



Education Law eBulletin

A newsletter for educators

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Litigation and Litigation Privilege: Disclosing Emails, Student's Statements and Interview Notes

Arbitration is an inherently adversarial process; however, it is essential to remember that full and frank disclosure is always required of all parties to the litigation, subject to litigation privilege or solicitor-client privilege. Arbitrators have continually reiterated the importance of pre-hearing production, that it narrows the issues in question, it facilitates settlement discussions, and pre-hearing production helps to avoid delays inherent when documents are requested and produced for the first time during the hearing. In addition, both arbitrators and the courts have stated that liberal disclosure enhances the fairness of the litigation process.

Often, there is confusion with respect to when litigation privilege can be said to "attach" to certain documents. In his recent March 7, 2012, decision titled *Peel District School Board v. OSSTF, District 19-Peel Region*, [2012] O.L.A.A. No. 94, Arbitrator Lorne Slotnick considered a request for documentary disclosure and claims of litigation privilege in the context of a termination grievance. To illustrate the importance of disclosure obligations and the risks that may be associated with producing voluminous materials during investigations, we now summarize this decision.

Peel District School Board concerned the termination of an auto shop teacher who had been employed by the School Board for over 20 years. In the 2008-2009 school year, a new principal was assigned to the teacher's school. Shortly after her arrival, issues arose between the principal and the teacher regarding the overall condition of the auto shop and the presence of vehicles that did not belong to the school, in contravention of school board policy. Very shortly into the 2008-2009 school year, the principal issued a written notice to the shop teacher directing him to remove all material not belonging to the school board from the auto shop area, to ensure that the compound and auto shop were properly locked at the end of each day, and to follow board policies and protocols.

Despite this notice, by mid-November, concerns continued to exist including health and safety violations and the presence of unauthorized volunteers in the shop. Subsequently, on November 19, 2008, the shop teacher was sent home with full pay and benefits pending an investigation. This paid suspension continued for nearly two years during which time the investigation into the use of the auto shop was carried out by the School Board.

In October 2010, the elected trustees of the School Board accepted a recommendation to terminate the shop teacher's employment. The recommendation specifically provided that, "based on the evidence gathered from the 2009 investigation," the shop teacher was guilty of misconduct. The recommendation also provided specifics regarding the shop teacher's misconduct.

As had been expected, the Union grieved the termination. At the grievance hearing, as a preliminary matter, the parties discussed a production request that had been made by the Union in August 2011. The production requested required production of "any notes, memoranda, communications or other documents generated through the Board's investigation process" regarding the shop teacher's termination. The Board asserted litigation privilege and/or solicitor-client privilege over 59 documents including the principal's emails, student statements, interview

notes regarding interviews with students and the shop teacher, and the principal's notes, all of which were related to the investigation.

The Board argued that litigation privilege was triggered when the shop teacher was suspended with pay. In the Board's view, given that "there was enough hard evidence to know that discipline would result and that any action take would likely be challenged" every document created afterward was protected by litigation privilege. It further argued that the documentary record created was created for the Board's lawyers. However, the Union's argued that the requested were created for the purposes of conducting an investigation and not with respect to litigation; therefore litigation privilege did not apply.

Arbitrator Slotnick found that the documents must be produced to the Union. Where documents are relevant to the proceeding, the employer must establish grounds for any refusal to produce them. In order to successfully claim litigation privilege, the documents must have been:

1. created at a time where litigation was pending or reasonably anticipated; and
2. they must have been created for the dominant purpose of that litigation.

In this case, although Arbitrator Soltnick accepted that litigation was reasonably anticipated on November 19, 2008, he did not agree that all documents created after that date are automatically protected from disclosure by litigation privilege.

Arbitrator Slotnick confirmed:

- all relevant documents must be disclosed to the other party subject to any claims of privilege – the burden lies on the party who resists disclosure to justify the refusal to disclose;
- the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation – that is, there must be a real prospect of litigation as opposed to a mere possibility;
- litigation privilege only attaches to documents created for the "dominant purpose" of litigation and that even after litigation is anticipated, a party who wishes to claim litigation privilege must establish that the document's "dominant purpose" was, in fact, the litigation in question; and
- a document can only have "one dominant purpose."

In this case, Arbitrator Slotnick held that the dominant purpose of the documents in question for the purposes of conducting an investigation; although litigation may have been contemplated on November 19, 2008, the investigation was far from complete at that point in time. It was the investigation, which included statements from students, email correspondence and notes, which contributed to the investigation and the ultimate decision to terminate the teacher's employment with the Board.

The fact that a union may grieve every action taken by an employer does not provide blanket protection over interview notes, email correspondence and/or statements made during an investigation. To help protect documents from unwanted disclosure, any documents must be created for the purpose of obtaining legal advice regarding litigation and should be clearly marked as such. Arbitrator Slotnick's decision serves as a very useful reminder to employers that email, voicemail, personal notes or other records will be subject to disclosure requirements if proper steps are not taken. Should you have any questions regarding litigation privilege or the most effective manner in which to conduct a workplace investigation, please feel free to contact us at 519-969-9844.