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

INTERIM ORDER MO-1539-I

Appeal MA-010196-1

Windsor-Essex Catholic 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 appellant, a member of the media, submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act (Act*) to the Windsor-Essex Catholic District School Board (the Board) for any and all documents relating to accounts rendered by a named solicitor (the affected person), for the period between January 1, 1998 to the date of the request. In particular, the request specified:

> We are requesting the following information for each and every month during the above time period:
>
> 1. any particulars provided with the accounts involving [the affected person]
> 2. itemized records of any and all payments on the accounts involving [the affected person]
> 3. any and all Board resolutions with respect to [the affected person's] legal services
> 4. any and all agreements between the Windsor-Essex Catholic District School Board and [the affected person]
> 5. itemized records of any and all dispersed reimbursements on behalf of [the affected person]
> 6. records of any and all total legal services paid by the Windsor Essex Catholic District School Board.

The Board denied access to the requested information on the basis of the exemptions in sections 12 (solicitor-client privilege), 14(1) with reference to the presumption in section 14(3)(f) (invasion of privacy) and 10(1)(a) (third party information) of the A*ct*.

The appellant appealed this decision.

Following confirmation of the appeal, the Board was asked to forward the records at issue along with an index of the records to this office. The Board initially refused to send the records to this office but then complied with the request and sent copies of them to the Mediator shortly before she issued the Report of Mediator, which is a document that the Mediator completes at the end of mediation.

Prior to the receipt of the records from the Board, the Mediator held a number of discussions with the parties, which resulted in the following:

- the Board indicated that records do not exist with respect to Board resolutions regarding the affected person's legal services (part 3) or with respect to agreements between the Board and the affected person (part 4);

- the appellant believed that more records exist, in particular, in response to parts 3 and 4 of his request;

- the affected person confirmed that he did not wish to consent to the disclosure of any information about him;

- the appellant agreed that it was likely that the same records would be responsive to parts 1 and 2 of his request. The appellant also agreed to withdraw his request for the affected person's statements of account;

- the appellant indicated that he was willing to narrow part 6 of his request to "total amounts" if that would expedite the processing of the appeal. This information was communicated to the Board by the Mediator. During these discussions, the Mediator indicated that the parties should contact each other directly to confirm the records that the appellant was seeking. No contact was made between the parties;

- the Board issued a new decision on October 1, 2001 in which it disclosed to the appellant the audited financial statements of the year ending August 31, 1999 and 2000; *Revenue Fund Schedule of Expenditure* – Schedule 10; and a severed version of the General Ledger Accounts for legal fees (total amounts released);

- the Board confirmed that it was withholding the remaining information in the records pursuant to sections 12, 14 and 10;

- the appellant believed that the Board should have provided him with unsevered copies of the General Ledger Accounts. The Board took the position that the appellant narrowed the scope of part 6 of his request to only "total amounts" and that the remaining portions of these records were outside the scope of his request, as narrowed; and

- the appellant raised the possible application of section 16 of the *Act*, the so-called "public interest override".

As a result of mediation, the records identified as remaining at issue consist of:

- Cheque Requisitions for Payments to the affected person (denied in full)
- General Ledger Accounts for Legal Fees
  - summary sheets (denied in part - total amounts released)
  - detailed listing (denied in full)
- Handwritten notes regarding cheque requisition/payments (one note also contains a batch list)
- Expense receipt
- Trust statement

Further mediation could not be effected and the appeal was moved into inquiry. I decided to seek representations from the Board and affected person, initially, and sent them a Notice of Inquiry setting out the facts and issues (as described above) remaining to be adjudicated.

Both parties submitted representations. In its representations, the Board indicated that it did not object to the sharing of its representations with the exception of those portions "which refer to the information and records for which the Board relies upon the exemptions provided in the

Act". The Board also objected to the sharing of the index it provided to this office as it was of the view that the index was subject to solicitor-client privilege.

During the inquiry stage of this appeal, an Adjudication Review Officer contacted the Board to determine the specific portions of the representations that it was concerned about sharing with the appellant. The Board subsequently identified certain portions that should not be shared, and provided reasons for its position. Upon review of the Board's reasons for withholding certain information, I agreed that some of this information should not be shared, but that the basis for withholding other information did not meet the criteria for the withholding of representations established by this office. I also decided that certain information from the index should be shared with the appellant, in particular, information that identified the records at issue and the specific exemptions that had been claimed for each. The Board agreed to share the information that I identified in the index, and certain other portions of its representations. The Board continued to object to the sharing of the remaining previously identified portions.

The Board also indicated at that time that it had concerns about the use to which the appellant would put its representations once they were shared with him. In particular, the Board expressed its concern that the appellant would publish them (or portions of them) in his newspaper and asserted that this was an improper use of the appeal process.

The Board subsequently submitted additional written representations on these two issues.

ISSUES:

The purpose of this interim order is: 1) to rule on the Board's request to withhold certain portions of its representations; and 2) to rule on the Board's request that I impose conditions on the appellant's use of the representations after they are disclosed to him.

DISCUSSION:

SHARING OF REPRESENTATIONS

Sharing of representations procedure

The *Inquiry Procedure at the Inquiry Stage* outline and *Practice Direction 7* provide a detailed description of the relevant procedures with regard to the sharing of representations. *Practice Direction 7* states:

> *General*
>
> The Adjudicator may provide representations received from a party to the other party or parties, unless the Adjudicator decides that some or all of the representations should be withheld.

Request to withhold representations

A party providing representations shall indicate clearly and in detail, in its representations, which information in its representations, if any, the party wishes the Adjudicator to withhold from the other party or parties.

A party seeking to have the Adjudicator withhold information in its representations from the other party or parties shall explain clearly and in detail the reasons for its request, with specific reference to the following criteria.

Criteria for withholding representations

The Adjudicator may withhold information contained in a party's representations where:

(a) disclosure of the information would reveal the substance of a record claimed to be exempt;

(b) the information would be exempt if contained in a record subject to the *Act* [or the *Municipal Freedom of Information and Protection of Privacy Act];* or

(c) the information should not be disclosed to the other party for another reason.

For the purposes of section (c) above, the Adjudicator will apply the following test:

(i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party;

(ii) Confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;

(iii) the relation must be one which in the opinion of the community ought to be diligently fostered;

(iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit thereby gained for the correct disposal of the litigation.

The Board's confidentiality request

In paragraph 6 of its representations, the Board includes descriptions of records that are no longer at issue. I agreed not to share this information because it was not relevant to the issues on appeal. In paragraph 7 of its representations, however, the Board submits an argument that

certain other records that had been identified are not responsive to the appellant's request. The responsiveness of these records remains an issue in the appeal. The Board states:

> This paragraph refers to documents which are not responsive to the Appellant's request, and therefore, in our submission, ought not to be revealed to the Appellant. This would be consistent with the decision not to release the nature of the documents not at issue in Paragraph 6 [records removed from the scope of the appeal during mediation], as well as the decision not to release information relating to the documents not at issue that are listed in the Index.

In essence, the Board appears to take the position that this information is not relevant to the appellant's request and that, consistent with my decision to sever out references to other records that are no longer at issue in the appeal, I should not reveal this information either.

With respect to the information in paragraphs 22 and 23 (although it appears that the Board is actually referring to paragraph 24), the Board states:

> In our submission, revealing the nature of the severed information – such as … provides the Appellant with detailed information that has not been requested. This information is of a different order than simply allowing the Appellant to know the nature of the document as being a Summary of the Board's General Ledger Accounts.

It is not readily apparent which of the three confidentiality criteria the Board is relying on. However, it appears that the Board's principal argument is that the information is not responsive to the appellant's request and that it would somehow be unfair or inappropriate for it to be disclosed to him.

The Board submits that certain information in paragraphs 45, 50, 53, 69, 79, 84, 89 and 95 should be withheld because, "release of these references would provide the Appellant with information that has not been requested, as well as information that may be exempt from production pursuant to the arguments made in our representations". In part, it appears that the Board is taking the position that this information falls within criterion (b) above.

Finally, the Board submits that disclosure of the information in paragraph 65 would identify a named individual. On this basis, I assume that the Board is taking the position that this information falls within criterion (b) above.

Findings

Criterion (a) – reveal substance of a record claimed to be exempt

In my view, none of the information at issue in the paragraphs identified by the Board would reveal the substance of a record claimed to be exempt. With respect to the identification of the records discussed in paragraph 7, simply referring to the type or nature of a record without

specific details as to its contents does not reveal the "substance" of a record. Upon review of the index, I realize that I neglected to identify the records referred to by the Board in paragraph 7 as being records at issue (until such time that I decide whether or not they are indeed responsive to the request). These two documents are identified as comprising Record 8 on the index provided by the Board. I will consider whether they fall within either of the other two confidentiality criteria.

In a similar vein, the information at issue in paragraphs 22 and 24 refers to the breakdown of categories (by heading) of information captured on the General Ledger Accounts. Although this information is on the record, the Board has not argued that identification of the categories would reveal the "substance" of the records at issue. Rather, the Board objects to disclosure because it takes the position that the appellant did not ask for this information. I will consider this argument below.

With respect to disclosure of information contained on the record itself, the General Ledger Accounts are standard use documents (broken down by categories into the type of information that is relevant to the operation of the Board). Identification of the categories of information captured on them simply describes the nature of the document. The "substance" of this record is the actual information recorded under each category. None of the information in paragraphs 22 and 24 reveals the substance of these records.

Accordingly, I find that none of the information at issue falls within criterion (a).

Criterion (b) – information would be exempt if contained in a record

The Board suggests that the identified information in paragraphs 45, 50, 53, 69, 79, 84, 89 and 95 "may be exempt from production pursuant to the arguments made in our representations". It is not clear which of its numerous exemption claims the Board relies on in this regard. In my view, it is not necessary for me to determine the Board's intention. The information at issue in these paragraphs is very general, and I find that none of the exemptions claimed by the Board, nor any other exemptions under the *Act* would apply to this particular information if it were contained in a record.

As I noted above, the Board also submits that disclosure of the information in these paragraphs would provide the appellant with information that has not been requested. In my view, what was requested is not a measure of what to disclose in the representations, although it can influence whether or not the information is relevant. The information in dispute appears in the Board's representations and is relevant to the issues in the appeal. The fact that the appellant did not request this particular information (or type of information) as part of an access request, in my view, is not sufficient to bring it within the scope of this criterion.

With respect to the information in paragraph 65, I agree that it is likely that sharing this portion of the representations would identify the individual referred to in it (whose name I have withheld) to any who are familiar with the Board. However, it is very clear from the Board's own evidence that the facts to which this information relates have been widely publicized. Based

on this and the nature of the information I have decided to share, I am not persuaded that this information would be exempt if contained in a record.

Accordingly, I find that none of the information at issue falls within criterion (b).

Criterion (c) – information should not be disclosed for any other reason

The Board has not made specific reference to the application of this criterion. Generally, however, it appears to take the position that much of the information it has identified was provided to me to assist in arriving at a determination on the issues, but is not directly relevant to the issues themselves. I disagree, for the reasons outlined below.

As discussed above, the Board takes the position that references to the information in certain categories (in the General Ledger Accounts) are not relevant to the appellant's request, since it argues that this information was not requested. However, this is, in fact, one of the issues to be determined at inquiry. Information about other categories is integral to the Board's position and, in fairness, the appellant must be given an opportunity to understand the Board's position and argument in order to respond to it in a meaningful way.

Further on this point, the Board suggests that I should sever the representations consistently so that non-responsive information is not shared with the appellant. The Board notes that I have decided not to share information about records that were removed from the scope of the appeal during mediation, and argues that I should similarly withhold information about records that it now claims are not responsive.

As I will discuss further below, the sharing of representations procedure was implemented to enhance fairness in the inquiry, to improve the processes for gathering and testing evidence, and to provide decision makers with better quality, more relevant and more focused representations.

Generally, no purpose would be served addressing records that the appellant has already indicated he is not interested in (unless they are relevant in some way to the remaining records or issues). In this case, the Board believes that two additional records should be removed from the scope of the appeal. However, the appellant has not agreed to remove these records, nor has he had the opportunity to address the issue. Without information about the nature of the records at issue, the appellant is placed at a significant disadvantage and is restricted from challenging the Board's position and argument. Consequently, the representations he makes would likely be less focused and relevant to the issue. Conversely, the appellant may agree that the records are not responsive and the issue will be resolved.

In my view, all of the information I have decided to disclose pertains directly to the issues to be determined. The fact that the representations might reveal some information about the Board, which the appellant has not requested, is not sufficient to bring these portions of the representations within criterion (c). Having carefully considered the Board's representations, and the nature of the information it objects to sharing, I find that the Board has not established that any of the information at issue falls within this criterion.

In order to afford the appellant the opportunity to know the case he has to meet and to assist him in making meaningful submissions, it will be necessary for me to disclose more of the Board's representations than it has agreed to disclose. Accordingly, I have decided that those portions of the Board's representations and index that do not qualify under any of the three criteria described above, and which are relevant to the issues on appeal, will be shared with the appellant. I have highlighted in yellow those portions of the Board's submissions which should **not be shared** with the appellant due to confidentiality concerns. The remaining portions of the Board's representations will be shared with the appellant. I have highlighted in green those portions of the Board's index that **will be shared**. The remaining portions of the index should not be shared with the appellant, as this information is not relevant to the issues on appeal.

RESTRICTIONS ON THE USE OF THE REPRESENTATIONS

The Board states:

> We also understand from [the Adjudication Review Officer] that it is not the Commission's practice to place restrictions on the publication of representations released to a party through the Commission's adjudication process.
>
> As indicated in our letter dated April 12, 2002, the Appellant has no entitlement under the Act to access to our representations, except insofar as the Commission chooses to release the representations in order to ensure procedural fairness. We feel it would be most unfair to allow the Appellant, a newspaper, to publish the Board's representations. The Board itself does not have the means to do so, even if it wished to do so.
>
> Rather, we urge you to consider the exchange of representations in the same light as the exchange of information in examinations for discovery in accordance with the *Rules of Civil Procedure*, in which case the information can only be used for the purposes of the proceeding therein. In our submission, this would be most appropriate given that the Commission's process was not intended to take place in a public forum.

The Rules of Civil Procedure provide for, *inter alia*, the examination of parties to an action who are adverse in interest (see: Rule 31). Rule 31 establishes the form, scope and use of examination. Rule 34 sets out the procedure regulating their conduct. Examinations for discovery occur prior to trial and can serve a number of purposes, including, presumably, facilitation of settlement (once a party knows the case it has to meet). However, their primary uses are to assist in the preparation for trial and for use at trial.

The Board asks that I equate an inquiry under the *Act* to the discovery process. In my view, such an analogy is not tenable. Examinations for discovery are a preliminary step in the civil litigation process, intended to assist the parties in obtaining the necessary evidence to present at trial in support of their case. By contrast, the trial itself is intended to receive and test all relevant evidence and render an impartial decision. Like

the trial stage of a civil law suit, the purpose of an inquiry under the *Act* is to receive and test evidence and argument and on that basis to have a decision rendered by an impartial decision maker.

The importance of this distinction between the discovery process and the trial or hearing stage of an action is highlighted by Rule 30.1.01(5)(b). Rule 30.1 sets out the "deemed undertaking" provision relied on by the Board. Subrule (5)(b) states:

> Subrule (3) [which states the essential "deemed undertaking" requirement] does not prohibit the use, for any purpose, of
>
> (b) evidence that is given or received *during a hearing* . [emphasis added]

Clearly, an inquiry conducted by the Commissioner is analogous to a hearing, not to the discovery process. I therefore reject the Board's request that I restrict the use of the representations on the basis of any analogy to the discovery process.

In assessing the Board's argument, it is also necessary to consider section 41of the *Act*, which establishes the Commissioner's authority to conduct an inquiry to review a head's decision. Section 41(3) provides that "the inquiry *may* be conducted in private" [emphasis added]. Section 41(13) states:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Docs. 103/98, 330/98, 331/98, 681/98, 698/98 (Ont. Div. Ct.), the Court declined to require that the representations of the parties, in the context of the Commissioner's Record of Proceedings in an application for judicial review, be sealed. The Court stated:

> There is a powerful tradition and philosophy that the operation of the courts should be open and transparent. The cases support this tradition. Notwithstanding, the courts which operate in a democratic context are subject to legitimate legislative limitations.
>
> I have engaged counsel in discussions on sections 52(13) [similar to section 41(13)] and [55(1)] of the *Act*. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the *Act* does not warrant the sealing of the representations.

> . . .
> This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

In the past, the Information and Privacy Commissioner (the IPC) did not usually share the representations of parties during an inquiry. However, several years ago, after considering input from participants in the inquiry process, court decisions and members of the public, the IPC decided that, as part of a fundamental restructuring of its appeal process, the inquiry stage would move to a more open style. As I noted above, these changes were made out of the belief that a more open process would enhance fairness throughout the inquiry, improve the processes for the gathering and testing of evidence and, ultimately, provide IPC decision makers with better quality, more relevant and more focussed representations. The IPC also believed that the sharing of representations would impact positively on the prospects of settlement during the mediation and adjudication stages of an appeal. The IPC believed that these changes would be not only consistent with the provisions of the legislation, but also in keeping with the practices generally of other administrative tribunals and would represent a significant step towards addressing the comments made by the courts and others with respect to the former process in which representations were, generally, not shared.

As is evident from section 41(13), it may not be appropriate, in many cases, for an inquiry under the *Act* to be an entirely "open" process. There are circumstances where a decision maker at the IPC will exercise his or her discretion to determine the extent to which an inquiry will be "open" or "closed" as between the parties and/or the public, just as there are circumstances under which a court will control access to the courtroom itself, seal court records and/or ban publication of information received during trial.

As noted above, the IPC has established a procedure for the submitting and sharing of representations, which clearly recognizes the need to protect the confidentiality of specifically identified information in accordance with legislative requirements. Recently, in Interim Order PO-2013-I, Assistant Commissioner Tom Mitchinson explained the rationale underlying section 52(13) of the provincial *Act* (and section 41(13) of the *Act*) and the procedures established by the IPC:

> The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) describes the rationale for providing the oversight body with discretion to deny parties full access to all proceedings and documents used in the inquiry process as follows (page 360):
>
> > The tribunal should have the capacity to compel the production of documents and should be permitted to examine such documents in the absence of either party. In situations where the government could not fairly present its reasons for withholding a document in

> the presence of the applicant, the tribunal should be *permitted* to entertain submissions from the government in the absence of the applicant. [my emphasis]
>
> As the Williams Commission and the courts make clear, processing an appeal under the *Act* raises unique confidentiality concerns, such as ensuring that the contents of a record at issue are not disclosed during an appeal. These concerns are the underlying policy basis for section 52(13), and the process outlined in *Practice Direction 7*, particularly its confidentiality criteria, were drafted to ensure that these unique confidentiality considerations are addressed in any decision by the Commissioner to share the representations of one party with another.

The interests of the parties submitting representations are taken into account through the application of the confidentiality criteria. Once a decision-maker is satisfied that the confidentiality criteria do not apply to the representations, or to portions of them, and that they may be shared with another party, the interests intended to be protected by section 41(13) of the *Act* are, in my view, satisfied. Generally speaking, the parties are free, thereafter, to use the information received through this process as they wish (subject to any other legal recourse outside the *Act* that an aggrieved party may have in connection with their use). I am not persuaded that the use of the representations should be restricted simply because the Board is concerned that they may be used to embarrass it or publicize its arguments beyond this proceeding.

On this basis, I will order that the portions of the representations and index I have found to be non-confidential be shared with the appellant in accordance with the procedure set out below. I will make no order as to the use to which this information may or may not be put.

PROCEDURE:

I have attached a copy of the Board's representations and index to this interim order being sent to the Board. The portions of the representations that I have highlighted in yellow indicate the passages which I will withhold from the appellant. The portions of the index that I have highlighted in green will be shared with the appellant. I intend to send the attached material as highlighted, to the appellant, along with a Notice of Inquiry, no earlier than **May 27, 2002**.

Original signed by: May 13, 2002
Laurel Cropley
Adjudicator