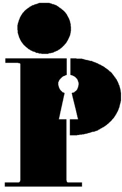

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2354

Appeal MA07-187

London District Catholic School Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the London District Catholic School Board (the Board) for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). She sought correction of certain information and disclosure of additional information, in accordance with a letter sent to her son's school on November 8, 2006 about his Individual Education Plan (IEP) for the 2006-2007 school year.

In the initial Notice of Inquiry sent to the Board, as well as the second party Notice sent to the appellant, the issues were identified from the November 8, 2006 letter from the appellant to the school and were summarized by the Adjudicator who then had carriage of the appeal as follows:

1. The appellant believes data is missing from the *Sources* and *Results* components of the *Relevant Assessment Data* section of the IEP. The appellant refers to assessments conducted by a specified professional [Dr. R.] and indicates that she wanted that professional's assessments included, since they document her son's issues at an early age, support another professional's [Dr. A.] findings years later, and also document the increase in her son's communication gap.

2. [Text removed at Reply Notice of Inquiry stage].

3. The appellant states that she and her husband did not attend an IPRC meeting on March 10, 2006, as indicated in the report. She does not recall being invited, or having waived their right to attend.

4. The appellant asserts that her son's IEP does not comply with section 6(3) of Ontario Regulation 181/98, which requires the inclusion of specific education expectations; an outline of the special education program and services to be received; and a statement of the methods by which the pupil's progress will be reviewed.

5. The appellant remarks upon references in the *Information Sources* section of the IEP, to board staff, professionals and paraprofessionals having provided information regarding her son and various types of assessment reports and diagnostic tests. The appellant stated she would like disclosure of the:

   - names of these Board staff, professionals and paraprofessionals;
   - **copies of all information these individuals provided about her son;**
   - copies of the assessment reports; and
   - copies of the diagnostic tests [emphasis added].

The Board issued a decision letter on March 22, 2007, granting access to the most recent assessment reports contained in the appellant's son's Ontario Student Record (OSR) and stating that these were the reports used in developing the IEP. The Board stated that the IEP had been developed by the school and Board staff, in accordance with the *Education Act* and Ministry guidelines. The Board noted that although parents are consulted in the process, the discretion for the final wording and content of the IEP rests with the school. The appellant appealed the Board's decision.

During the mediation stage of the appeal, several matters were clarified, including the removal of Item #2 of the numbered list above from the scope of this appeal. At the end of mediation, the appellant continued to seek correction of her son's 2006/2007 IEP with respect to the following:

- the identity of those in attendance at a March 10, 2006 IPRC meeting,
- the inclusion of Dr. R.'s assessments, and
- the inclusion of information to ensure compliance with section 6(3) of Ontario Regulation 181/98 to the *Education Act*.

This matter also proceeded to adjudication on the issue of access to the information described in the bulleted list accompanying Item #5, above. Since the Board's decision letter of March 22, 2007 did not specifically refer to records responsive to this part of the request, and the matter did not appear to have been clarified during mediation, the adjudicator with carriage of the file at that time added the adequacy of the Board's decision to the issues under review as part of the inquiry in this appeal.

The adjudicator commenced her adjudication by sending a Notice of Inquiry to the Board, setting out the facts and issues in the appeal, and seeking the Board's representations. She specifically drew the Board's attention to the appellant's concern that it appeared that no decision was issued with respect to the information contained in Item #5, described above. Representations were submitted by the Board in response to the Notice.

Next, the adjudicator sent the appellant a copy of the Board's submissions, including excerpts from the appendices which accompanied the Board's representations, along with several orders from this office that had been cited by the Board, along with a modified Notice of Inquiry, inviting the appellant's representations. The adjudicator drew the appellant's attention to the fact that she had severed a portion of the Board's representations from the appellant's copy. This was done because these representations contained submissions on the substantive issue of the conformity of the IEP with section 6(3) of Ontario Regulation 181/98, which falls outside the scope of the jurisdiction of the Commissioner's office to determine. Accordingly, the adjudicator indicated to the appellant that she would not be considering these issues, which had been enumerated at Item #4 of the list provided to this office by the appellant in her November 8, 2006 letter.

The appellant provided representations in response to the Notice, parts of which address compliance with Regulation 181/98 and Ministry guidelines regarding the requirements for the completion of an IEP, notwithstanding a clear statement from the adjudicator in the Notice of Inquiry that she would not consider such submissions as they addressed an issue that was beyond her jurisdiction. The adjudicator then sought and received representations by way of reply from the Board on the remaining issues raised by the appellant in her submissions.

Following its submission of reply representations, the Board provided the appellant with a further decision letter enclosing complete copies of 91 pages of additional records, comprised of various notes taken on January 12, 2006 at a meeting of the IPRC, along with correspondence between the appellant and the Board. This disclosure appears to have been aimed at addressing the information sought in Item #5 of the appellant's November 8, 2006 letter. At this time, for administrative reasons, the appeal was transferred to me to complete the inquiry and render a decision.

RECORD:

There is only one record at issue in this appeal, the appellant's son's IEP for the 2006/2007 school year, which is the subject of the correction request.

DISCUSSION:

CORRECTION OF PERSONAL INFORMATION

General principles

Section 36(1) gives an individual a general right of access to his or her own personal information held by an institution. Section 36(2) gives the individual a right to ask the institution to correct the personal information. If the institution denies the correction request, the individual may require the institution to attach a statement of disagreement to the information. Sections 36(2)(a) and (b) read:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information where the individual believes there is an error or omission therein;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

Where the institution corrects the information or attaches a statement of disagreement, under section 36(2)(c), an individual may require the institution to give notice of the correction or statement of disagreement to any person or body to whom the personal information has been disclosed within the year before the time the correction is requested or the statement of disagreement is required.

Request for correction

An appellant must first ask the institution to correct the information before this office will consider whether the correction should be made. The appellant in the present appeal indicated in her representations that she has asked the Board to correct the information, and the Board has declined to do so. The Board agrees that this is the case.

"Personal information" definition

The right of correction applies only to information that qualifies as "personal information". The Board has not objected to the appellant's contention that the information that is sought to be corrected qualifies as the personal information of the appellant's son for the purposes of the definition of that term in section 2(1) of the *Act*.

Grounds for correction

For section 36(2)(a) to apply, the information must be "inexact, incomplete or ambiguous". This section will not apply if the information consists of an opinion [Orders P-186, PO-2079].

Section 36(2)(a) gives the institution discretion to accept or reject a correction request [Order PO-2079]. Even if the information is "inexact, incomplete or ambiguous", this office may uphold the institution's exercise of discretion if it is reasonable in the circumstances [Order PO-2258].

Findings

IPRC Meeting Date indicated on the record

First, the appellant is seeking the correction of information that she describes as "misleading" that is contained in the IEP. She is of the view that the inclusion of the date March 10, 2006 next to the heading "Most Recent IPRC/Review Waived by Parent or Guardian" constitutes a misstatement because no such meeting took place on that date; nor did she waive the right to participate in an IPRC meeting to be held on that date. In fact, the appellant indicates that the only IPRC meeting involving her son that was held during that school year took place on January 12, 2006. She emphatically states that she did not attend a meeting on March 10, 2006 and did not waive her right to have an IPRC meeting on or around that date.

The Board submits that the date indicated on this line of the IEP "was not intended to, nor would it be generally understood by Board's staff to mean that the Appellant had actually 'waived' the right to attend this meeting." The Board states that this portion of the form used for the IPRC is designed to "include a location where the writer typically adds the specific date that the results of the Identification, Placement and Review Committee (the IPRC) decision" took place. It suggests that because the "actual decision of the IPRC was not finalized until March 10, 2006, the actual date referred to in the IEP is March 10, 2006."

I note that there is a space indicated on Page 4 of the IEP form for a date, next to the space for the Principal's signature. The date indicated on this completed IEP form is March 10, 2006, which the Board submits is the date the principal finalized the IEP document. The date filled in on Page 1 under the heading "Most Recent IPRC/Review Waived by Parent or Guardian" also refers to March 10, 2006, despite the fact that the only IPRC meeting actually held took place on January 12, 2006, as indicated by the appellant.

In my view, the position put forward by the Board in this regard is untenable. The form clearly calls for the individual completing it to identify the date of the "Most Recent IPRC", which is January 12, 2006, and not the date that the form is actually completed, March 10, 2006, a space for which is provided on Page 4 of the form. It is common ground between the parties that no IPRC meeting was held on March 10, 2006 and the appellant did not waive a review on or relating to that date.

Further, I find that the change requested to this portion of the IEP document would not result in a substitution of the opinion of the author of the report for that of the appellant. In my view, the fact that the IPRC meeting took place on January 12, 2006 is simply a fact that is beyond dispute and does not represent an opinion.

Accordingly, I am satisfied that the date listed in this portion of the form is factually inexact and is clearly incorrect. I further find that the Board's decision to exercise its discretion to not to correct this obvious error is unreasonable. I will, accordingly, order the Board to correct the entry in Page 1 of the IEP document under the heading "Most Recent IPRC/Review Waived by Parent or Guardian" to read January 12, 2006, rather than March 10, 2006.

Inclusion of Dr. R's Report

The appellant takes the position that the IEP ought to be amended to include a report prepared by a specified doctor concerning an evaluation of her son in 2001 in the section entitled "Relevant Assessment Data". The Board argues that the Ministry of Education guidelines about the preparation of an IEP indicates that this section is not intended to include every document in the student's file, but rather only those which are "most relevant", particularly those that are the most current.

The Board argues that the inclusion of a report from 2001 in an IEP prepared in 2006 is not in keeping with the guidelines provided by the Ministry. It goes on to submit that the individual preparing the IEP, in this case the principal of the school, has the discretion to determine which documents are included in this list of data. In this case, the Board argues that the principal exercised his discretion not to include Dr. R's report, and instead relied upon more recent reports created in 2005.

In my view, the correction provisions contained in section 36(2)(a) are not intended to address situations where an appellant seeks the inclusion of information into a record, as opposed to the usual case where the information existing in a record is said to be "inexact, incomplete or

ambiguous" and requires correction. I agree with the Board that the creator of the record has the discretion to include or not include any information in the IEP document, with the proviso that it not be "inexact, incomplete or ambiguous", and therefore subject to the correction provisions in section 36(2)(a).

Accordingly, I dismiss this part of the appeal. Requiring an institution to include information in a record, as opposed to correcting existing information in a record, is not contemplated by the correction provisions in section 36(2)(a) and I am unable to order such a remedy under that section.

ADEQUACY OF DECISION LETTER/ SCOPE OF REQUEST

The appellant takes issue with the adequacy of the Board's decision letter dated March 22, 2007 on several grounds, arguing that it does not satisfy the requirements of sections 19 and 22 of the *Act*. She submits specifically that the decision letter is not in conformity with the *Act* because:

- the Board provided access to her son's Ontario Student Record (the OSR), which was what she had requested because it did not include the documents referred to in the IEP; and
- the Board failed to provide her with a decision respecting access to the "Information Sources" contained in the IEP, as she had requested, including any personal notes taken by staff during various IPRC and IEP meetings, which were not included in the OSR records that were disclosed to her.

I note that following its submission of reply representations to this office, the Board disclosed to the appellant a further 91 pages of documents, including notes taken by three staff participants at the January 12, 2006 IPRC meeting attended by the appellant. In my view, the Board was remiss in not identifying and rendering a decision on access to these records at the time the request was received. These items were clearly identified in the appellant's November 8, 2007 letter and in Item # 5 of the request in the Notice of Inquiry document sent to it by this office when the inquiry was begun. I find that the Board failed to properly and completely identify all of the responsive records in its custody or control at the time the request was originally submitted.

However, in my view, the disclosure of records made to the appellant on February 14, 2008 essentially remedied this deficiency. I find that the records sent to the appellant, particularly the notes taken by Board staff at the IPRC meeting on January 12, 2006, were clearly responsive to the request, as described by the appellant and in the initial Notice of Inquiry provided to the Board by this office. Based on my review of the voluminous material submitted by the parties to this appeal, I am of the view that following the issuance of its supplementary decision letter on February 14, 2008, the Board properly identified the records that are responsive to the request and rendered an adequate decision respecting access to those records which is in conformity with the requirements of sections 19 and 22 of the *Act*. As a result, I conclude that this issue has been

adequately addressed by the Board and that no useful purpose would be served by revisiting it further.

ADEQUACY OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

As noted above, at the time she filed her appeal, the appellant took issue with the fact that the Board's search for responsive records did not include a number of documents that she felt ought to have been identified. I note that following the submission of its reply representations, the Board located and disclosed a number of additional records to the appellant, including those which specifically were identified in the appellant's November 8, 2006 letter and her request, relating to the IPRC meeting held on January 12, 2006.

In its reply representations, the Board provided a detailed and useful explanation of the searches which it conducted for responsive records, particularly following the receipt of the appellant's representation in this appeal. Specifically, the Board indicates that it made detailed inquiries from the individuals who are still in its employ for any documents which relate to their attendance at the January 12, 2006 IPRC meeting with the appellant. Each of these individuals confirmed that:

> they are not in possession of any notes or other documents related to any assessments of [the appellant's son] that were used in the IEP that have not already been provided in the OSR other than copies of email exchanges which are either to or from the appellant (which the appellant naturally already has access to) and notes which were taken at the January 12, 2006 meeting.

The Board indicates that the notes of the January 12, 2006 were not originally provided to the appellant because she was in attendance at that meeting and was in receipt of any information that was provided at that time. In addition, the Board pointed out that the appellant had filed a complaint under the *Human Rights Code* and that it considered the notes to be subject to the solicitor-client privilege or the invasion of privacy exemptions contained in the *Act*. Following

the submission of the Board's reply representations, however, it determined that the appellant was entitled to receive access to all of these records, and disclosed them to her.

Based upon my review of the appellant's submissions on this issue, her appeal letter, request and the November 8, 2006 letter, as well as the Board's reply representations, I am satisfied that the Board has conducted a reasonable search for records responsive to this part of the appellant's request. In my view, the Board has, following its identification of all of the responsive records at the reply representations stage of the inquiry process, performed an adequate and reasonable search for responsive records and disclosed them, in their entirety to the appellant.

As a result, I find that the Board has satisfied its obligations under section 17 of the *Act* and I dismiss that part of the appeal.

ORDER:

1. I order the Board to correct the entry in Page 1 of the IEP for the 2006/2007 school year under the heading "Most Recent IPRC/Review Waived by Parent or Guardian" to read January 12, 2006, rather than March 10, 2006, by **November 30, 2008**.

2. I order the Board to provide me with a copy of the amended IEP so that I may verify that the correction has been made.

3. I uphold the Board's decision to decline to correct the IEP by including Dr. R's report.

4. The Board has conducted a reasonable search for responsive records and I dismiss this part of the appeal.

______________________________ October 28, 2008

Donald Hale
Adjudicator