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

ORDER MO-1542

Appeal MA-010119-1

Halton 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 submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* to the Halton Catholic District School Board (the Board). The request was for a copy of a letter that had been placed in his daughter's Ontario Student Record (OSR), which related to him and which he believed contained unfair statements about him. The appellant indicated that the letter was written by the Board's solicitor and was addressed to the Superintendent – Human Resources.

In response, the Board indicated that it had not been able to locate the letter he had requested and that it was returning his $5 processing fee.

The appellant appealed the Board's determination that no record exists to this office. In support of his appeal that the record must exist, the appellant provided a copy of a memorandum from the principal of his daughter's school, which had been placed in his daughter's OSR.

By way of background, the appellant explained that he had come across the letter from the Board's solicitor in February 2001, while viewing his daughter's OSR. However, when he later asked for copies of the documents in her OSR, a copy of the letter was not included in the copies provided to him. Rather, the file contained the above-mentioned memorandum from the school principal, which noted that a letter had been removed from the OSR.

This memorandum indicated that the letter was addressed to the Superintendent-Human Resources, although it did not identify either the date or the author of the letter. It indicated further that the letter had been removed from the daughter's OSR because:

- it contained confidential information protected by solicitor-client privilege
- it had been placed in the OSR in error and has been returned to the Board's Human Resources Department.

During mediation of the appeal, the Board, through its solicitor, acknowledged the existence of the letter requested by the appellant and confirmed that it was claiming section 12 of the *Act* (solicitor client privilege) to withhold the letter.

Also during mediation, the Board wrote to the appellant to advise him that this letter never properly constituted part of his daughter's OSR, that it was mistakenly placed in her OSR, and that it has since been removed and will not be placed in her OSR again. The Board also reiterated that it was refusing access to any documents prepared by its legal counsel in this matter, pursuant to section 12 of the *Act*, since they are subject to solicitor-client privilege and/or prepared by the Board's legal counsel for use in giving the Board legal advice.

In response to this letter, the appellant confirmed with the mediator that he is appealing the Board's decision to deny access to the record pursuant to section 12. In this regard, he took the position that section 12 should not apply to the letter, as the litigation to which the letter referred had since concluded.

Finally, during mediation, the mediator raised the issue of waiver of solicitor-client privilege with the parties. In doing so, the mediator pointed the parties to the discussions of this issue in previous orders of this office, and in particular, Order MO-1258, as well as the decision of the Federal Court in *Stevens v Canada (Privacy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.).

Further mediation could not be effected and this appeal was moved into adjudication. I decided to seek representations from the Board, initially and sent it a Notice of Inquiry setting out the facts and issues on appeal. Because the record appears to contain information about the appellant, I included the possible application of section 38(a) (discretion to refuse requester's own information) as an issue in this inquiry.

The Board submitted representations, which I sent to the appellant along with a copy of the Notice. In its representations, the Board acknowledges that the appellant had seen the record at issue, but takes the position that it was disclosed to him inadvertently. The appellant submitted representations in response to the Notice. The only issue that the appellant addresses in his representations pertains to the issue of waiver of solicitor-client privilege. In his submissions, the appellant describes in detail the circumstances under which the principal of his daughter's school disclosed the record at issue to him. He takes the position, based on these circumstances, that the disclosure was not inadvertent. He also disputes the Board's position, based on the nature of other records that had been included in his daughter's OSR, that the record was placed in the file in error. Rather, he believes that the principal's intention was to include this record in the file.

I decided to seek submissions from the Board in Reply and attached the non-confidential portions of the appellant's representations to the copy of the Reply Notice. The only issue that the Board was asked to address in reply was whether, in error or not, the record was intentionally placed in the daughter's OSR and whether the principal waived privilege on behalf of the Board in permitting the appellant to review it during his February 1, 2001 meeting with her (and any legal arguments relating to either issue). In responding to these issues, the Board was asked to provide evidence from the principal in affidavit form with respect to the placement of the record in the OSR, her usual practice in placing information in students' OSR's, and the circumstances under which the record was allegedly disclosed to the appellant.

The Board submitted representations in reply, which included an affidavit sworn by the principal of the daughter's school. In her affidavit, the principal disputes the version of events as described by the appellant in his representations. Because the appellant had not had an opportunity to review and consider this information, I decided to seek representations from him in surreply and provided him with a copy of the Board's representations in their entirety. The appellant was asked to respond only to the representations submitted by the Board in reply, including the information contained in the principal's affidavit. The appellant was also asked to provide his surreply submissions pertaining to the circumstances of the February 1, 2001 meeting in affidavit form.

The appellant submitted additional representations along with affidavits sworn by him and his common law spouse (who was in attendance at the meeting in question).

RECORD:

The record is a two-page letter dated September 16, 1999 from a solicitor for the Board and is addressed to a named Superintendent – Human Resources of the Board. The letter refers to a court judgment dated December 16, 1998 regarding the appellant's access rights to his daughter, and its application to the Board.

Appended to the copy of the September 16, 1999 letter are copies of the judgment of December 16, 1998 and court orders dated August 10, 1999 and September 7, 1999 relating to the same court file. The attachments are not at issue in this appeal.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual". The record at issue mentions the appellant by name and refers to a court judgment regarding his access rights to his daughter and to her school. The Board acknowledges that it contains the appellant's personal information and I concur. The record also peripherally refers to the appellant's daughter and accordingly, contains her personal information as well.

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

Introduction

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

Under section 38(a) of the *Act*, the Board has the discretion to deny the appellant access to his own personal information in instances where the exemptions in sections 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that information.

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.

Solicitor-client communication privilege

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].

The Board submits:

> The record is clearly of a confidential nature. It is written on [the solicitor's] legal letterhead and is marked "STRICTLY PRIVILEGED AND CONFIDENTIAL". It is a letter from legal counsel for the Board … to the Superintendent – Human Resources at the Board.

> The letter was prepared by counsel for the Board for the purpose of providing the Board with legal advice and instruction with respect to the decision … and how it applied to the Board. The letter recommended a course of action, based on legal considerations, regarding a matter with legal implications, namely the appellant's access to his daughter's school. [emphasis in the original]

Based on the Board's submissions and my review of the record at issue, I accept that it comprises a direct communication of a confidential nature between a solicitor and client (in this case an employee of the Board), made for the purpose of providing professional legal advice. On this basis, I find that the record qualifies for exemption under section 12 of the *Act*, subject to any finding I make below with respect to waiver.

Waiver

As I noted above, the representations of the parties and the affidavits sworn by the principal and the appellant and his spouse in support of them describe two different versions of the circumstances of the appellant's review of his daughter's OSR. It is agreed between them, however, that the appellant did, in fact, review the record at issue when he attended at his daughter's school on February 1, 2001. The dispute between the parties centres on whether this disclosure constitutes waiver.

I have decided that it is not necessary to assess the credibility of each version of events because my decision is not premised on which version I prefer. Rather, it is the conduct of the Board in placing the record in the daughter's OSR in the first place combined with the fact (as undisputed) that the principal provided the appellant with an opportunity to review it that is determinative of this issue.

In this regard, the Board argues:

> The Board has maintained from the beginning that the **document was placed in the appellant's daughter's OSR record in error** and that it never properly constituted part of the appellant's daughter's OSR. The Board's conduct reinforces this position, since it removed the document as soon as it became aware that the document was in the appellant's daughter's OSR. The OSR itself is privileged under section 266 of the *Education Act* and can only be viewed by supervisory officers, principals and teachers of the Board. A parent is also entitled to view the OSR under subsection 266(3).

The Board submits that the circumstances of this case are distinguishable from other decisions of this office in which "mistake" was rejected as a defence (for example, Orders MO-1258 and P-341, which I will discuss further below). Citing *Stevens*, the Board submits:

> Solicitor-client privilege should be construed broadly. Inadvertent disclosure of documents covered by solicitor-client privilege does not constitute waiver.

Referring to the principal's affidavit, the Board submits that, "there was no clear or conscious intention on the part of the Board, including [the principal], to waive privilege". In her affidavit, the principal describes the circumstances surrounding the placement of the record in the OSR:

> My usual practice for placing a document in a student's OSR is to assess whether the document impacts or relates to a student's education, well-being or school environment. I consider settlements between parents, custody orders, restraining orders and related documents to be relevant to a student's well being and, accordingly, place them in a student's OSR. I generally receive such documents from a parent who is interested in the school enforcing the terms and conditions of the orders contained in the document.
>
> …
>
> In or about October, 1999, I met with [the] Superintendent of Human Resources, at his request to discuss, among other things, [the appellant's] access rights to his daughter. I was advised by [the Superintendent] and do believe that the reason for his request was to ensure that the school abided by the terms and conditions set out by the court with respect to [the appellant's] access rights since I had never met [the appellant] or his daughter and was unaware of the court proceedings. [The Superintendent] was particularly interested in discussing …
>
> [The Superintendent] provided me with a copy of the record that is in issue and which is described in paragraph 1 of this Affidavit. The record consists of two pages in length. The record was stapled and attached to copies of [the] judgment of December 16, 1998 and court orders dated August 10, 1999 and September 7, 1999. I assumed that the record was "part of the package" and placed it in [the appellant's] daughter's OSR unaware of the privilege attaching to the record.
>
> On or about February 1, 2001, [the appellant] attended … for the purpose of reviewing the contents of his daughter's OSR. Parents are entitled to view the contents of their child's OSR as long as the Principal or Vice Principal of the school is present at the time the parent is reviewing the file.
>
> I sat across from [the appellant] with the OSR file opened on the table in front of me. I handed [the appellant] the documents contained in the OSR one at a time…
>
> [The appellant] viewed every document contained in his daughter's OSR, including the record in issue. I did not withhold the record because I was unaware at the time that it was privileged and that it should not have been in the OSR.
>
> Upon reviewing the entire contents of his daughter's OSR, [the appellant] requested that he be allowed to have photocopies of the documents. I advised [the appellant] that I did not know if he was entitled to photocopies of the documents contained in the OSR and informed him that I would make the necessary enquiries and contact him when I knew the answer.

> I contacted … Superintendent of Education, to inquire whether [the appellant] was entitled to copies … advised me that [the appellant] was, in fact, entitled to photocopies of the documents in his daughter's OSR. [The Superintendent of Education] and I reviewed the contents of the OSR together. [The Superintendent of Education] came across the record at issue and advised me that it should not be in the OSR. I was directed by [the Superintendent of Education] to remove the record and to forward the record to the attention of the Board's Superintendent of Human Resources.
>
> I was advised by [the Superintendent of Education] and do believe that the record at issue should not have been placed in the OSR because it was a document prepared by counsel for the Board solely for the Board's use and was covered by solicitor/client privilege. I was unaware of the nature of the record at the time that I placed the record in [the appellant's] daughter's OSR.

Analysis and Findings

Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> >
> > Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

In *S. & K. Processors Ltd.* ... McLachlin J. noted:

> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In Order MO-1494, Adjudicator Sherry Liang considered whether an institution had waived solicitor-client privilege when it permitted a requester to review a large volume of records in order to reduce the number to which he was seeking access. In that case, the institution advised the appellant that, "prior to the review, all exempted information under [the *Act*] will be severed". In explaining why some records for which solicitor-client privilege was subsequently claimed were shown to the requester, the institution indicated that, "because of the volume of documentation, and other commitments, the time available for this matter … did not allow for the completion of the process". The institution in that case argued that it never intended to waive privilege. Rather, it submitted that "[h]is review was an administrative convenience agreed to … to facilitate the processing of his request". Adjudicator Liang noted that, "it was not until after this date that she [the Manager of Corporate Records for the institution] became aware that 'this was a matter that was in litigation'." In concluding that waiver had occurred, Adjudicator Liang cited, with approval, previous orders of this office which had addressed "inadvertent" disclosure, including those referred to by the Board.

In Order MO-1258, an appellant had attended at the institution's offices on two occasions to review records. On the first occasion, the institution removed certain records from the file for which section 12 had been claimed. However, on the second visit, the institution conceded that it "mistakenly included some records in the file" which it claimed were exempt. In concluding that waiver had occurred, Senior Adjudicator David Goodis stated:

> Because the Town permitted the appellant to view Record B1, I find that the Town has implicitly waived privilege with respect to this document, despite the

> fact that the Town characterizes its inclusion of records claimed to be exempt in the file as a mistake. This is consistent with Order P-341, in which the Ministry of the Attorney General was found to have waived privilege in a document by providing access to it under the *Act*, although the Ministry later claimed that access was provided by mistake. Order P-341 was upheld by the Divisional Court in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 557/92.

In Order P-341, Assistant Commissioner Tom Mitchinson concluded:

> [I]n responding to the original request the designated head must be deemed to have either concluded that the record, with the exception of the section 21 severance, did not qualify for exemption, or chosen to exercise his discretion against claiming exemption under section 19 … I find that the appellant has been provided with access to the severed record. Therefore, I find that it is not possible for the institution to raise a claim under the discretionary exemptions provided by sections 19 and 49(a) after access has been granted.

The Board submits that Order MO-1258 is distinguishable from the current appeal because in that case, the institution had advance notice that the appellant would be coming to review the records and it had already reviewed the files and removed certain records, but still neglected to remove the documents at issue.

In contrast, in the circumstances of the current appeal, the Board notes that because the appellant had the right to review the OSR, and because the record should never have been in the OSR, it had no reason to review the file prior to the appellant's review. The Board suggests that had it reviewed the file before giving it to the appellant, the "mistake" would have been discovered.

With respect to Order P-341 (referred to in Order MO-1258), the Board notes that in that case, the institution had actually given the record to the appellant, whereas in this case, "the appellant found a document that never should have been where he found it. There was no act of providing or giving the appellant the document".

Contrary to this last assertion, the principal affirms that she, in fact, handed the document to the appellant. He did not, unbeknownst to her, inadvertently come across an otherwise privileged document.

Although not raised by the Board, I note that in all three cases referred to above, the requester made an access request under the *Act*, and records were later provided to the requester inadvertently, despite the fact that those records would have arguably been exempt under the solicitor-client privilege exemption. In the case at hand, the document was disclosed outside of an access request under the *Act*. I have, therefore, also considered whether these previous orders are distinguishable on this basis.

In Order MO-1172, I addressed the issue of waiver within the framework of government accountability and the freedom of information context. This issue was also discussed in *Stevens* (as relied upon by the Board). I concluded:

> In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).
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> This issue was recently addressed by the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal *Access to Information Act*, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:
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> > In *Lowry v. Can. Mountain Holidays Ltd.* [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
> >
> > ...
> >
> > I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [emphasis added in the original]

> Although the matter in *Stevens* arose in the context of disclosure under the federal *Act*, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

In my view, the rationale underlying *Stevens* and my decision in Order MO-1172 is not present in the current appeal. This is not a case of partial waiver and the record does not address government actions or policies for which it would be reasonable to conclude that the institution's decision to disclose otherwise privileged information is desirable in making government actions more transparent.

Moreover, the timing and contextual variations in the orders pertaining to waiver in the access context do not lead me to conclude that the findings in these orders are distinguishable from the present case because the disclosure occurred outside that context. Essentially, the conclusions in these orders that the institution cannot rely on the exemption under section 12 (or 19 in the provincial *Act*) because it has waived privilege are based on common law considerations.

In *Stevens*, Linden, J.A. discussed the history of solicitor-client privilege and noted (at page 92):

> Nowadays any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. The great Dean Wigmore has explained the privilege as follows:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.
>
> This is the basic rule as it applies in Canadian law today. The rationale of the privilege is to ensure that a client is free to tell his or her lawyer anything and everything that is pertinent to the case, without any fear that this information may subsequently be divulged and used against them. Without this freedom, there is the possibility that the lawyer may not have the benefit of all the relevant information, and may not be able to do his or her job effectively. And that possibility must be avoided as contrary to the interests of justice.

With respect to the issue of waiver, Linden, J.A. commented (at page 108):

> Given the importance of the right involved – the right to communicate freely and openly with one's solicitor without fear of disclosure of that communication – the case law provides ample support for the Trial Judge's conclusions [to the effect that inadvertent release does not necessarily constitute waiver]. The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances.

The question is, therefore, based on the common law considerations noted above, do the circumstances under which the confidential solicitor-client communication was disclosed to the appellant amount to waiver? In other words, when viewed objectively, does the Board's conduct touch a certain point of disclosure such that fairness requires that privilege shall cease whether the Board intended that result or not? I conclude that it does.

The circumstances that warrant a finding of waiver

Sections 266(2) and (3) of the *Education Act* provide:

> (2) A record is privileged for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,
>
> (a) subject to subsections (2.1), (3) and (5), is not available to any other person; and
>
> (b) except for the purposes of subsection (5), is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record,
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> without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil.
>
> (3) A pupil, and his or her parent or guardian where the pupil is a minor, is entitled to examine the record of such pupil.

The *Ontario Student Record (OSR) Guideline, 2000*, which is a document prepared by the Ministry of Education (and which can be found on its website) describes, among other things, the purpose, use, responsibilities with respect to and access to the OSR. The relevant portions of these guidelines provide:

> **1. ESTABLISHMENT OF THE OSR**
>
> An OSR will be established for each student who enrols in a school operated by a school board or the Ministry of Education. Each student and the parent(s) of a

student who is not an adult must be informed of the purpose and content of the OSR at the time of enrolment.

…

All schools that establish and maintain an OSR for their students must do so in accordance with this guideline.

2. RESPONSIBILITY FOR THE OSR

School boards are responsible for ensuring compliance with the policies set out in this guideline.

…

In addition, boards will develop procedures to be followed to ensure:

- whether it is maintained electronically or in hard copy, during the security of the information contained in the OSR, both the period of use and the period of retention and storage;
- the regular review of the OSR for the removal of any material that is no longer considered to be conducive to the improvement of the instruction of the student;
- the storage of the OSR for the period specified in the retention schedule (see section 8);
- the complete and confidential disposal of material removed from the OSR.

…

It is the duty of the principal of a school to:

- establish, maintain, retain, transfer, and dispose of a record for each student enrolled in the school in compliance with this guideline and the policies established by the board;
- ensure that the materials in the OSR are collected and stored in accordance with the policies in this guideline and the policies established by the board;
- ensure the security of the OSR;
- ensure that all persons specified by a board to perform clerical functions with respect to the establishment and maintenance of the OSR are aware of the confidentiality provisions in the Education Act and the relevant freedom of information and protection of privacy legislation.

According to the guidelines, it is the principal's responsibility to establish and maintain the OSR; to ensure that only those records (and types of records) as identified in the guidelines are included in the OSR. It is her responsibility to regularly review the OSR for the removal of material. In my view, it is reasonable to conclude from a reading of the guidelines that the principal, as the Board's representative, has a "duty" to do so in a reasonable, responsible and informed manner.

This is not a case of a clerical or misfiling error being made by someone else; someone who does not have the responsibility assigned to the principal. In this case, the principal met with the Superintendent of Human Resources specifically to discuss the legal matters involving the appellant. He handed her a document related to these matters, which she appears to have reviewed. It is not clear whether she did so in his presence or not. It is not clear whether he expected that this document would be placed in the OSR. Rather, the principal asserts that she made an "assumption" that the record at issue was part of a package, the likes of which she would routinely include in a student's OSR as being "relevant to a student's well-being".

As I noted above, the record is written by legal counsel for the Board and is addressed directly to the Superintendent. The letter is very clearly marked "STRICTLY PRIVILEGED AND CONFIDENTIAL". It is apparent that the Superintendent did not draw her attention to any privilege attached to this record although as the recipient, it might be reasonably expected that he, in particular, would be in a position to assert the privilege. Nor did the principal ask him about the nature of this letter even though it was clearly marked as privileged and confidential. The record is of a very different nature from the record it was attached to – it is a letter from the Board's legal counsel in contrast to an order of the court.

The principal asserts that she did not know that the record was privileged. I do not accept that this negates a finding of waiver. This record was transferred between two senior Board employees. In this case, I find that both the Superintendent and the principal ought to have known that the record was subject to solicitor-client privilege and that its disclosure would constitute waiver. I find further that the principal intentionally placed the letter into the daughter's OSR and subsequently gave it to the appellant to read.

In these circumstances, I conclude that the conduct of the Board (as represented by both the Superintendent and the principal) in permitting the record to be placed in the OSR (regardless of whether it should have been placed there or not) amounts to waiver of any solicitor-client privilege which attached to it. Accordingly, I find that in placing the record in the OSR and then permitting the appellant to read it, the conduct of the Board, when viewed objectively, amounted to an implied waiver of privilege. As a result, the record is not exempt under section 12 and 38(a) and must be disclosed to the appellant.

ORDER:

1. I order the Board to disclose the record to the appellant by providing him with a copy of it on or before **June 18, 2002**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Order Provision 1.

Original signed by: May 28, 2002
Laurel Cropley
Adjudicator