SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

A newsletter for educators January 2009

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Create Programs to Produce Records – Court of Appeal Upholds IPC's Findings

In a decision entitled *Toronto Police Services Board and Information and Privacy Commissioner of Ontario and James Rankin*, dated January 13, 2009, the Ontario Court of Appeal has confirmed that, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, municipal government bodies must use their technical expertise to develop new algorithms or software to produce electronically stored information to which the public has a right of access.

Rankin, a journalist with the *Toronto Star*, had been seeking information since May 2003 about individuals who had come into contact with the Police in connect with work he was doing regarding racial profiling and law enforcement. Rankin was seeking information that existed in two electronic databases maintained by the Police but wanted the information released in a manner that kept the identities of the individuals anonymous. The Toronto Police Services Board refused the request on the basis that the information requested was not a "record" pursuant to *MFIPPA*, as it did not exist in the requested format.

Rankin appealed the Police Services Board's decision to the Information Privacy Commissioner. An IPC Adjudicator held that information capable of being produced did exist in the Police databases. Further, the Adjudicator held that the mere fact that the process of producing the record would "take time and effort" was not a sufficient basis for finding that the process would unreasonably interfere with the Police Service Board's operations. Finally, the Adjudicator held that it was within the Police's capabilities to develop software that would replace a unique identifier with a random number and produce the record. The records were ordered to be produced as the method of production was not critical to the issue of whether the information constituted a record that ought to be produced.

This decision was appealed by the Toronto Police Services Board. At the appeal before the Ontario Superior Court (Divisional Court), the Police Services Board advanced the argument that the information sought did not constitute a "record" pursuant to s. 2(1)(b) of *MFIPPA* because it could only be produced in the requested format through software that the Police did not normally use. The Divisional Court accepted this argument and overturned the Adjudicator's decision.

However, on further appeal, the Court of Appeal held that s. 2(1)(b) ought to be given a "fair, large and liberal construction;" the Act should be "given a broad interpretation to best ensure the attainment of its object, according to its true intent, meaning and spirit." The Court of Appeal agreed with the Adjudicator that the information did, in fact, exist as records in the two Police databases, and that it was in the public's interest that these records be made available. With respect to the Police Services Board's argument that the Board would have to use software not normally used by the institution, the Court held that the Adjudicator's interpretation of s. 2(1)(b), that records must be produced where an institution has the technical expertise, using its existing software, to develop a computer program to provide the requested information, was reasonable.

In its following remarks, the Court of Appeal specifically indicated that it would not make findings as to whether an institution must acquire or purchase new software to develop its existing software so that records could be produced, and that such decisions would be left to the Information and Privacy Commissioner in the future. Notwithstanding its statements, the Court did go on to emphasize the import of construing *MFIPPA* in a manner that accounts for the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept. Further, the Court underscored that the Ontario Regulation 823 provides that requestors are to be accountable for costs incurred in the procurement of records where computer programs need to be developed.

According to the Court of Appeal, institutions must use existing technical expertise to create or modify software in order to produce requested records. In addition, given the Court's remarks regarding the pervasive use of computers and the import of public access to records, institutions should be prepared that, in the future, they may be required to procure software that may be beyond their technical expertise in order to produce records that "ought to be open to public scrutiny."

Arbitrator Interprets Ontario Regulation Regarding Teacher Performance Appraisals

In 2004, a teacher recevied his Certificate of Qualification from the Ontario College of Teachers; he commenced his teaching career for the Greater Essex County District School Board (the "Board") in September 2004 as an occasional teacher. The teacher began working full time afternoons teaching grade 5 in September 2005 and, in addition, began teaching grade 6 at another school in the mornings as of January 2006. Although the teacher was not evaluated as an Occasional Teacher in the 2004-2005 school year, he was evaluated on two occasions in the 2005-2006 school year. The teacher was declared surplus at the end of the 2005-2006 school year and was subsequently informed that he would be teaching grade 2 at another school during the upcoming 2006-2007 school year.

Upon attending a staff meeting at the new school, the teacher was told by his new Principal that he would be evaluated in the upcoming year as the teacher was new to the school and because the teacher was making a change from the junior to primary division in terms of teaching assignments. In November, the teacher received a satisfactory evaluation from the Principal. The Union subsequently brought a grievance, arguing that pursuant to the specific provisions of O. Reg. 99/02, the Board was not entitled to perform the 2006 performance appraisal and that Principals must adhere to the legislation and not perform performance appraisals outside of legislated evaluation cycle. At the arbitration, the Board took the position that, due in part to a manual prepared by the Ministry of Education, a Principal is entitled to perform additional performance appraisals as he or she deem necessary. The Board therefore requested that the arbitrator deny the grievance and uphold a Principal's right to conduct a performance appraisal in the circumstances of this case.

In reaching his conclusion, the Arbitrator held that the legislation in question must be narrowly construed; the issue was whether the Principal was entitled, as a matter of discretion, to conduct the 2006 performance appraisal. Having regard to the legislation, the Arbitrator found that s. 4 of O. Reg 99/02 requires that each teacher receive at least two performance appraisals during each of his or her evaluation years. Further, s. 4 mandates an evaluation cycle of three years. In this respect, the Arbitrator found that s. 5(2) of the Regulation, which provides that a Principal may perform performance appraisals at intervals he or she considers appropriate, subject to the requirements set out in the Regulation or the Education Act, refers to the interval between the two mandatory performance appraisals performed during the evaluation year. Accordingly, the language in section 5(2) did not provide a Principal with the discretion to conduct additional performance appraisals. Although the regulation, pursuant to s. 6(1), does provide Principals with the discretion to perform additional performance appraisals where it is advisable “in light of circumstances relating to the teacher's performance,” the Principal must identify actual, and not speculative, issues relating to the Teacher's performance, none of which was present in this case.

This decision clearly restricts Principals' abilities to conduct performance appraisals to the evaluation cycles of five years (pursuant to amendments to O. Reg. 99/02 made after the above-mentioned grievance was filed), or in situations where a Principal can demonstrate that an evaluation is necessary having regard to issues directly relating to a teacher's performance. *Elementary Teachers' Federation of Ontario, Greater Essex County Local, Federation, and The Greater Essex County District School Board, Employer,* [2008] O.L.A.A. No. 540.

CASES

An Ontario Labour Arbitrator held that, in order to establish that a School Board's decision to hire new teachers to fill long-term occasional positions discriminated against retired teachers, the Union must demonstrate not only differential treatment based on the prohibited ground of age but also that the Board's action was an affront to the retired teachers' dignity or disadvantaged them. *Dufferin-Peel Catholic District School Board and Ontario English Catholic Teachers' Association Elementary and Secondary Occasional Teachers' Unit,* [2008] O.L.A.A. No. 508.

The British Columbia Provincial Court held that the University of British Columbia could not recover fees from a student that the student was not contractually bound to pay. *University of British Columbia, Enrolment Services v. Magolan,* [2008] B.C.J. No. 2044.

The Prince Edward Island Supreme Court dismissed an action by a teacher alleging that the French School Board had discriminted against him with respect to full-time employment opportunities. *Ayangma v. French School Board and Gabriel Arsenault*, [2008] P.E.I.J. No. 43.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com.

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.

© Copyright 2008. Shibley Righton LLP. All rights reserved.