

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT MC11-73

York Region District School Board

June 15, 2016

Summary: The Office of the Information and Privacy Commissioner of Ontario received a complaint alleging that the York Region District School Board (the Board) contravened the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) when it disclosed the complainant's son's Ontario School Record (OSR) during a proceeding filed against the Board with the Human Rights Tribunal of Ontario (HRTO). The Privacy Complaint Report concludes that the *Act* prevails over the confidentiality provisions in section 266(2) and 266(10) of the *Education Act*. The Board's disclosure of the personal information from the OSR to the HRTO and the Board's legal counsel was in accordance with sections 51 and 32(d) of the *Act*, respectively.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 32(d) and 51; *Education Act*, R.S.O. 1990, c. E.2, sections 266(2) and 266(10).

Orders and Investigation Reports Considered: Orders P-53, M-162, M-852, PO-1998, PO-2029, PO-2083 and PO-2411-I; Privacy Complaint Report MC-050034-1; Investigation Reports I95-007M, I96-032M and I96-113P.

Cases Considered: *H. (J.) v. Hastings (County)* (1993), 12 M.P.L.R. (2d) 40 (Ont. Ct. Gen. Div.).

BACKGROUND:

[1] The Office of the Information and Privacy Commissioner/Ontario (IPC) received a

privacy complaint from an individual (the complainant) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) against the York Region District School Board (the Board).

[2] The complainant alleges that the Board disclosed personal information in her son's Ontario School Record (OSR) by including it in the information it had compiled for a human rights complaint proceeding filed against the Board by her on behalf of her son. Specifically, the complainant alleges that the Board inappropriately disclosed this information to its legal counsel and the Human Rights Tribunal of Ontario (HRTO).

[3] The complainant filed a complaint under the *Ontario Human Rights Code* with the HRTO against the Board on behalf of her son, alleging discrimination in receipt of services on the basis of disability. During that proceeding, and in accordance with the HRTO Rules of Procedure, the complainant delivered a Brief of Documents for Hearing which included copies of the documents she intended to rely on at the hearing. Included in the information produced by the complainant were records that formed part of her son's OSR.

[4] At various times in the proceeding, the Board sought the complainant's consent to its production of portions of her son's OSR that it determined were relevant to its defence of her complaint. The complainant repeatedly declined to provide her consent in response to these requests.

[5] Subsequently, in the absence of the complainant's consent, the Board delivered a Respondent's Brief of Documents for Hearing which included copies of records from the complainant's son's OSR.

[6] The HRTO held a preliminary hearing on November 7, 2011 to address a number of issues. One of the issues addressed by the adjudicator was the complainant's request for an order seeking the exclusion of the OSR documents filed by the Board on the basis that they were used in the proceeding without the complainant's consent contrary to section 266 of the *Education Act*.

[7] The adjudicator issued an interim decision on November 22, 2011 in which he stated:

[T]he applicant refers to information and material in the OSR. It is apparent from this, and from the issues raised in the Application, that information and documents in the OSR will be material to the case presented by the applicant and the defense presented by the respondent. It would be manifestly unfair for the applicant to be able to rely on this material, but not the respondent.

. . . .

The issue before me in exercising the Tribunal's mandate is how, if the applicant's request is granted, the issues raised by him could be adjudicated in a fair, just and expeditious manner. It is apparent that they could not.

What the applicant seeks is for the Tribunal to continue to deal with his Application with only one side of the dispute being fully heard and the other being barred from relying on relevant information and documents. It would amount to a breach of natural justice and would run counter to the rules of procedural fairness to proceed in this manner.

[8] In that decision, the adjudicator directed the complainant to state in writing whether she gave consent to the Board to use and disclose documents and information from the OSR for the purposes of the proceeding. The adjudicator directed that if the complainant refused to provide her consent within two weeks of the date of the Interim Decision, the application before the HRTO would be dismissed as an abuse of process.

[9] The complainant elected to withdraw her complaint and the HRTO proceeding was closed.

[10] In this complaint, the complainant asserts that section 266(2) of the *Education Act* states that the OSR is a privileged document which cannot be used as evidence at trials, etc. without the written consent of the parent and that this office should find that the Board's production of the OSR records in the proceeding before the HRTO to the HRTO and the Board's legal counsel was in contravention of section 266(2) of the *Education Act*. The complainant also states that the Board's production and disclosure of the OSR to the HRTO and to its legal counsel was contrary to section 266(10) of the *Education Act*.

[11] In its submissions provided to this office, the Board states that this disclosure was in accordance with the *Act*. It explains that the complainant's allegations of discrimination to the HRTO were based on her son's disability and that documents in his OSR were directly related to his condition. The Board further submits that these documents were relevant to the proceedings with the HRTO, were required in order for it to properly defend itself against the complainant's allegations of discrimination, and to provide context for the records from the OSR that the complainant provided to the HRTO.

[12] With respect to the disclosure of the OSR to its legal counsel, the Board states that the legal counsel was its agent and the disclosure was in accordance with the *Act*.

[13] There is no question raised here about the nature of the information that was disclosed by the Board to the HRTO and its legal counsel. This information qualifies as "personal information" as that term is defined in section 2(1) of the *Act*.

ISSUES

[14] The issues raised by the complainant are as follows:

1. What is the effect of sections 266(2) and 266(10) of the *Education Act* in the circumstances of this complaint?
2. Does section 51 of the *Act* apply to the disclosure made by the Board to the HRTO?
3. Was the disclosure of the information at issue to the Board's legal counsel in accordance with section 32 of the *Act*?

DISCUSSION:

[15] The following addresses whether the Board's disclosure of the complainant's son's personal information, as contained in the OSR, accords with the privacy protection rules set out in the *Act*.

Issue 1: What is the effect of sections 266(2) and 266(10) of the *Education Act* in the circumstances of this complaint?

[16] The complainant asserts that the Board disclosed information from her son's OSR without her consent, contrary to section 266(2) and 266(10) of the *Education Act*.

[17] Section 266(2) of the *Education Act* states:

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), (5), (5.1), (5.2) and (5.3), is not available to any other person; and

(b) except for the purposes of subsection (5), (5.1), (5.2) and (5.3), 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, 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.

[18] Section 266(10) of the *Education Act* states, in part:

Except as permitted under this section, every person shall preserve secrecy in respect of the content of a record that comes to the person's knowledge in the course of his or her duties or employment, and no such person shall communicate any such knowledge to any other person except,

- (a) as may be required in the performance of his or her duties; or
- (b) with the written consent of the parent or guardian of the pupil where the pupil is a minor; or
- (c) with the written consent of the pupil where the pupil is an adult.

[19] Section 53 of the *Act* governs the relationship between the *Act* and confidentiality provisions in other legislation. It states:

(1) This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this Act:

- 1. Subsection 88(6) of the Municipal Elections Act, 1996.
- 2. Subsection 53(1) of the Assessment Act.

[20] If this office finds that a confidentiality provision in another statute prevails over the *Act*, then the *Act* does not operate as the controlling statute.¹ A finding that a confidentiality provision in another act prevails can only be made where the other legislation or the *Act* specifically provides that it prevails. Therefore, I will begin my analysis with a consideration of whether or not sections 266(2) and 266(10) of the *Education Act* qualify as confidentiality provisions that prevail over the *Act*.

[21] I have carefully reviewed the *Education Act* and find that there is nothing in that legislation that indicates that sections 266(2) and (10) prevail over the *Act*. I also note that section 53(2) of the *Act* does not list the *Education Act*.

[22] This office considered the impact of sections 266(2) and 266(10) of the *Education Act* in Privacy Complaint Report I96-032M. The complainant in that case alleged that a police service had inappropriately used information from a student's OSR in the context of an investigation about the conduct of a specific officer. The parent of the student filed a complaint under the *Act* alleging that the police service's use was contrary to the *Act*. In that Report, this office found that sections 266(2) and (10) did not operate as confidentiality provisions that prevail over the *Act*.

¹ Orders PO-2029, PO-2083 and PO-2411-I.

[23] Having carefully reviewed the *Act* and the *Education Act*, I agree with that finding. I conclude that the *Act* prevails over the confidentiality provisions in section 266 of the *Education Act*. Accordingly, in the circumstances of this complaint, this office is not bound to consider section 266 of the *Education Act* in its deliberations concerning the disclosure of information from the complainant's son's OSR.

[24] I now turn to consider whether the disclosures were authorized under the *Act*.

Issue 2: Does section 51 of the *Act* apply to the disclosures made by the Board to the HRTO?

[25] Section 51 of the *Act* is relevant to the circumstances of this complaint. It states:

(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[26] If section 51 of the *Act* applies, the provisions of the *Act* that govern the collection, use and disclosure of personal information do not apply to the disclosures made by the Board.

[27] My consideration of the possible application of section 51 to this complaint is guided by the comments of former Commissioner Linden in Order P-53 where he stated:

The *Act* was not intended to prevent tribunals from carrying out their statutory functions.

[28] In Order M-852, this office considered the application of this section and its provincial equivalent in an access appeal. While the issues in that appeal differ from the ones the complainant has raised, in that case the IPC found that the purpose of this section was to ensure that the *Act* and its exemptions do not operate in a way which would deny access to information through other legal rules or principles including the rules of natural justice and the requirements of the *Statutory Powers Procedure Act*.

[29] Recently, the IPC has reaffirmed this approach, stating in Privacy Complaint Report MC11-84:

...sections 51(1) and (2) together operate to ensure that the prohibitions against disclosure in the *Act* do not act as a barrier to prevent personal information from being available for use as evidence in a proceeding before a court or tribunal where, but for the provisions of the *Act*, such information would otherwise be available.

[30] I agree with this finding. In my view, the purpose of section 51 is to ensure that the provisions of the *Act* do not interfere with the processes by which adjudicative bodies conduct their proceedings, including the promulgation of rules governing the production of potentially relevant documents by the parties in advance of a hearing, and the ability of parties to comply with those rules without running afoul of the *Act*, whether or not the documents in question are ultimately admitted into evidence.

[31] As noted above, the complainant filed a complaint before the HRTO against the Board. The HRTO has developed rules of procedure that apply to complaints made under the *Human Rights Code*. Rule 1 gives the HRTO various powers including the power to require a party or other person "to produce any document, information or thing;" and the power "to take any other action that the tribunal determines is appropriate."

[32] I am of the view that the circumstances of this case fall squarely within the ambit of section 51(1).

[33] As noted above, section 51(1) provides that the *Act* "does not impose any limitation on the information otherwise available by law to a party to litigation." Previous orders of this office have found that proceedings before tribunals qualify as "litigation." For example, in Order M-162, former adjudicator Fineberg stated that "no distinction should be made between court actions and matters heard before administrative tribunals," such as the Ontario Municipal Board. I agree and find that proceedings before the HRTO constitute "litigation."

[34] It is important to consider next the meaning of the phrase "available by law to a party to litigation." The word "available" is defined in the *Concise Oxford Dictionary* (8th ed.) as "1. capable of being used; at one's disposal. 2. within one's reach." The primary meaning given to "available" in the *Shorter Oxford English Dictionary* (3rd ed.) is "capable of producing a desired result." In my view, the context within which the term "available" appears in section 51(1) indicates that each of these variations in meaning are intended.

[35] Rule 16 outlines the process for the disclosure of documents in proceedings before the HRTO. Specifically, Rule 16.3 states:

16.3 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must file with the Tribunal:

- a) a list of documents upon which the party intends to rely; and
- b) a copy of each document contained on the list.

[36] As set out in Rule 16.3, unless otherwise ordered by the HRTO, each party **must** file a copy of each document that it intends to rely on in the proceedings. Therefore, if

the Board intended to rely on any documents from the complainant's son's OSR to respond to the discrimination claim brought against it, it would be required to file these documents with the HRTO.

[37] The issue of the availability of the complainant's son's OSR was directly before the HRTO in the interim hearing that concluded with the decision issued by the adjudicator dated November 21, 2011. As noted above, prior to the date set for a hearing on the merits of the human rights complaint application, the HRTO conducted a preliminary hearing to determine a number of questions, including a request made by the complainant for an Order seeking exclusion of the documents filed by the Board which were obtained from her son's OSR.

[38] In its decision on the preliminary issues², the HRTO stated that the complainant produced information and material that was contained in her son's OSR in the proceeding. After hearing arguments from the complainant and the Board on the implications of section 266(2) and (10) of the *Education Act*, it found it would be manifestly unfair and a breach of natural justice for the complainant to be able to rely on portions of the OSR but not the Board. For these reasons the HRTO directed the complainant to state in writing whether she would consent to the Board using and disclosing documents and information from the OSR for the purposes of the proceeding before it. The HRTO also stated that if the complainant refused to consent, the application would be dismissed as an abuse of process.

[39] In my view, the ruling of the HRTO in the preliminary hearing amounted to a clear finding that under the common law rules of natural justice, the Board was entitled to rely upon the portions of the complainant's son's OSR that it had produced, and that any attempt to proceed in the absence of those records would be treated as an abuse of process. The effect of the ruling was to require the complainant's consent to the Board's use and disclosure of information from her son's OSR, in order to continue with the application before the HRTO. In making its ruling, the HRTO was aware of the complainant's objections regarding the Board's decision to file copies of records from the complainant's son's OSR as part of its Brief of Documents for Hearing, and her request to exclude those documents. It also considered the complainant's arguments that the Board had violated section 266 of the *Education Act*.

[40] In light of the finding of the HRTO adjudicator in the matter before it, the information that the Board sought to rely on in the proceeding before the HRTO was information that was "otherwise available by law" to the Board as a party to the HRTO litigation and it was available for use by the Board in making its case. Although the HRTO's ruling came after the Board had filed records from the OSR in its Brief without the complainant's consent, its determination at the preliminary hearing, in the face of the complainant's request that it do otherwise, confirmed the Board's entitlement to rely

² 2011 HRTO 2110.

on that material in the proceeding.

[41] The ruling of former Commissioner Linden in Order 53 indicates that the *Act* is not intended to interfere with the processes of a tribunal in resolving questions concerning the use of documents in its proceedings, as the HRTO did in this case. The Board's actions followed the normal processes set out at Rule 16.3 of the HRTO's *Rules of Procedure*. Having made its ruling not to hear the complaint without the complainant's consent to production of the OSR, the HRTO performed the function assigned to it under its home statute. The result of the HRTO's ruling is that the OSR was not ultimately admitted into evidence. Section 51(1) makes it clear that the *Act* is not intended to be used to second guess the tribunal in the performance of that function.

[42] For these reasons, I conclude that section 51(1) applies in the circumstances of this case. The result is that the *Act* "does not impose any limitation" on disclosure of the portions of the complainant's son's OSR that the Board filed with the HRTO pursuant to Rule 16.3.

[43] Although I have concluded that the Board's disclosure of the complainant's son's OSR was not in breach of the *Act*, I also believe that the Board should implement practices that would not depend on confirmation, after the fact, of its entitlement to rely on that material. For example, in the circumstances of this complaint, the Board could have sought an order from the HRTO regarding its use of information from the OSR prior to disclosing it to the HRTO. Such a course of action would have acknowledged the sensitivity of and statutory protection given to the information while simultaneously protecting the Board's right to rely on the information in order to respond to the complainant's allegations.

[44] I now turn to consider whether the disclosure by the Board to its counsel was in accordance with the *Act*.

Issue 3: Was the disclosure of the information at issue by the Board to its legal counsel in accordance with section 32 of the *Act*?

[45] The complainant asserts that the Board inappropriately disclosed her son's OSR to its legal counsel.

[46] Section 32 of the *Act* creates a general prohibition against the disclosure of personal information subject to the enumerated exceptions. If any one of the exceptions applies, then disclosure is in accordance with the *Act*. In response to the complaint, the Board relies on section 32(d) of the *Act*.

[47] Section 32(d) states:

An institution shall not disclose personal information in its custody or under its control except,

if the disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and if the disclosure is necessary and proper in the discharge of the institution's functions;

[48] Section 32(d) of the *Act* permits a disclosure of information if the disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and if the disclosure is necessary and proper in the discharge of the institution's functions.

[49] The Board states that its disclosure to its legal counsel was permitted because legal counsel was an agent of the Board and the disclosure was necessary in order for the Board to properly defend the allegations made against it to the HRTO.

[50] This section has been considered by this office in a number of previous Privacy Complaint Reports. Generally, the IPC decisions identify three criteria for the application of this exception. They are:

1. The disclosure must be made to an officer, employee, consultant or agent (Investigation Report I96-113P);
2. Who needs the information in the performance of their duties (Privacy Complaint Report MC-050034-1 and Order PO-1998); and
3. The disclosure must be necessary and proper in the performance of the institution's functions which includes the administration of statutory programs and activities necessary to the overall operation of the institution (See, for example, Investigation Report I95-007M).

[51] Section 32(d) makes it clear that a disclosure of personal information even within an institution must be justified and will be subject to scrutiny on a "need to know basis." The sharing of information pursuant to this section must be based on more than "mere interest or concern" [for example, see: *H. (J.) v. Hastings (County)* (1993), 12 M.P.L.R. (2d) 40 (Ont. Ct. Gen. Div.).

[52] It is my view that legal counsel qualifies as an agent of the Board in the circumstances of this complaint. In addition, and in light of the fact that portions of the OSR were produced by the complainant in the matter before the HRTO, counsel needed the record to properly perform her duties as legal advisor to the Board. I also find that disclosure of the information in the OSR was necessary in the discharge of the institution's functions.

[53] For all of these reasons, I find that the disclosure of the records and information from the complainant's son's OSR to its legal counsel was in accordance with section 32(d) of the *Act*.

CONCLUSIONS:

1. The *Act* prevails over the confidentiality provisions in section 266(2) and 266(10) of the *Education Act*. Furthermore, the IPC is not bound to consider sections 266(2) and 266(10) in the circumstances of this complaint.
2. Section 51 of the *Act* applies to the Board's disclosure of personal information from the complainant's son's OSR to the HRTO. Accordingly, this disclosure was not in breach of the *Act*.
3. The Board's disclosure of the personal information from the complainant's son's OSR to its legal counsel was in accordance with section 32(d) of the *Act*.

RECOMMENDATION:

I recommend that the Board implement measures that would better acknowledge the sensitivity of the information contained within Ontario School Records. Specifically, the Board should make efforts to seek direction from an administrative tribunal or court prior to disclosing the information contained within an Ontario School Record during the course of litigation.

Original Signed by: _____

Jeff Cutler
Investigator

June 15, 2016 _____