Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER M-635

## Appeal M_9500348

## Metropolitan Separate School Board
## [Toronto]

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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 Metropolitan Separate School Board (the Board) received a request for access to the following records:

1. A copy of all records, provided and/or recorded, in relation to the investigation of a sexual harassment complaint filed with the Board on May 11, 1994.

2. A copy of the written discipline correspondence that was placed on the file of a named individual.

3. A copy of the contents of the requester's personnel file.

The Board granted access to the records responsive to Part 3 of the request. In response to Part 1 of the request, the Board denied access to all of the responsive records, which consist of a response to the harassment complaint (pages 1-26), a typewritten summary of the requester's complaint (page 27), typewritten notes of a meeting dated June 1, 1994 (pages 28-37), a memorandum dated September 28, 1994 (page 38), and a letter dated June 27, 1994 (pages 39-40). The Board relies on the following exemption in denying access to these records:

- invasion of privacy - section 38(b).

In addition, with respect to Part 2 of the request, the Board refused to confirm or deny the existence of any records pursuant to section 14(5) of the Act. The requester appealed the Board's decision and also claimed that further responsive records exist.

During mediation of the appeal, the Board disclosed page 27 (typewritten summary of complaint) to the appellant.

A Notice of Inquiry was provided to the appellant, the Board and the individual named in Part 2 of the appellant's request (the affected person). Representations were received from all three parties.

## PRELIMINARY ISSUE:

### COLLECTION, USE AND RETENTION OF PERSONAL INFORMATION

During this appeal, a concern arose about whether the collection, use and retention of particular personal information was authorized by the relevant provisions in Part III of the Act.

In these circumstances, I believe that the interests of all the parties would be best served by having this concern investigated more fully by the Compliance Branch of the Commissioner's office. Accordingly, I have referred this matter to the Compliance Branch of this office to

conduct an independent investigation into the circumstances of the collection, use and retention of the personal information.

### RECORDS ALREADY IN THE POSSESSION OF THE APPELLANT

Included with the appellant's representations and supporting documents was an unsevered copy of page 38 of the record. Thus, the disclosure sought under the Act has been accomplished by other means for this page. I note in this regard that the copy in the Board's possession has no notations or marks of any kind to distinguish it from the copy given to the appellant.

In Order M-271, Assistant Commissioner Irwin Glasberg dealt with a situation in which the requester had obtained a copy of the record from someone other than the institution. In that case, he proceeded with the appeal because one of the issues was the appellant's desire to request a correction of personal information under section 36 of the Act. He indicated that, in this situation, the institution in question would have to acknowledge that it had custody of the record for which the correction was to be requested. Also, the parties in that case had been involved in an ongoing series of requests and the Assistant Commissioner was of the view that his order might reduce the need for future appeals.

However, he also made the following comments of a more general nature about situations where an appellant already has the record at issue:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.

I agree with these views and adopt them for the purposes of this appeal. In my view, some appeals may present circumstances (such as those referred to in Order M-271) which would justify proceeding even where an appellant has obtained a copy of the record at issue. However, in the absence of factors such as those present in Order M-271, the fact that an appellant has, by legitimate means (in this case through the normal course of the investigation and processing of her complaint), obtained a copy of part of the record at issue would render the appeal moot as regards that part of the record, because any determination regarding access would have no practical effect.

In this case, I find that there are no factors such as those present in Order M-271 to warrant continuation of this appeal in respect of page 38 of the record. I find that this appeal is moot with respect to this page and no useful purpose would be served by proceeding.

## DISCUSSION:

### REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) of the Act provides the Board with the discretion to refuse to confirm or deny the existence of records responsive to the appellant's request. This section provides:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(5), the Board is denying the requester the right to know whether a record exists, even if one does not. This section provides institutions with a significant discretionary power which, in my view, should be exercised only in rare cases.

An institution relying on section 14(5) of the Act must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under section 14(1). The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under section 14(1) of the Act.

In its representations, the Board submits that by confirming that records of the nature requested in Part 2 of the request exist, the Board would be unable to control the use of this knowledge whether or not the records themselves are disclosed and this would be an unjustified invasion of another individual's personal privacy.

The appellant has provided me with correspondence received from the Board's Superintendent of Education, Personnel Services which confirmed that her complaint was upheld and written discipline correspondence was placed on the accused's file. Accordingly, I find that the existence of records responsive to Part 2 of the appellant's request has already been confirmed by the Board, and section 14(5) of the Act does not apply.

Responsive records do exist. These records are two letters; the first is one page in length and dated October 17, 1994 and the second is four pages in length and dated November 8, 1994.

**INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the records, and I find that it satisfies the definition of personal information. In my view, the personal information in pages 1-26, 28-37, 42-45 is that of the appellant and the affected person, the personal information in pages 39-40 is that of the affected person and another identifiable individual and the personal information in page 41 is that of the affected person only.
In her representations the appellant has made it very clear that she is only interested in seeking access to records that contain her personal information and what was said about her during the investigation of her complaint. As I have found that pages 39-40 and 41 do not contain the appellant's personal information, these records are no longer at issue in this appeal.

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.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and another individual and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

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 can be overcome is if the personal information at issue falls under section 14(4) of the Act 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 institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Pages 1-26 are the affected person's written response to the appellant's harassment complaint. Pages 28-37 are the typewritten minutes of a meeting between the affected person and members of the Board respecting the affected person's response to the appellant's complaints. Pages 42-45 are a letter addressed to the affected person from the Board addressing the conclusions drawn by the Board and the resultant actions taken by the Board.

With respect to section 14(3), the Board submits that the records are subject to the presumptions found under sections 14(3)(b) (was compiled and is identifiable as part of an investigation into a possible violation of law), 14(3)(d) (relates to employment or educational history) and 14(3)(g) (consists of personal recommendations or evaluations, character references or personnel evaluations). The affected person also raises the application of sections 14(3)(b) and (g) of the Act.

Under section 14(2), the Board submits that the information contained in the records was provided in confidence (section 14(2)(h)). The affected person adds that he will be exposed unfairly to pecuniary or other harm (section 14(2)(e)) should the records be disclosed and that the information is highly sensitive (section 14(2)(f)).

The appellant contends that the records she has received are inaccurate and incomplete. She submits that she requires the additional information withheld to assure herself of the action taken with respect to her complaint and, therefore, argues the records are relevant to a fair determination of her rights (section 14(2)(d)). She adds that the affected person cannot expect confidentiality in the resolution of the dispute between them and that this situation has adversely impacted on her employment with the Board.

Having reviewed the representations and the records, I have made the following findings:

(1) The information contained in the records was not compiled as part of an investigation into a possible violation of law. Therefore, section 14(3)(b) of the Act does not apply.

(2) The records contain information concerning employment-related incidents involving the appellant and the affected person. However, in my view, the information in the records cannot accurately be characterized as the employment history of any of the individuals to whom it relates, and section 14(3)(d) does not apply.

(3) In a broad sense, it could be argued that some of the comments contained in the records are "evaluations" of the affected person. However, in my view, it is not possible to characterize these comments as "personal evaluations" or "personnel evaluations". Accordingly, in my view, section 14(3)(g) does not apply.

(4) Included with the appellant's representations was a copy of pages 1-26 (the response to the complaint) which had been provided to her during the investigation of her complaint. The only difference between the Board's copy and the appellant's copy is a series of notations in the margins of the Board's copy which appear to have been made by one of the individual's involved in the investigation.

(5) I have not been provided with any information which supports the assertion that disclosure of the information relating to the affected person in the records would result in him being exposed unfairly to pecuniary or other harm (section 14(2)(e)).

(6) In this case, I agree that the information contained in the records would be considered highly sensitive (section 14(2)(f)).

(7) While section 14(2)(h) is a relevant consideration in the circumstances of this appeal, in matters such as this it is not reasonable to expect complete confidentiality. Fairness demands that the appellant be made aware of the response to her allegations made in her complaint. 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 (see Order P-694).

Having considered all of the circumstances of this appeal, and weighed the appellant's right to access her personal information against the interest of the affected person in protecting his privacy, I find that disclosure of pages 1-26 and 28-37 would not be an unjustified invasion of the personal privacy of the affected person and, therefore, section 38(b) does not apply to these pages. In my view, only pages 42-45 are exempt under section 38(b) of the Act.

**REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records to which she is seeking access and the Board indicates that further responsive records cannot be located, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. In my view, the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist. However, in order to properly discharge its obligations under the Act, the Board must provide the Commissioner's office with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate records responsive to the request.

The appellant contends that reasonable searches were not conducted by the Board for records relating to investigative notes taken by the members of the Board who were involved in the investigation of the appellant's complaints. She has provided me with evidence to indicate that notes were taken both manually and on a lap top computer. This information, however, also includes assertions from the Board that some of this information was transcribed and the original information destroyed.

The representations of the Board include the sworn affidavits of the four Board members who were involved in the investigation of the complaints. They outline and describe the steps taken to conduct the search for and locate relevant records which are responsive to the appellant's request. They include the statement that all notes taken were provided to one of the members who transcribed them into a lap-top computer and, once edited for spelling, format and grammar, a paper hardcopy was created and the computer disc was erased and re-used. None of these individuals have any further records nor are they aware of any further existing records.

I have carefully reviewed the representations of both parties, the supporting documentation and the affidavits and I am satisfied that the Board has taken all reasonable steps to locate records which may be responsive to the request.

## ORDER:

1. I uphold the Board's decision not to disclose pages 39-45 of the record.

2. I order the Board to disclose pages 1-26 and 28-37, in their entirety to the appellant 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.

3. In order to verify compliance with the provisions of 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 Provision 2.

4. In this order, I have disclosed the fact that records responsive to Part 2 of the request exist. I have released this order to the Board and the affected person in advance of the appellant in order to provide the Board and the affected person with an opportunity to review this order and determine whether to apply for judicial review. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant within five (5) days of the expiration of the 15-day period.

Original signed by: November 1, 1995
Holly Big Canoe
Inquiry Officer