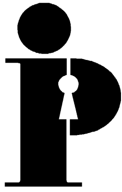

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1938

Appeal MA-050017-1

Kawartha Pine Ridge District School Board

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NATURE OF THE APPEAL:

A request was submitted to the Kawartha Pine Ridge District School Board (the Board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information regarding the requester and his daughter relating to an incident that occurred at a school, resulting in an injury to the daughter. Specifically, the request was for all information including copies of notes taken during meetings, telephone conversations and discussions with Board employees regarding his daughter, her injury, or school conduct and policy concerns. The request was also for "all notes taken during interviews of co-students in regards to [the daughter's] injury." The request identified that it was for questions only, and not the children's responses.

The Board located responsive records and denied access to them on the basis that they are exempt under section 12 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed the Board's decision.

During the mediation stage of this appeal, the Board issued a revised decision letter to the appellant, and granted partial access to the responsive records. An Index of Records was attached to the revised decision containing a description of each record, and indicating whether access was granted and the applicable exemptions where access was denied. Some of the records were disclosed in full. The remaining records were withheld in full pursuant to section 38(a) (discretion to refuse requester's own information) and section 12 of the *Act*.

Also during mediation, the appellant advised that he was pursuing access to all of the withheld records; however, he clarified that he is not seeking access to the names of students and their responses to questions, nor to the names of other parents.

Mediation did not resolve all of the issues, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Board, initially. In the Notice of Inquiry, I also invited the parties to address the possible application of the exemptions in section 14(1) and 38(b) (invasion of privacy) in this appeal. In addition, as it appeared that the appellant was requesting the information on his own behalf, as well as on behalf of his daughter, who is a minor, I invited the parties to provide their position on this issue.

The Board provided representations in response to the Notice of Inquiry. I then sent the Notice, along with a copy of the Board's representations, to the appellant, who also provided representations.

RECORDS:

The records remaining at issue are numbered 1 to 17, 19 to 26, 28 to 30, 32, 33, 36 to 38, 40 and 41. They consist of copies of the Principal's notes, staff member's notes, form record interviews with students and correspondence from the Board's insurer.

DISCUSSION:

PRELIMINARY ISSUE

Section 54(c) of the *Act* permits the exercise of rights under the *Act* on behalf of minors, in the following terms:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

There is no dispute that the appellant's daughter is under the age of sixteen, and there is nothing to suggest that the appellant does not have lawful custody of his daughter. Accordingly, in light of the wording of the request, I find that the appellant is representing both himself and his daughter in this appeal.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), personal information is defined, in part, to mean recorded information about an identifiable individual, including the age, sex and marital status of an individual [paragraph (a)], information relating to the education or the medical history of the individual [paragraph (b)], the personal opinions or views of the individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] or the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

The request resulting in this appeal is for information concerning the appellant and his daughter. I find that, because the records relate to an incident involving the appellant's daughter, and to the subsequent actions of the appellant, they contain either his or his daughter's personal information, within the meaning of section 2(1) of the *Act*.

In my view a number of the records also contain the personal information of other identifiable individuals. These include other students and their parents. Although the appellant stated that he is not seeking the names of these individuals, I am satisfied that it is reasonable to expect that certain individuals may be identified if the information relating to them is disclosed. [See Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Furthermore, I am satisfied that some of the records contain the personal information of Board employees. Although as a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, MO-1550-F, PO-2225], even if information relates to an individual in a

professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225]. I am satisfied that some of the records contain the personal information of Board employees (identified staff at the daughter's school), as their disclosure would reveal something of a personal nature about these individuals.

In light of my finding that section 38(a) applies to a number of the records at issue, it is not necessary for me to identify precisely those portions of the records that contain the personal information of other identifiable individuals. With respect to the remaining records, I find that Records 12, 13, 14, 15 and 16, which consist of written statements of Board employees, contain the personal information of those employees, as their disclosure would reveal something of a personal nature about them.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Under section 38(a), the Board has the discretion to deny the appellant access to his own personal information (or that of his daughter) where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

The Board relies on section 38(a) in conjunction with section 12 to deny access to the records. Section 12 is the "solicitor-client privilege" exemption.

SOLICITOR-CLIENT PRIVILEGE

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 contains two branches, a common-law privilege and a statutory privilege. It is unnecessary to discuss the two branches separately in this decision.

The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- 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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO- 2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Representations

The Board submits that the records qualify for exemption on the basis that they are exempt under the solicitor-client privilege exemption in section 12. The Board states:

> The [appellant] has made it clear that [he intends] to take legal action against the Board. The [appellant] has also served notice of [his] intention to report certain staff to the Ontario College of Teachers regarding their professional status. In addition, the [appellant] has engaged a private investigator who has contacted or attempted to contact parents and staff.
>
> Board staff, knowing of the [appellant's] intent and with direction from their supervisors have made detailed notes of conversations and meetings with the [appellant], other staff, students, parents and other parties. These notes have and will be provided to the Board's legal counsel and insurer for the purpose of giving legal advice and for use in litigation.

The appellant submits that he should be granted access to the information at issue. He identifies that he is asking for the information on his own behalf as well as on behalf of his daughter, and states:

> I want to be sure her situation has been dealt with properly before any decisions are made. There has not been lawyer letter of intent (sic) nor Ontario College of Teacher concerns filed. I am merely protecting my child's rights as her father at this time and requesting personal information pertaining to her and myself.
>
> … As far as legal intent no decisions have been made nor action (sic) regarding the status of staff.

Analysis

Solicitor-client communication privilege

I find that the Board has not provided me with sufficient evidence to support a finding that the records constitute direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice, nor that they formed any part of "a continuum of communications" between a solicitor and client.

Although the Board states that the records "have and will be provided to the Board's legal counsel and insurer for the purpose of giving legal advice", the Board has not identified who the legal counsel is or which records have been provided to counsel. The Board's representations are equivocal on this point – it does not specifically identify any records that were communicated to the Board's legal counsel. Accordingly, I am not satisfied that the records are exempt under the solicitor-client communication privilege aspect of section 12 of the *Act*.

Litigation Privilege

As identified above, litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. In order to meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation.

In this appeal, the Board asserts that the appellant made it clear that he intended to take legal action against the Board as a result of the incident involving his daughter. The Board also states that Board employees, based on that knowledge and with direction from their supervisors, made detailed notes of conversations and meetings with the appellant, other staff, students, parents and other parties. The appellant takes the position that no decisions have been made regarding "legal intent", and that he is merely protecting his child's rights and requesting personal information relating to him and his daughter.

I have carefully reviewed the records at issue in this appeal, as well as the representations of the parties and the other documentation in this appeal. It is clear from this material that, on the day following the day the incident took place, the appellant informed the Board that legal action was being contemplated by him. I am satisfied that, as of that day, litigation was reasonably contemplated by the Board.

Although the appellant takes the position that no decisions have been made regarding "legal intent", and that he is merely requesting personal information relating to him and his daughter, I find this information to be at odds with his actions and the statements he made to the Board the day following the incident. These included his reference to this now becoming a "legal problem", the taping of conversations by him, involving the Police in the matter, and subsequent references by him to holding the Board and an employee "civilly" and "legally" responsible.

In my view, the records relating to the incident and created on or after the day following the date of the incident were created for the "dominant purpose" of existing or reasonably contemplated litigation – at that time litigation was reasonably contemplated by the Board, and became more than a "vague or general apprehension of litigation".

However, in my view, five of the records (Records 12, 13, 14, 15 and 16) do not relate directly to the incident; rather, they relate to other matters concerning the appellant and his actions. Based on my review of those records and the representations of the Board, I am not satisfied that these

records were created for the "dominant purpose" of existing or reasonably contemplated litigation.

Furthermore, records created on the date of the incident and relating to it would not have been created for the "dominant purpose" of existing or reasonably contemplated litigation. In my view, at that time litigation resulting from the incident involving the appellant's daughter was not reasonably contemplated. Accordingly, any records created on that day would not have been created for the "dominant purpose" of existing or reasonably contemplated litigation.

The one document relating to this incident that was clearly created on the date of the incident - the "Incident Report Form" prepared by a teacher – has been disclosed to the appellant in the course of this appeal, and access to it is, accordingly, no longer an issue. Many of the records that remain at issue in this appeal, including the Principal's notes, staff member's notes, form record interviews with students and correspondence from the Board's insurer, were clearly created after the date of the incident. I find that they were created for the "dominant purpose" of existing or reasonably contemplated litigation. Some of these records recount in detail the events that occurred on the date of the incident; however, I find that they were clearly written following the date of the incident and in an attempt to provide a written account of the events that occurred on the date of the incident. These include the interview notes of other students about the incident, as well as the Principal's notes.

With respect to three of the records (Records 17, 19 and 20), the date identified on these records is the date of the incident. However, based on the information provided to me, the records themselves and the representations of the Board that staff made detailed notes knowing of the appellant's intent and "with direction from their supervisors", I am satisfied that these records were created following the date of the incident and not on that date or contiguous with the incident. I find further support for this in a reference to written records made on the date of the incident, which only refers to the "Incident Report Form".

Accordingly, I am satisfied that all of the records remaining at issue in this appeal that relate to the incident were created for the "dominant purpose" of existing or reasonably contemplated litigation, and qualify for exemption under the litigation privilege aspect of section 12.

Because these records contain the personal information of the appellant and his daughter, once section 12 is found to apply, section 38(a) provides the Board with the discretion to either release them or deny access to them. I have reviewed the Board's decision to deny access to the records, and find nothing inappropriate in its exercise of discretion under this provision. These records are therefore exempt under section 38(a).

Having found that the records that relate to the incident qualify for exemption under section 38(a), it is not necessary for me to decide whether section 38(b) applies to them. I will now review whether the remaining records (Records 12, 13, 14, 15 and 16) qualify for exemption under section 38(b).

INVASION OF PRIVACY

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(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations of the Parties

The Board has referred to sections 14(2)(e), (f), (h) and (i) as relevant factors in this appeal. The appellant has identified that his interest in the records stems from his concern that the situation involving his daughter has been dealt with properly by the Board, indirectly raising the factor in section 14(2)(a). These sections read as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Findings

I find that the factors set out in sections 14(2)(f) and (h) are relevant considerations that favour the non-disclosure of the records remaining at issue. In my view, the information contained in those records is "highly sensitive" for the purpose of section 14(2)(f) (See Orders M-1053, P-1681, PO-1736). I am also satisfied, based on the nature of the records and the information contained in them, that the information was supplied in confidence by the individuals who provided the information to the Board.

With respect to the possible application of section 14(2)(a), the appellant identifies that he is interested in the information to review whether the situation involving his daughter has been dealt with properly; however, as identified above, Records 12, 13, 14, 15 and 16 do not relate directly to the incident involving the appellant's daughter. The appellant's stated reason for reviewing the records does not apply to the records remaining at issue, and I find that the consideration in section 14(2)(a) is not a relevant factor favouring disclosure of those records.

After weighing the factors referred to above, I find that the disclosure of the records remaining at issue, which contain the personal information of the appellant and other identifiable individuals, would constitute an unjustified invasion of the personal privacy of the other individuals. I am also satisfied that there was nothing inappropriate in the Board's exercise of discretion under this provision. The remaining records are therefore exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Board to deny access to the records.

Original signed by: June 29, 2005
Frank DeVries
Adjudicator