1), in conjunction with section 38(a), to Records 3, 5, 10, 11, 27, 33 and 34. Section 7(1) of the *Act* 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 an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established 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 [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office. (Orders P-1147 and P-1299)

Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the *Act*. (Orders 94, P-233, M-847, P-1709)

Record 3

Record 3 consists of a FAX cover sheet to which are attached a hand-written memorandum dated October 21, 1999 and a type-written memorandum dated October 21, 1999. I find that the FAX cover sheet does not contain any advice or recommendations and is not, therefore, exempt from disclosure under section 7(1). The memoranda dated October 21, 1999, however, contain specific advice or recommendations as to a course of action to be followed by the Board in addressing the concerns raised by the appellant. As such, I find that both memoranda are properly exempt from disclosure under section 7(1).

Record 5

Record 5 is a printout of an e-mail dated October 18, 1999 which contains a recommendation as to how the Board might proceed in remedying the problem identified by the appellant. I find that this record qualifies for exemption under section 7(1). Since it also contains the personal information of the appellant, it is exempt from disclosure under section 38(a).

Record 10

Record 10 consists of two FAX cover sheets dated September 9, 1999 and a third FAX cover sheet dated September 8, 1999 containing information about an Acoustic Consultant retained by the Board in its efforts to resolve the appellant's complaints. None of these records contain any advice or recommendations and they do not, therefore, qualify for exemption under section 7(1).

Record 11

I have discussed the application of section 12 to Record 11 above and found that a letter dated August 3, 1999 was exempt under that section. I will not, therefore, address the possible application of section 7(1) to that portion of Record 11.

The remaining portions of Record 11 consist of FAX cover sheets dated September 8, 1999 and August 31, 1999, along with a letter from the appellant dated August 27, 1999. I find that neither of the FAX cover sheets contain any information which qualifies as “advice or recommendations” within the meaning of section 7(1). Accordingly, I find that these records are not exempt under section 7(1) or 38(a). Obviously, the letter from the appellant cannot qualify under either of these sections.

Record 27

Record 27 is an invoice rendered to the Board by the architect which it engaged for the construction of the school building adjacent to the appellant’s property. This document contains only a breakdown of the architect’s fees for the project and does not include any “advice or recommendations” as contemplated by section 7(1). Accordingly, I find that this record does not qualify for exemption under this section.

Records 33 and 34

These documents consist of certain information of a technical nature gathered by the Board’s architect in an attempt to remedy the complaints of the appellant. They do not contain any advice or recommendations and do not, therefore, qualify for exemption under section 7(1).

By way of summary, I find that only the two memoranda contained in Record 3 and Record 5 in its entirety qualify for exemption under sections 7(1) or 38(a). The remaining records to which these exemptions were applied, page 1 of Record 3, Records 10, 11 (except that portion which I found to be exempt under section 12 above), 27, 33 and 34 are not exempt from disclosure.

ORDER:

- I order the Board to disclose to the appellant copies of Records 1, 2, page 1 of Record 3, 4, 6, 8, 9, 10, 11 (with the exception of the letter dated August 3, 1999), 12 (with the exception of the letter dated August 3, 1999), page 2 of Record 13, 27, 28, 29, 33, 34, 36, 37, 42 and 45 by **July 19, 2001** but not before **July 13, 2001**.
- I uphold the Board’s decision to deny access to pages 2 and 3 of Record 3, Records 5 and 7, the letter dated August 3, 1999 in Records 11 and 12, page 1 of Record 13 and Records 26, 30, 32, 35, 38, 39, 40, 41, 43 and 44 in their entirety.
- I reserve the right to require the Board to provide me with copies of the records disclosed to the appellant pursuant to Provision 1.

Original Signed By: _____

June 14, 2001

Donald Hale
Adjudicator