



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# **ORDER M-122**

## **Appeal M-9200350**

### **The Northern District School Area Board**



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# ORDER

## BACKGROUND:

The Northern District School Area Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to two letters and a report which contain complaints regarding the conduct of the requester, who is a teacher employed by the Board.

Following notification of the authors of the letters, the Board denied access to the two letters pursuant to section 38(b) of the Act. With regard to the report, the Board indicated that no such record exists. The requester appealed the Board's decision.

Record 1 is a letter dated March 2, 1992, addressed to the principal of the school where the appellant taught. It was written by a parent (the first affected person) of a student at the school. Part of this record refers to a complaint about an individual other than the appellant. This information is not responsive to the appellant's request and should be severed from the record.

Record 2 is a letter dated March 4, 1992, addressed to the Board's Supervisory Officer and was also written by a parent (the second affected person) of a student.

## ISSUES:

The issues in this appeal are:

- A. Whether the information contained in Records 1 and 2 qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.
- C. Whether the Board's search for the additional requested record was reasonable in the circumstances.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the information contained in Records 1 and 2 qualifies as "personal information" as defined in section 2(1) of the Act.**

In all cases where the request involves access to personal information, it is my responsibility, before deciding whether the exemptions claimed by the Board apply, to determine whether the information falls within the definition of "personal information" as set out in section 2(1) of the Act, and whether it relates to the appellant, another individual or both.

In part, section 2(1) of the Act defines "personal information" as "... recorded information about an identifiable individual, ...".

I have reviewed the records and, in my view, Records 1 and 2 contain personal information of the appellant, the affected persons and other identifiable individuals.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.**

In Issue A, I found that Records 1 and 2 contain personal information of both the appellant and the affected persons.

Section 36(1) of the Act gives individuals a general right of access to their personal information in the custody or control of institutions. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access. Specifically, section 38(b) provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Board must look at the information and weigh the requester's right of access to his/her own personal information against other individuals' right to the protection of their personal privacy. If the Board determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the Board the discretion to deny the requester access to the personal information (Order 37).

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information the disclosure of which is presumed to

constitute an unjustified invasion of personal privacy.

The Board and the first affected person have not claimed any of the provisions of section 14(3) of the Act. The second affected person submits that sections of Record 2 contain references to medical information and the education of her children. Sections 14(3)(a) and (d) state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (d) relates to employment or educational history;

Based on the representations received from the second affected person and my review of the records, in my view, none of the factors listed in section 14(3) apply to the information contained in either record. Part of Record 2 contains information provided by the second affected person which refers to a symptom of an undisclosed medical condition. The references to education consist of general comments and observations made by the affected persons. In my view, the information is not sufficiently detailed to attract the application of the presumptions contained in section 14(3)(a) and (d). Accordingly, I find that the requirements for a presumed unjustified invasion of personal privacy under section 14(3) have not been satisfied.

Section 14(2) provides some circumstances for the Board to consider in determining whether a disclosure of personal information would constitute an unjustified invasion of personal privacy. The Board submits that sections 14(2)(e), (f) and (h) are relevant considerations. The affected persons have also provided comments which I consider to be reflective of those provisions. If applicable, those circumstances would favour the protection of personal privacy. The appellant raises the type of circumstances found in section 14(2)(d) and specifically relies on section 14(2)(g) in support of his position. Section 14(2)(d) is a circumstance which, if relevant, would favour disclosure of personal information. These sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be

exposed unfairly to pecuniary or other harm;

- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The Board and the affected persons have provided no evidence to substantiate the relevance of section 14(2)(e). Accordingly, I find that section 14(2)(e) is not a relevant consideration in the circumstances of this appeal.

The Board submits that the personal information contained in both Records 1 and 2 is highly sensitive. The second affected person submits that Record 2 contains information regarding "very personal issues".

The contents of both records suggest that it was the intention of the affected persons that the information contained therein would be brought to the attention of other persons, including the appellant. Accordingly, I find that section 14(2)(f) is not a relevant consideration in the circumstances of this appeal.

In its representations, the Board relies on the submissions of the affected persons to indicate that they intended Records 1 and 2 to have been submitted in confidence. The Board, however, has not suggested that it ever provided any assurance to the affected persons that any information they provided would remain confidential. The second affected person submits that "the letter at issue [Record 2] was written originally with the understanding it was done in the strictest confidence". I have reviewed the records, and I find that there is no evidence or mark of confidentiality on either letter. Furthermore, as I indicated above, the contents of both Records 1 and 2 suggest that it was the intention of the affected persons that the information contained therein would be brought to the attention of other persons, including the appellant. Based on my review of the records, the representations of the parties and the evidence provided, I find that section 14(2)(h) is not a relevant consideration in this appeal.

Although the appellant does not specifically raise section 14(2)(d), his representations refer to the substance of that section.

In order for section 14(2)(d) to be regarded as a relevant consideration in the circumstances of an appeal, the appellant must establish each part of the following four-part test:

- (1) the right in question is a legal right which is drawn from the concepts of

common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**

- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

In his representations, the appellant submits that the records have been negatively used against him without his being able to answer the accusations or even know the identity of the accusers. He states that excerpts from the letters were used to convince the Board to transfer him to a school 650 kilometres away. He states that he would like the opportunity to submit the records in their entirety to his employers and to reply to the allegations raised.

In its representations, the Board states that the issues in question are currently the subject matter of arbitration proceedings which are to be conducted under the School Boards & Teachers Negotiations Act. The proceedings have not yet commenced. The Board submits that the appellant will be availed all of the rights of disclosure and opportunities to cross-examine witnesses and call his own witnesses in the arbitration proceeding.

In my view, if an alternative means of disclosure is available at a certain stage in another type of proceeding, disclosure under the Act is not ruled out. In my opinion, the information contained in Records 1 and 2 may be relevant in the context of the fair determination of the appellant's legal rights at the grievance hearing. Therefore, in my view, section 14(2)(d) may be a relevant consideration in this appeal.

The appellant has also raised section 14(2)(g) of the Act, in support of his position. He contends that the information contained in Records 1 and 2 is inaccurate and unreliable. If there were sufficient reason to question the accuracy or reliability of the records, then that factor would weigh in favour of protection of privacy (Order 151) and would not assist the appellant's position. In my view, there is no evidence to establish the relevance of section 14(2)(g) and I find that it is not a relevant consideration in the circumstances of this appeal.

In summary, I have found that none of the factors listed in section 14(2) which favour privacy protection are relevant considerations in the circumstances of this appeal, and section 14(2)(d) may be a relevant

consideration.

In Order P-440, Inquiry Officer Asfaw Seife discussed the application of section 49(b) of the provincial Freedom of Information and Protection of Privacy Act, which is similar in wording to section 38(b) of the municipal Act:

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

I agree.

In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected persons in the protection of their privacy, I find that disclosure of the substance of the complaints made by the affected persons would not constitute an unjustified invasion of the personal privacy of another individual, and section 38(b) does not apply.

I acknowledge that disclosure of the substance of the complaints made by the affected persons may invade their privacy to a degree. However, in balancing the interests of the appellant in disclosure and the interests of the affected persons in the protection of their privacy, I find that, in these circumstances, disclosure of the substance of the complaints would not constitute an **unjustified** invasion of their personal privacy.

The records contain the home telephone number of the first affected person, and the address of the second affected person. This personal information is not directly concerned with the substance of the complaint. In my view, disclosure of the home telephone number and home address would constitute an unjustified invasion of the personal privacy of the affected persons, and section 38(b) applies. I have highlighted these portions of the records on the copy forwarded to the Board with this order.

Section 38(b) is a discretionary exemption which allows the Board to deny a requester access to his or her own personal information if disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. The Board has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of this appeal. I have reviewed these representations and, with regard to the information I have found section 38(b) to apply to, find nothing improper in the Board's exercise of discretion, and would not alter it on appeal.

**ISSUE C: Whether the Board's search for the additional requested record was reasonable in the circumstances.**

In his representations, the appellant outlines his reasons for believing that a report exists. The Board has submitted an affidavit sworn by the employee of the Board who conducted the search, outlining the steps taken to locate any additional responsive records. The affidavit states that in addition to searching the appellant's personnel file inquiries were made with the Board employees who would be aware of such a record if it did exist. Most importantly, the individual the appellant believes wrote a report was contacted and he advised that he did not write any report concerning the appellant.

Having carefully reviewed the representations of the appellant and the Board, and the affidavit evidence submitted to me, I am satisfied that the Board has taken all reasonable steps to locate additional records that would respond to the appellant's request, and I find that the search was reasonable in the circumstances of this appeal.

**ORDER:**

1. I order the Board to disclose Records 1 and 2 to the appellant, subject to the severance of the first affected person's telephone number, the second affected person's address, and the information which relates to another individual. I have attached a highlighted version of the Records which identifies the portion which should not be disclosed.
2. I order the Board to disclose the records referred to in Provision 1 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon my request.

Original signed by: \_\_\_\_\_  
Holly Big Canoe

\_\_\_\_\_ April 22, 1993



Inquiry Officer