

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 MC14-5

Hamilton-Wentworth Catholic District School Board

June 15, 2016

Summary: The Office of the Information and Privacy Commissioner of Ontario received a complaint alleging that the Hamilton-Wentworth Catholic 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 sections 266(2) and 266(10) of the *Education Act*. The Board's disclosure of the personal information from the OSR to the HRTO was in accordance with section 51 of the *Act*.

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: *G.A. v. York Region District School Board*, 2011 HRTO 2110.

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 Hamilton-Wentworth

Catholic District School Board (the Board).

[2] The complainant submitted an application with the Human Rights Tribunal of Ontario (HRTO) alleging that the Board discriminated against his son. He alleges that during the course of preparing for the HRTO matter, on November 22, 2013, the school principal provided the complainant's son's complete Ontario School Record (OSR) to the Board's legal counsel who then submitted the records to the HRTO.

[3] The complainant asserts that he was not asked to release his son's OSR, nor was he asked to sign a consent for the release of the OSR. The complainant eventually consented to the use of the OSR in the HRTO proceeding (as of January 30, 2014), but he asserts that the Board's initial disclosure of his son's OSR was in violation of the *Education Act* and the *Act*.

[4] While the complainant acknowledges that he subsequently granted his consent to the Board to disclose the records at issue to the HRTO, he asserts that at the time these records were disclosed, he had not provided his consent and the disclosure was inappropriate. The complainant emphasizes that his subsequent granting of consent is unrelated to the school principal's actions on November 22, 2013 in which the principal provided the OSR to the Board's lawyers who then forwarded it to the HRTO.

[5] 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

[6] 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?

DISCUSSION:

[7] 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?

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

[9] 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.

[10] Section 266(10) of the *Education Act*, which is also relevant to the circumstances of this complaint, 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.

[11] 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*.

[12] 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*.

[13] 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*.

[14] 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*.

[15] 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.

[16] I now turn to consider whether the disclosure was authorized under the *Act*.

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

[17] 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.

[18] If section 51 of the *Act* applies, the provisions of the *Act* that govern the

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

collection, use and disclosure of personal information do not apply to the disclosures made by the Board.

[19] 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.

[20] 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 raised by the complainant, 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*.

[21] 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.

[22] 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.

[23] 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."

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

[25] 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."

[26] 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.

[27] 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.

[28] 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.

[29] The issue of the availability of the complainant's son's OSR was resolved by the HRTO Adjudicator's Case Assessment Direction of January 30, 2014. The Case Assessment Direction confirmed the complainant's consent to the use of the OSR as well as his consent for the Board to use and disclose the information in the OSR as set out in the Board's document book.

[30] It is noted that the Case Assessment Direction details the parameters regarding document disclosure, but does not articulate whether it required the complainant's consent in order for the information in the OSR to be produced, nor whether the complainant's application would be dismissed if consent was not granted. As noted in the Board's submissions, the HRTO has found in similar circumstances that an applicant must provide consent for the use of documentation from an OSR in a proceeding, and the failure to do so will result in the application's dismissal for abuse of process. In *G.A.*

*v. York Region District School Board*², the HRTO stated:

[27] I note that, in the Application, the 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.

[28] When asked during the course of the preliminary hearing, the applicant's next friend conceded that in the normal course all parties should have access to relevant materials in the OSR. She distinguishes the circumstances in this particular case by pointing to the fact that, in her view, the respondent is seeking consent after the fact and should not be permitted to do so.

[29] 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.

[30] 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 rules of procedural fairness to proceed in this manner.

[31] In his submissions to this office, the complainant acknowledges "... that my application [with the HRTO] would more than likely be dismissed as an abuse of process, if I did not provide my consent in terms of my son's OSR."

[32] In my view, the HRTO's ruling in *G.A. v. York Region District School Board*, as well as its directions in the circumstances of this complaint, make it clear that, as a matter of procedural fairness, 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 HRTO's determinations in this area was to require the complainant's consent to the Board's use and disclosure of information from his son's OSR, in order to continue with the application before the HRTO.

[33] In light of the findings of the HRTO, 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

² 2011 HRTO 2110.

use by the Board in making its case. Although the HRTO's direction and the complainant's consent came after the Board had filed records from the OSR in its Brief without consent, the decision in *G.A. v. York Region District School Board* confirmed the Board's legal entitlement to rely on that material, based on principles of procedural fairness. In these circumstances, I see no purpose in separately analyzing the Board's actions and legal rights and duties at each point in time, in isolation.

[34] 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 happened in this case. The Board's actions followed the normal processes set out at Rule 16.3 of the HRTO's *Rules of Procedure*. In making its direction based on the complainant's consent, the HRTO performed the function assigned to it under its home statute. The result of the HRTO's ruling is that the OSR was properly 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.

[35] 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.

[36] 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.

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*.

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: _____

Jeffrey Cutler
Investigator

_____ June 15, 2016