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

ORDER MO-1473

Appeal MA-010125-1

Simcoe County District School Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

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

1. All the electronic (email) correspondence initiated at the SCDSB by employees in reference to the requester's son since Sept. 01 2000;
2. In particular, a copy of an email from a named individual to the appellant explaining how to contact the York Board about the Gifted Program in Newmarket High School;
3. Follow-up soft and hard copy information between two named Board employees and others including the appellant that took place after a meeting in reference to the appellant's son's IEP, in the first quarter of 2000;
4. The report on Gifted secondary programs put together during the first half of 2000;
5. SCDSB's response to the Ministry of Education in reference to last year's Special Education Plan May 2000.

The Board located and provided access to a number of records upon payment of a fee of $20. The requester, now the appellant, appealed the Board's decision on the basis that additional records responsive to her request should exist.

During the mediation stage of the appeal, the Board issued a second decision letter to the appellant, which provided an explanation for its original response to the request. In this second decision letter, the Board indicated that it had identified additional records responsive to Part 1 of the appellant's request, but were denying access to these records under section 12 of the *Act* (solicitor-client privilege). The Board provided the appellant with access to a copy of the e-mail referred to in Part 2 of the appellant's request. The appellant agreed that Parts 2 and 3 of her request had been satisfied, and these items are, accordingly, no longer at issue in this appeal.

The appellant is of the view that there are additional records responsive to Parts 4 and 5 of her request, and this remains at issue in the appeal. She is also appealing the application of section 12 to the records identified as responsive to Part 1 of her request.

I decided to seek the representations of the appellant, initially. I did not receive any submissions from the appellant. Because I was able to rely on the non-confidential material provided by the Board to the Mediator in support of the positions which it has taken on the issues extant in this appeal, it was not necessary for me to hear from the Board.

RECORDS:

The records remaining at issue consist of eleven (11) electronic mail messages passing between staff of the Board and its counsel between October 4, 2000 and December 6, 2000.

DISCUSSION:

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

Section 2(1) of the *Act* defines the term "personal information", in part, as 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 (paragraph (h) of the definition).

Based on my review of the contents of the records, I find that they contain the name and other personal information of the appellant and her son. The records refer to and were created as a result of the filing of an appeal by the appellant of the Board's decision with respect to the placement of her son in a special education program. As a result, I find that the records contain the personal information of both the appellant and her son.

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, while section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply the disclosure of that information. [my emphasis]

I will consider whether the discretionary exemption in section 38(a) applies to the electronic mail messages which are responsive to the first part of the appellant's request in conjunction with the exemption claimed to apply to this information, the solicitor-client privilege exemption contained in section 12 of the *Act*.

Solicitor-Client Privilege

Introduction

Section 12 of the *Act* reads:

> 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 of or for use in litigation.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, the Board must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

In its decision letter and in correspondence with the Mediator, the Board submits that the records are subject to solicitor-client communication privilege.

Solicitor-client communication privilege

Introduction

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 Board advised the appellant in the clarification of its decision that the e-mail records which have not been disclosed are communications sent electronically to the Board's solicitor "for the purpose of obtaining legal advice regarding [the appellant's] appeal of [her son's] placement". In addition, the Board indicated that it was relying on section 12 to exempt the records as they represent confidential solicitor-client communications.

The appellant has not provided any submissions on the application of this exemption to the records either in her letter of appeal or in her subsequent, non-confidential communications with the Intake Analyst and the Mediator assigned to this file by the Commissioner's office.

I have reviewed each of the 11 e-mail messages which form the records at issue in this appeal and find that, based on their content alone, all of them are confidential communications from various employees of the Board to the Board's counsel pertaining to a legal matter, specifically, the pending appeal launched by the appellant of the Board's decision respecting the placement of her son. I find that each of the communications were made for the purpose of obtaining legal advice from counsel and that a solicitor-client relationship existed between the Board, and its employees on the one hand, and the solicitor on the other. As a result, I find that these records qualify for exemption under section 12. Because each of them refers to or is about a matter involving the appellant, I find that they are exempt from disclosure under section 38(a).

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Board has conducted a reasonable search for the records as required by section 17 of the *Act*. The *Act* does not require the Board to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, the Board must establish that it has made a **reasonable** effort to identify and locate records responsive to the request (Orders PO-1837 and MO-1446).

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Board's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. In the Notice of Inquiry which I provided to the appellant, I asked a number of specific questions regarding the objective reasons for her belief that additional records should exist. I did not receive any submissions from the appellant, unfortunately.

In her letter of appeal and a subsequent clarification which she provided to the Intake Analyst assigned to the appeal by this office, the appellant indicated that she received a document dated 1998 which the Board feels is responsive to Part 4 of her request. However, the appellant takes the position that a more recent, updated version of this document prepared sometime in the first half of 2000 should exist. In addition, the appellant submits that a response ought to have been prepared by the Board following its receipt of certain comments from the Ministry of Education pertaining to its Special Education Plan of May 2000, which is responsive to Part 5 of her request.

In response, the Board advised the appellant that no additional records responsive to Part 4 of her request were, in fact, prepared in 2000. The Board states that it provided a copy of the 1998 report to the appellant. With respect to records responsive to Part 5 of the request, the Board indicates that:

> The Ministry of Education sent a letter to the Board which indicated that the Board's Special Education Plan met the requirements of the Education Act. A copy of this letter was provided to [the appellant] along with the Plan submitted by the Board to the Ministry.

Based upon the evidence provided by the Board, I find that the searches which it undertook for records responsive to Parts 4 and 5 of the request were reasonable. In my view, and in the absence of any evidence to the contrary from the appellant, I am satisfied that the Board has made a reasonable effort to locate records responsive to these portions of the appellant's request.

ORDER:

I uphold the Board's decision on access and find that its search for responsive records was reasonable in the circumstances.

Original signed by: October 12, 2001
Donald Hale
Adjudicator