Court File No: 289/93

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1990, c.J.1

AND IN THE MATTER OF the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.45

AND IN THE MATTER OF Order M-91 of Tom Mitchinson, Assistant Information and Privacy Commissioner, dated March 2, 1993

B E T W E E N:	
LINCOLN COUNTY BOARD OF EDUCATION	Robert Reid for the Applicant
Applicant	
- and -	
INFORMATION AND PRIVACY COMMISSIONER/ONTARIO	David S. Goodis for the Respondent
Respondent	David Brown for the Intervenor, Association of Test Publishers
	Heard: November 30, 1994

WHITE J. (Orally)

Background

There is an application pending before the Divisional Court for judicial review of Order M-91, made by the Information and Privacy Commissioner/Ontario, dated March 2, 1993. In support of the application was filed an affidavit of Brenda Stokes Verworn, sworn April 27, 1993. Ms. Verworn is a solicitor employed by the applicant for judicial review, the Lincoln County Board of Education. In her affidavit, she deals with different matters and, in paragraphs 10, 11, 12 and 16, 17 and 19, she,

in effect, argues the reasons supporting the position of the applicant, the Lincoln County Board of Education, as to why there was error on the part of the Information and Privacy Commissioner/Ontario in making Order M-91.

The grounds of the substantive application for judicial review are that the responding Commissioner erred in law in ordering the applicant to disclose portions of certain psychometric test material, containing the concerned student's answers, and scores, and the psychologist examiner's comments thereon, in that:

1. the respondent erred in determining the definition of "questions" in s. 11(b) of the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.56 so as to exclude correct answers given by the student where correct answers were synonymous with questions;

2. the respondent erred in failing to consider whether the suggested correct answers constituted trade secrets, commercial material, or technical information under s. 10(1) of the said Act; and

3. the respondent erred in failing to consider whether, by their content, the correct answers sufficiently identified the questions so as to constitute part of the trade secrets, commercial material, or technical information contained in the test.

What lead to Order M-91, is that the parents of a student enrolled in one of the schools under the control of the Lincoln County Board of Education wanted information pertaining to the psychometric test scores of their child. An objection was made by the Board to the disclosure of such information and, in Order M-91, some of the information in the psychometric test scores was ordered to be made available to the parents of the student.

The Three Motions Before This Court:

I have before me today, sitting as a Motions judge in Divisional Court, three motions that have to do with the record that will go before the Divisional Court, when it considers on its merits the

Lincoln County Board of Education's application, for judicial review of Order M-91 of the Commissioner.

The First Motion:

The first motion is one made by the Commissioner to strike out the affidavit of Brenda Stokes Verworn, on the basis that it presents arguments that were not before the Tribunal of first instance. The general principle is that the record that goes before the court hearing an application for judicial review should essentially be the material that was before the Commissioner. The case that supports that proposition is Broda v. Edmonton (City) (1989), 102 A.R. 255, (at 259 (Q.B.)).

The material that was before the Commissioner consisted of a series of letters between the Lincoln County Board of Education, the Information and Privacy Commissioner/Ontario and the parents of the student. I agree with counsel for the Commissioner that, at least in part, the affidavit of Brenda Stokes Verworn should be struck. Since paragraphs 10, 11, 12, 16, 17 and 19 are essentially argumentative, and really re-state, perhaps with elaboration, the positions and arguments contained in the correspondence that was before the Commissioner, I am of the opinion that those paragraphs should be excised from her affidavit, in the record that goes before the Divisional Court.

The Second Motion:

The next motion is brought by the Commissioner requesting that the Commissioner's record be sealed. All counsel consent to such an order being made. That is the type of order that is usually made; and, consequently, an order sealing the record will go.

Included in the Commissioner's motion to seal the record is the request that certain correspondence which had, by error and omission, been left out of the Commissioner's record of proceedings before him, be added to that record. The correspondence in question was correspondence between the Board of Education and the Commissioner; and, certainly, that correspondence should be added to the

Commissioner's record. Of course, I have already indicated that the Commissioner's record should be sealed, so after the Commissioner's record has been so amended, it should be sealed.

The Third Motion:

There is one more motion, and that is a cross-motion brought by the Intervenor, the Association of Test Publishers. That motion seeks to have added to the record that is to go before the Divisional Court, correspondence between the Board of Education and the Commissioner, subsequent to the rendering of the Commissioner's Order M-91. Order M-91 contained the reasons of the Commissioner for making the order.

Counsel for the moving party on this cross-motion, takes the position that two letters found at tabs "B" and "C" of the cross-motion record, should be part of the record that goes before the Divisional Court or the substantive application. The first letter is one from the Board of Education to the Commissioner, dated March 26, 1993, acknowledging receipt of a copy of Order M-91, and requesting a reconsideration of the decision. The jurisprudence would indicate that, notwithstanding the absence of any specific provision in the relevant statute authorizing the Commissioner to reconsider his decision, that he does have the jurisdiction to do so. The letter from the Board of Education, dated March 26, 1993, to the Commissioner, sets out propositions, point-by-point, supporting, in the Board of Education's view, grounds for the Commissioner to reconsider, and vary, his order.

The second of these letters is a letter dated April 2, 1994, from the Commissioner to the Board answering, point-by-point, the propositions set out in the Board's letter and giving reasons for not accepting such propositions and arguments supporting them, for varying the decision which he incorporated in Order M-91.

I regard the letter of the Commissioner, dated April 2, 1993, to constitute supplementary reasons for decision to those stated by the Commissioner in Order M-91. Further, I am of the view that, in order

to comprehend the supplementary reasons contained in the letter of the Commissioner, dated April 2, 1993, one also has to read the letter of the Board to the Commissioner, dated March 26, 1993.

Counsel for the Commissioner objects to the inclusion, in the record to go before the Divisional Court, the letter from the Board to the Commissioner dated March 26, 1993, and the letter of Commissioner to the Board, dated April 2, 1993, on the basis that they constitute fresh material and, in principle, only the material that was before the Commissioner, namely the correspondence between the parties preceding the decision of the Commissioner, should go before the Divisional Court. I agree in principle that only that which was before the Commissioner should form part of the record for judicial review, with one exception, and that exception is that, if the additional material falls within the category of supplementary reasons of the Commissioner for his decision, then that material should form part of the second going before the court charged with judicial review.

I find support for this view in the text book David Folkes, Administrative Law, 5th ed., Butterworths, dealing with the subject of certiorari for error on the face of the record. The substantive application pending before the Divisional Court is one of judicial review, but the particular appellation of that application is in common law terminology certiorari. The basis of the application is that the statutory tribunal, (the Commissioner), has erred in law on the face of the record. Professor Folkes, at p. 263, addresses what is the particular record of proceedings that one takes into consideration, when one is concerned whether that record contains error of law, on its face, at p. 263:

> Wherever any body having made a decision which can be questioned by certiorari chooses to disclose the reasons for the decision, whether it could have been compelled to do so or not, and however informal the document embodying the reasons, the decision with the added reasons becomes a "speaking order" and if an error of law appears in the reasons, certiorari will lie to quash the decision. In R. v. Greater Birmingham Supplementary Benefit Appeal Tribunal, ex parte Khan, the court held that the record included a letter sent by the tribunal subsequent to its decision, at the applicant's request, which explained and expanded the reasons for its decisions. The letter disclosed an error of law, etc. . .

The case mentioned in the foregoing passage by Professor Folkes is R. v. Greater Birmingham Supplementary Benefit Appeal Tribunal, ex parte Khan, [1979] 3 All E.R. 759, a decision of the Queen's Bench Division, sitting as a Divisional Court, consisting of Chief Justice Lord Widfery, and

Lords Justices Shaw, and Lloyd. A statutory tribunal had given short reasons for its decision, and then, the concerned person/solicitor wrote to the tribunal, setting out certain questions: and the tribunal wrote to the solicitor setting out certain reasons supporting its decision which had not been contained in its original short reasons; those supporting reasons purported to justify the tribunal's decision.

The issue that the Divisional Court dealt with, that is of concern to me, is whether the record before the Divisional Court should include the correspondence between the solicitor and the tribunal, subsequent to the making of the tribunal's decision. This is dealt with in the court's reasons at p. 762:

> There then remains the question of whether that error is one which is apparent on the face of the record. The answer to that question must again be yes. We are not confined to the decision itself. We can look at the subsequent letter explaining and expanding the Tribunal's reasons for their decision. The error is apparent on the face of that letter.

It is my view, therefore, that the cross-motion of the Intervenor, the Association of Test Publishers, should be allowed and the post-decision correspondence, to which I have alluded, should be part of the record that goes before the Divisional Court, on the substantive motion for judicial review of the Commissioner's order.

This is not a matter for costs in respect of all three motions (including a cross-motion) before this court.

RELEASED: **December 6, 1994** WHITE J.

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DIVISIONAL COURT

B E T W E E N:

LINCOLN COUNTY BOARD OF EDUCATION

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Respondent

ORAL JUDGMENT

WHITE J.

RELEASED: **December 6, 1994**