



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-256

Appeal M-9300058

Hornepayne Board of Education



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ORDER

BACKGROUND:

The Hornepayne Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act, (the Act) for access to certain correspondence sent by a named individual to the Chairperson of the Board. Following notification of the author of the letters and other individuals who were named in the letters (the affected persons), the Board denied access to each of the two letters pursuant to section 38(b) of the Act. The requester appealed the decision of the Board to the Commissioner's office.

Mediation was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the Board, the appellant and the affected persons. Representations were received from all parties.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records 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 described by section 38(b) of the Act applies to the personal information contained in the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records 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 parties.

Section 2(1) of the Act defines "personal information", in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual.

The records in this appeal consist of two letters from one of the affected persons addressed to the Chairperson of the Board, in which certain allegations of unfair treatment of one of the other affected persons by the appellant are made.

In my view, the records contain information which qualifies as personal information under section 2(1) of the Act, and which relate both to the appellant and to the affected persons.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption described by section 38(b) of the Act applies to the personal information contained in the records.

Under Issue A, I found that the two letters contain the personal information of both the appellant and the affected persons.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access. One such exception is found in section 38(b) of the Act, which reads as follows:

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;

As has been stated in a number of previous orders, section 38(b) introduces a balancing principle. The Board must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their 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.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of the personal privacy of the individual to whom the information relates.

I have carefully reviewed the contents of the two letters and find that neither sections 14(3) nor (4) apply to the personal information at issue.

Section 14(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. In interpreting section 14(2), all the relevant circumstances of the appeal must be considered, not only those factors enumerated in the section.

The Board submits that the consideration described in section 14(2)(h) of the Act, which weighs in favour of non-disclosure, is relevant in the circumstances of this appeal. The affected persons, while not specifically citing sections of the Act, make submissions which appear to refer to the considerations contained in sections 14(2)(f), (h) and (i), which also weigh in favour of protecting the privacy interests of the affected persons.

While the appellant also does not refer to specific sections of the Act, his representations appear to raise the factors contemplated in sections 14(2)(d) and (e) of the Act which weigh in favour of disclosure of the records.

Sections 14(2)(d), (e), (f), (h) and (i) of the Act read as follows:

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;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I will first examine the considerations raised in section 14(2) which weigh in favour of protecting the privacy interests in the personal information.

Section 14(2)(f)

In order for personal information to be considered "highly sensitive", the party relying on this proposition must establish that disclosure of the information would cause "excessive personal distress" to the affected person (Order P-434).

The affected persons submit that "[one of affected person's] interests could be damaged at the high school by disclosure of the records". The affected parties have, however, specified neither the interests which could be damaged by the disclosure of the records nor how disclosure may damage such interests. Based on the representations provided and my own review of the record, I am unable to agree that the information may be characterized as "highly sensitive". I find, accordingly, that section 14(2)(f) of the Act is not a relevant consideration in the circumstances of this appeal.

Section 14(2)(h)

The Board submits that it believes that the author of the letters intended that they be kept confidential by the Board. In its representations, the Board refers to a sentence in one letter which requests that the correspondence should be kept in the addressee's file in the event of any further occurrence.

The affected persons also state, in their representations, that the author had addressed her letters "solely to the Board of Education".

In my view, the wording of the letter suggests that, if there were further occurrences which required investigation, it was intended that the letters would be considered as part of such an investigation. In my view, they were intended to serve as documentation of allegations which might be revisited at some future time. I am not satisfied that there existed the requisite expectation of confidentiality on the part of the author of the letters. In the circumstances of this appeal, I do not find section 14(2)(h) to be a relevant consideration.

Section 14(2)(i)

The affected persons appear to have claimed this section as being a relevant consideration favouring privacy protection as they have indicated that the interests of one of the affected persons could be harmed. In my view, however, section 14(2)(i) of the Act is not a relevant consideration in the circumstances of this appeal as this section applies only in situations where the disclosure of the records could unfairly damage a person's

reputation. The affected parties have not established how the affected person's reputation could be damaged by the disclosure of the records. Therefore, I find that section 14(2)(i) is not a relevant consideration.

In summary, I find that neither sections 14(2)(f), (h) and (i) of the Act are relevant considerations in the circumstances of this appeal.

I will now consider the factors in section 14(2) which weigh in favour of disclosing the personal information contained in the letters.

Section 14(2)(d)

In order for section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (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]

The appellant has not provided me with any information to indicate that disclosure of the records has some bearing on or is significant to a fair determination of his rights in a legal proceeding which is either existing or contemplated. I therefore find that section 14(2)(d) is not a relevant consideration in the present appeal.

Section 14(2)(e)

The appellant appears to have raised section 14(2)(e) of the Act as a consideration which weighs in favour of disclosure of the records to him. It has been well-established in previous orders that section 14(2)(e) is a consideration which weighs in favour of privacy protection only. Accordingly, I find that it has no application in the circumstances of this appeal as a factor weighing in favour of disclosure.

I find, therefore, that none of the considerations raised by the appellant which favour disclosure of the records is relevant in the circumstances of this appeal.

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 38(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.

Having considered the representations of the parties, the provisions of the Act and the contents of the records, I find that there are no considerations which would support the conclusion that disclosure of the requested information to the appellant would be an unjustified invasion of the privacy interest of the affected parties. Accordingly, I find that section 38(b) of the Act does not apply to the records and that they ought to be disclosed to the requester.

ORDER:

1. I order the Board to disclose the records to the requester within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
2. 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 requester pursuant to Provision 1, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 1, 1994