Court File No. 289/93

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

McMURTRY, C.J.O.C., SAUNDERS and WINKLER JJ.

B E T W E E N:	)	
	)	
LINCOLN COUNTY BOARD OF EDUCATION	)	Robert Reid and
	)	Brenda Stokes Verworn
Applicant	)	for the applicant
	)	
- and -	)	David M. Brown
	)	for the Intervenor
	)	
	)	
INFORMATION AND PRIVACY	)	Christopher Bredt and
COMMISSIONER/ ONTARIO	)	David S. Goodis
	)	for the respondent Commissioner
Respondent	)	
	)	
	)	Heard: June 20, 1995

E N D O R S E M E N T

[1] Application is allowed and the decision of the Assistant Commissioner is set aside. No order as to costs.

R E A S O N S

[2] This is an application for judicial review of an order by the Assistant Information and Privacy Commissioner (the "Commissioner") under the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M56 (the "Act").

[3] The requester sought disclosure of information relating to a standard intelligence test administered to one particular student. Specifically, disclosure was requested of fourteen pages from an answer booklet which contained questions, suggested correct answers, student's answers and examiner's comments.

[4] Pursuant to s. 42(13) off the Act, the Commissioner, by notice, gave the parties an opportunity to make representations. In the notice, the Commissioner described the record in issue and stated that the issues were whether the discretionary exemption in s. 11(h) or the mandatory exemption in s. 10 applied to that record. The requester, the Board, and another party all made representations. The requester narrowed the scope of the request to include only the student's answers and scores and the examiner's comments. The Commissioner therefore deleted from the record under consideration the questions and the suggested answers. The Board and the other affected party were not aware of the deletion and had made their representations on the basis of the whole record in issue being disclosed. (The requester had earlier informed the Board, but not the other party, that he would be satisfied if he had access to the questions under Board supervision provided he received disclosure of the answers). It should be noted that some extraneous wording was not deleted which the intervener submitted would disclose part of the structure of the test.

[5] The Commissioner then considered the applicability of the exemption in s. 11(h). He considered the amended record which now contained only the student's answers, her score and the examiner's comments. He found that the amended record did not contain "questions that are to be used in an examination or test", and concluded that s. 11(h) did not apply.

[6] Turning to s. 10, the Commissioner said:

> . . . Because neither the questions nor the suggested correct answers to the questions are at issue in this appeal, it is not necessary for me to consider whether the suggested correct answers qualify as a trade secret for the purposes of section 10(1). The student's answers to the questions and the examiner's comments are clearly not trade secrets, and I find that the portions of the record which remain at issue in this appeal do not contain any of the types of information listed in section 10(1).

He accordingly found that the exemption did not apply.

[7] Both s. 10 and s. 11(h) empower the Board to refuse to disclose a record. In this case the record was 14 pages of a booklet. Section 4(2) permits a head to disclose as much of a record "as can reasonably be severed without disclosing the information that falls under one of the exemptions".

In this case the information was questions (s. 11(h)), and trade secrets (s. 10). The deletion of part of the record raised a net issue as to whether the remaining part disclosed exempt information.

[8] With respect, we consider that the Commissioner approached the issues too narrowly. He looked at the amended record and determined that it contained neither questions nor trade secrets and accordingly there was no exemption. In our view he should first have considered whether the record (the booklet) contained questions (s. 11(h)) or revealed trade secrets (s. 10). If he found that it did, he should have gone on to consider whether disclosure of the amended record disclosed information that fell under the exemptions (s. 4(2)). In our opinion the Commissioner failed to consider relevant and important issues. His decision was patently unreasonable and cannot stand (see Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier (1985), 20 D.L.R. (4th) 641 (S.C.C.)).

[9] The order of the Commissioner is set aside. The requester did not appear in these proceedings. In the circumstances we consider it appropriate not to remit the matter back to the Commissioner.

[10] The process under the Act requires the maintenance of confidentiality throughout. This puts considerable administrative and other burdens on the Commissioner. His task is not an enviable one. He cannot hold a hearing with all interested parties present. He cannot provide each party with the representations of the others. The language of his decision must be restricted to preserve confidentiality. While it is not a basis for the decision to set his order aside, we are of the view that in this case the Commissioner ought to have invited representations on the issue that emerged when the record was amended as a result of the representations of the requester. The other parties should have been asked to make representations as to whether the answers, scores and comments alone would have disclosed exempt information. That was the issue that was joined following the first round of representations.

[11] It is recognized that asking for further representations is cumbersome, costly and delays the process. The person conducting the inquiry must exercise judgment to keep the process within

reasonable and workable limits. In a proper case, soliciting further representations is justified because of the importance of the disclosure issues that are at stake. In this case the Board and the other interested party were not given an opportunity to make representations on a crucial issue. It would have been too much to expect them to anticipate the possibility of deletions especially where the Commissioner has no specific power to sever.

McMURTRY, C.J.O.C.
SAUNDERS J.
WINKLER J.

July 5, 1995