



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-396

Appeal M-9400185

Carleton Board of Education



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Carleton Board of Education (the Board). The records relate to harassment and other complaints against the appellant, who is a teacher employed by the Board. The harassment complaint led to an investigation under the Board's policy on this subject. The Board granted partial access, and relied on the following exemptions to withhold the responsive records and portions of records which were not disclosed:

- advice to government - section 7(1)
- third party information - sections 10(1)(b) and (d)
- discretion to refuse requester's own information - section 38(a)
- invasion of privacy - sections 14 and 38(b).

A Notice of Inquiry was provided to the parties to the appeal, including 19 affected persons. The affected persons included the complainants in the harassment investigation, other witnesses, students and parents. Representations were received from the appellant, the Board and six affected persons.

One of the affected persons consented to the disclosure of some information pertaining to her. This consent related to part of Record 13, and the specified information has now been disclosed to the appellant. Accordingly, this part of Record 13 is not at issue in this appeal.

In its representations, the Board withdrew its reliance on section 10(1) of the Act. None of the affected persons advanced any arguments to support the application of this mandatory exemption. Since the records themselves do not substantiate the application of this exemption, and I have not been presented with any other information to indicate that it applies, I will not consider it further in this order.

There are 19 records at issue in this appeal. The records, and the exemptions to be considered for each of them, are listed in Appendix "A". To facilitate the analysis of these records, I have divided them into the following groups:

- Group 1: Notes and memoranda created during the Board's investigation of harassment complaints against the appellant by other teachers (Records 1-10);
- Group 2: Notes, letters and memoranda regarding other complaints by students and their parents concerning the appellant (Records 11-18); and
- Group 3: Notes of the principal regarding the appellant (Record 19).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Board submits that all the information contained in the records that have been withheld qualifies as personal information as defined in the Act. I have carefully reviewed the records and, with one exception, I find that all of them contain the personal information of the appellant **and** one or more other identifiable individuals. The exception is the undisclosed portion of Record 19, which contains the personal information of the appellant only.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access. Two of these exceptions may be relevant in the circumstances of this appeal, namely sections 38(a) and (b). I will consider each of these in turn.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

Section 38(a) of the Act gives the Board the discretion to deny access to an individual's own personal information in circumstances where any of the exemptions listed in that section would otherwise apply to the information. The only exemption mentioned in section 38(a) which is at issue in this appeal is the "advice or recommendations" exemption provided by section 7(1) of the Act. Accordingly, I will now turn to the issue of whether any records qualify for exemption under that section.

The Board initially claimed the exemption in section 7(1) for all of the records at issue. However, its representations concerning this exemption only refer to Records 9, 10 and the severed portion of Record 19. In the absence of representations to support its application to the other records, I will only consider its possible application to Records 9, 10 and the relevant part of Record 19.

Section 7(1) states that:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 7(1) of the Act. He stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

This view was the subject of the following comment by former Assistant Commissioner Tom Mitchinson in Order P-434:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial Act] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

Record 9 is a draft of the investigation report relating to the allegations of sexual harassment against the appellant, with additional notes. Record 10 is a summary of the investigation report. The Board states that these records contain a suggested course of action to be taken in the harassment complaint, which it submits would constitute a "recommendation" within the meaning of section 7(1).

In my view, Records 9 and 10 are analogous to those considered in Order P-434 because they deal with a harassment complaint, which is essentially a human resources matter and has no relation to the actual business of the Board. In my view, applying section 7(1) to these records would also extend the exemption beyond its purpose and intent, and I find that they do not qualify for exemption under this section.

The undisclosed portion of Record 19 consists of one line severed from the notes of the school principal. The Board submits that the line consists of a suggested course of action which was ultimately rejected by the principal. In my view, this possible course of action was not related to the actual business of the Board, and did not relate to any deliberative or policy-making process intended to be protected under section 7(1).

Moreover, it has been previously established that in order to qualify as "advice" or "recommendations" there must be evidence of some type of communication of information from one person to another (Order 58). The undisclosed portion of Record 19 consists only of a course of action being considered by the principal himself, and does not involve any communication from one person to another.

Accordingly, I find that the severed portion of Record 19 does not qualify for exemption under section 7(1).

Because none of the records qualify for exemption under section 7(1) of the Act, they are not exempt under section 38(a). Since no other exemption has been claimed for the undisclosed portion of Record 19 (which is the only item in Record Group 3), and no mandatory exemption applies, it should be disclosed to the appellant.

INVASION OF PRIVACY

I have already found that all of the records for which the Board seeks to rely on sections 14 and 38(b) contain the personal information of the appellant and one or more other individuals. In these circumstances, where access is to be denied because disclosure would be an unjustified invasion of the personal privacy of individuals other than the requester, it has been previously held that section 38(b) is the proper exemption to apply (Order M-352). Accordingly, I will consider whether the records are exempt under that section, and not section 14.

In considering the possible application of section 38(b), sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the Board must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

Record Group 1

In order to facilitate the analysis of these records, I will first summarize the representations submitted and then state my findings.

Section 14(3)

In its representations, the Board submits that the records comprising Record Group 1 contain information relating to medical, psychiatric or psychological conditions (section 14(3)(a)), employment or educational history (section 14(3)(d)) and personal recommendations or evaluations (section 14(3)(g)). Therefore, the Board states that the release of the information would represent a presumed unjustified invasion of personal privacy.

One affected person also submits that sections 14(3)(a), (d) and (g) apply to all of the records; another states that section 14(3)(a) applies to Record 1. One affected person submits that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law (section 14(3)(b)).

Section 14(2)

The Board also submits that there are a number of factors under section 14(2) which favour non-disclosure of the information in the records. In particular, it submits that:

- disclosure of the records could unfairly expose the affected persons to harm - section 14(2)(e)
- the information is highly sensitive - section 14(2)(f)
- it has been supplied in confidence - section 14(2)(h).

With respect to the confidentiality of the information provided, the Board provided me with a copy of the Board's Harassment Policy, Harassment Procedure, and Sexual Harassment Procedure, which states as follows in this regard:

The Carleton Board of Education recognizes the sensitive nature of making an allegation of harassment against a co-worker, or supervisor and the desire of the complainant and the person against whom the complaint is made, to keep matters of this kind confidential.

To this end, confidentiality will be maintained at all stages of the process to the extent practicable and appropriate under the circumstances, subject to the right to due process of the person against whom the complaint is made.

The Board's representations indicate that the investigators advised everyone interviewed in the course of the investigation of the nature of the complaint, the confidential nature of the investigation, and that only the substance of their interviews would be reported back to both the person bringing forward the complaint and the accused employee. Record 10 confirms that the investigators advised the parties and the witnesses that the substance of their interviews would be reported back to the complainants and the appellant.

The Board states that, during the investigation process, it provided the appellant with verbal disclosure of the comments made by the complainants and witnesses to the investigators. The Board submits that, although this factor is not mentioned in section 14(2), it is a relevant factor favouring non-disclosure. This submission relates to Records 4, 5, 6, 7 and 8.

Several affected persons have also made submissions concerning the factors under section 14(2). These may be summarized as follows:

- two affected persons submit that disclosure of the records could unfairly expose the affected persons to harm - section 14(2)(e)
- four affected persons submit that the information is highly sensitive - section 14(2)(f)
- one affected persons submits that the information in Records 4 and 8 should not be disclosed as it is not accurate or reliable - section 14(2)(g)
- three affected persons submit that the information has been supplied in confidence - section 14(2)(h).

One of the affected persons advises that Records 1, 2 and 3 consist of notes of meetings with a Board advisor, whose role is to give advice to complainants in harassment investigations. She also states that these meetings were not part of the formal investigation. She indicates that the advisor stated that all information she recorded would be for her own reference and would not be released to other parties.

Another affected person submits that with regard to Records 1, 2 and 3, she was advised that her meetings with the Board advisor would be confidential.

The appellant submits that disclosure of the information in all the records is desirable for the purpose of subjecting the activities of the institution to public scrutiny (section 14(2)(a)). He states that the Board has refused to release this information as it would reveal the negative conduct of some teachers and the administration. He asserts that the Board has violated all of the protections established under the teaching contract, and that the harassment policy is unfair. The appellant submits that disclosure of the records is desirable so that the institution will be held up to public scrutiny and its policies changed. On this issue, the Board states that public scrutiny is not an issue in this case, as there is no public interest in disclosure. It submits that there must be a public demand for scrutiny of the institution, rather than one person's demand for scrutiny.

The appellant also submits that disclosure of the records is necessary to ensure a fair determination of his rights (section 14(2)(d)), as he requires the records for an arbitration hearing. On this point, the Board submits that even if the appellant is involved in a grievance procedure, he is not necessarily entitled to disclosure of the records. It also states that the information is not required by the appellant to prepare for a grievance arbitration as the grievance procedure is a trial *de novo*. Therefore the records at issue would be irrelevant to the arbitration hearing.

Findings on the Group 1 Records

Having carefully reviewed the Group 1 records and the representations concerning them, I have made the following findings:

- (1) Some portions of Records 1-10 contain general references to the psychological condition of individuals. Because of the general nature of these observations, and the fact that they were made by individuals who are not qualified to assess medical, psychiatric or psychological conditions, in my view they do not relate to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Therefore, section 14(3)(a) does not apply to Records 1-10.
- (2) Records 1-10 contain no specific references to the employment or educational histories of individuals, other than the appellant. Therefore, section 14(3)(d) does not apply to them.
- (3) The terms "personal evaluations" or "personnel evaluations" in section 14(3)(g) refer to assessments made according to measurable standards (Order P-447). Records 1-10 contain opinions, comments and observations provided by the affected persons during an investigation into allegations of harassment which, in my view, do not consist of personal or personnel evaluations. Therefore section 14(3)(g) does not apply to Records 1-10.

- (4) Records 1-10 concern an internal Board investigation into harassment complaints filed against the appellant. In my view, this was not an investigation into a possible violation of law and section 14(3)(b) does not apply to Records 1-10.
- (5) Based on the representations of the Board and the affected persons, and the personal information contained within Record Group 1, I find that disclosure of parts of Records 1, 4, 5 and 7 could unfairly expose some of the affected persons to harm (section 14(2)(e)).
- (6) Many past orders have indicated that some information in connection with harassment investigations is highly sensitive within the meaning of section 14(2)(f), and that some information collected in the context of such investigations was provided in confidence within the meaning of section 14(2)(h). However, it has also been found that it is not possible for such an investigation to proceed if the complaint is not made known to the person complained against (in this case, the appellant), and the direct response to the allegations made in the complaint is not made known to the complainants (Orders M-82 and P-685). In addition, where, as in this case, the investigation has been completed, it is essential that the parties (including the appellant) be advised of how the complaint was resolved and why (Order P-694).

With regard to Records 1, 2 and 3, sections 14(2)(f) and (h) are relevant considerations. With respect to the other Group 1 records, sections 14(2)(f) and 14(2)(h) are relevant with respect to the personal information of persons other than the appellant and the complainants, and not to information which directly addresses the substance of the complaint and the findings.

- (7) The accuracy or reliability of personal information (section 14(2)(g)) is not a relevant consideration. The affected person relying on this provision has not provided sufficient evidence to establish the relevance of this section to the records for which she seeks to rely on it.
- (8) The fact that verbal summaries of the comments made by the complainants and other witnesses were previously given to the appellant is not, in my view, a relevant factor to be considered in deciding whether the appellant is entitled to receive copies of the written summaries of these interviews.
- (9) The appellant has not established that disclosure of the Group 1 records is desirable for the purpose of subjecting the activities of the institution to public scrutiny (section 14(2)(a)), and I therefore find that section 14(2)(a) is not relevant to these records.
- (10) The appellant has not provided sufficient evidence to demonstrate that the personal information in Record Group 1 is relevant to a fair determination of his rights (section 14(2)(d)). In particular, he has not demonstrated that the personal information in these records has any bearing on, or is significant to the determination of any legal right, nor does he identify why the records are required in order to prepare for any legal proceeding or to ensure an impartial hearing (Order P-312).
- (11) Section 14(4) does not apply to any of the information in the Record Group 1.

To summarize, I have found that no presumed unjustified invasion of personal privacy under section 14(3) applies to the records which comprise Record Group 1. Section 14(2)(e) is a factor favouring non-disclosure which is relevant to parts of some of the records in this group. Sections 14(2)(f) and (h) are relevant factors which favour the non-disclosure of some of the records in their entirety, and parts of others.

Accordingly, I find that the disclosure of the following information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and accordingly, this information is exempt under section 38(b) of the Act: Records 1, 2, 3 and 6 in their entirety, and the parts of Records 4, 5, 7 and 8 which are highlighted on the copy of these records which is being sent to the Board's Freedom of Information and Privacy Co-ordinator with this order.

I find that Record 9, which is a draft of the investigation report which the appellant has received, and Record 10, which is a summary of the report, are not exempt under section 38(b), as their disclosure would not constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

Section 16 and the Group 1 Records

The appellant submits that it is in the public interest that the actions of the Board be exposed and therefore that section 16 of the Act may apply. Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The exemption which I have found to apply to some of the Group 1 records is found in section 38(b) of the Act. Section 16 does not refer specifically to this exemption. This matter has been previously considered in Order P-541, where Inquiry Officer Anita Fineberg made the following comments concerning sections 23, 49(b) and 21 of the Provincial Freedom of Information and Protection of Privacy Act, which are the equivalent of sections 16, 38(b) and 14 of the Municipal Act:

In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

I agree, and accordingly, I will consider the possible application of section 16 to any portions of the records which are found to qualify for exemption under section 38(b).

The appellant's representations in support of the application of section 16 are similar to those outlined above with respect to section 14(2)(a). In order for section 16 to apply, there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question. In my view, there is no compelling public interest in disclosure of any information which I have found to be exempt under section

38(b). Accordingly, section 16 has no application to the records within Record Group 1 which I have found to be exempt.

Record Group 2

I have previously found that the records in this group, which concern complaints by students and their parents regarding the appellant, contain the personal information of the appellant and other identifiable individuals.

The Board and the affected persons have not claimed that disclosure of any of the Group 2 records would constitute a presumed unjustified invasion of personal privacy under section 14(3).

The Board submits that portions of Record Group 2 contain personal information including students' academic standing, personal feelings concerning themselves and their own abilities, telephone numbers, and interactions with other students and teachers. For these reasons, according to the Board, all of the information in these records is highly sensitive and the factor in section 14(2)(f) is a relevant consideration. The Board has also claimed that section 14(2)(h) applies to Record 18.

The principal of the school submits that Records 11-17 were prepared by him, or provided to him by others, with an expectation of confidentiality. This suggests that, in his view, section 14(2)(h) is a relevant factor with respect to those records.

Some of the affected persons also claim that sections 14(2)(f) and 14(2)(h) are relevant. Two affected persons also indicate that disclosure of the personal information in this group of records would unfairly expose individuals other than the appellant to harm (section 14(2)(e)).

The appellant submits that sections 14(2)(a) (public scrutiny) and 14(2)(d) (fair determination of rights) also apply for the same reasons as outlined above for Record Group 1.

Having carefully reviewed the records and the representations, I have made the following findings regarding the Group 2 records:

- (1) None of the presumptions in section 14(3) applies to any part of Record Group 2.
- (2) Based upon the evidence provided, I am satisfied that the disclosure of the personal information in Record Group 2 could unfairly expose the affected persons to harm, and therefore section 14(2)(e) is a relevant consideration with respect to all of these records.

- (3) I find that, because disclosure of the personal information in Record Group 2 could reasonably be expected to cause excessive personal distress to the affected persons (Order P-434), this information is highly sensitive, and therefore, section 14(2)(f) is a relevant consideration.
- (4) I find that section 14(2)(h) is a relevant consideration with respect to all of Record Group 2.
- (5) For the same reasons outlined above under Record Group 1, I find that sections 14(2)(d) and 14(2)(a) have no application to Record Group 2.
- (6) Section 14(4) does not apply to any of the information in Record Group 2.

To summarize, I have found that no presumption of invasion of personal privacy under section 14(3) applies to any part of Record Group 2. I have found that sections 14(2)(e), (f) and (h) are relevant factors which favour the non-disclosure of the records.

Accordingly, I find that the disclosure of Records 11-18 would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and accordingly, this information is exempt under section 38(b) of the Act.

For the same reasons as outlined under Record Group 1, I find that section 16 does not apply to Record Group 2.

ORDER:

1. I uphold the Board's decision to deny access to the whole of Records 1, 2, 3, 6, 11, 12, 13, 14, 15, 16, 17 and 18.
2. I order the Board to disclose to the appellant the whole of Records 9 and 10, the undisclosed portion of Record 19, and the parts of Records 4, 5, 7 and 8 which are **not** highlighted on the copy of these records which is being sent to the Board's Freedom of Information and Privacy Co-ordinator with this order.
3. I order the Board to disclose the records and parts of records ordered to be disclosed in Provision 2 within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
4. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 2 and 3.

Original signed by: _____
John Higgins
Inquiry Officer

_____ September 30, 1994

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APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	RECORD GROUP	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	1	Meeting notes of Board Advisor, May 29, 1993	38(b)	Decision upheld
2	1	Interview notes of Board Advisor with complainants, April 28, 1993	38(b)	Decision upheld
3	1	Notes of Board Advisor re: discussion with complainant, April 30, 1993	38(b)	Decision upheld
4	1	Interview notes of Investigating Team with complainants, April 28, 1993	38(b)	Disclose in part
5	1	Interview notes of Investigating Team with third parties, April 29, 1993	38(b)	Disclose in part
6	1	Note by member of investigating team re: a complainant, undated	38(b)	Decision upheld
7	1	Interview notes of investigating team with respondent and third parties, May 4, 1993	38(b)	Disclose in part
8	1	Interview notes of Investigating Team, May 5, 1993	38(b)	Disclose in part
9	1	Draft of Investigation Report with notes, undated	7(1), 38(a), 38(b)	Disclose in full
10	1	Summary of report of the Investigators - Harassment Complaint, undated	7(1), 38(a), 38(b)	Disclose in full
11	2	Handwritten notes re: students, undated	38(b)	Decision upheld
12	2	Handwritten notes of principal, re: student, undated	38(b)	Decision upheld
13	2	Notes of principal re: students, appellant, Dec. 9, Dec. 16, 1992	38(b)	Decision upheld
14	2	Notes of principal, re: appellant and student, Jan. 18, 1993	38(b)	Decision upheld
15	2	Notes of principal re: parent of student, Jan. 18, 1993	38(b)	Decision upheld
16	2	Letter from parents to principal	38(b)	Decision upheld

RECORD NUMBER	RECORD GROUP	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
		re: student, Nov. 22, 1992		
17	2	Notes re: student, Oct. 14, 1992	38(b)	Decision upheld
18	2	Caricature, with handwritten notes	38(b)	Decision upheld
19	3	Notes of principal re: appellant, April 28, 1993	7(1), 38(a)	Disclose withheld portion