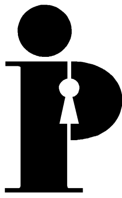

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-615

Appeal M_9500280

Toronto 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 submitted a request to the Toronto Board of Education (the Board) for access to the following:

(1) copies of handwritten notes and any rewritten versions, pertaining to five specified meetings at a school attended by the appellant's daughter (these meetings were attended by the appellant and his wife, several school officials, and in one case, other parents);

(2) copies of all records containing any reference to the meetings referred to in item (1);

(3) copies of all records containing the name of the appellant, his wife or daughter, "... for the year 1995".

The meetings referred to in items (1) and (2) pertained to the conduct of a teacher (referred to in this order as "the teacher") which the appellant and his family found objectionable. The teacher was subsequently disciplined by the Board and no longer teaches at the school.

The Board identified a number of responsive records and issued a decision letter to the appellant, including an index of records. The Board granted access to eight responsive records. Access to another five records was denied under the following exemption in the Act:

- invasion of privacy - section 14(1).

The decision letter also stated that the Board "... relies on section 14(5) of the [Act] in refusing to confirm or deny whether records additional to those listed on the index exist."

The appellant filed an appeal of this decision with the Commissioner's office. The letter of appeal objected to the denial of access, and to the lack of responsive records identified with regard to two of the meetings referred to in the request. The appellant also queried why there was no internal documentation relating to his family's frequent correspondence with the Board. These comments about the possible existence of additional records raise the issue of whether the Board conducted a reasonable search.

During the appeals process, the Board identified two further responsive records and granted access to one of them. The other newly discovered record, which the Board decided not to disclose, includes notes from one of the meetings mentioned in the request (namely, the meeting on January 24, 1995) for which notes were not previously located. The Board is not refusing to confirm or deny the existence of this record, and I will include it in my review of the Board's denial of access.

A Notice of Inquiry was sent to the appellant, the Board and five affected persons. One of the affected persons is the teacher, and the other four are individuals who attended one or more of the meetings referred to in the request.

Because the records appear to contain the appellant's personal information, the Notice of Inquiry raised the possible application of section 38(b) of the Act. This section provides a discretionary exemption which may apply where disclosure of a record containing the requester's own personal information would be an unjustified invasion of the personal privacy of another individual or individuals.

In response to the Notice of Inquiry, representations were received from the appellant, the Board and the teacher.

The first issue in this appeal is the Board's denial of access to undisclosed records whose existence has been confirmed to the appellant. These consist of the undisclosed records which the Board identified in its index prepared at the request stage, and the additional undisclosed record discovered during the appeal (as mentioned above). Collectively, these records will be referred to in this order as "the records at issue". They all consist of meeting notes. More particularly, the records at issue are as follows:

Record 1a:	Handwritten meeting notes dated January 13, 1995 (partly in shorthand)
Record 1b:	Typed transcript of Record 1a
Record 2:	Meeting notes dated February 8, 1995
Record 3:	Meeting notes dated February 13, 1995
Record 4:	Meeting notes (different author than Record 3) dated February 13, 1995
Record 5:	Meeting notes dated January 23, 24 and 25, 1994 (the undisclosed record discovered during the appeals process).

Another issue to be decided in this appeal is the Board's decision to refuse to confirm or deny the existence of additional records under section 14(5). In addition, the question of whether the Board conducted a reasonable search for responsive records must be considered.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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.

I have reviewed the records at issue to determine whether they contain personal information and if so, to whom the personal information relates.

The Board argues that the records do not contain personal information of the appellant or his wife, since the references to them in the records do not reveal any other information about them. I do not agree with this view.

In my opinion, the fact that the appellant attended these meetings is revealed by these records, and constitutes his personal information. On this basis, I find that all the records at issue contain personal information pertaining to the appellant, who was in attendance at each of the meetings documented in the records.

Records 1a, 1b, 2 and 4 also document the appellant's wife's attendance at the meetings being recorded, and several comments she made. I find that this constitutes her personal information. Records 3 and 4, which record a meeting at which other parents were present, also contain the personal information of these other parents and, in some cases, their children. Record 5 also contains the personal information of a child other than the appellant's daughter, pertaining to a classroom incident.

In addition, all of the records at issue contain personal information pertaining to the appellant's daughter, consisting of details of incidents which occurred in the teacher's class. Given that the records reveal allegations of improper conduct by the teacher, I also find that all of the records at issue contain her personal information.

The Board argues that the records contain personal information pertaining to several Board employees other than the teacher, namely the school principal and vice-principal, and the superintendent. I have found that the records contain the personal information of the teacher because they pertain to allegations of professional impropriety on her part. The records contain no such allegations with respect to these other individuals, and only record activities which fall within their normal professional activities. Many previous orders have determined that information about individuals in their corporate or professional capacity does not qualify as their personal information (see, for example, Order 80). I agree with this interpretation.

As part of its argument that the information pertaining to Board employees other than the teacher constitutes the personal information of the employees, the Board mentions that several of these individuals made their notes for their own use only, and that they never intended them to be Board property. In my view, these submissions might properly be directed to a discussion of whether the notes are within the Board's custody and/or control for the purposes of sections 4(1) and 36(1) of the Act. Only records in the Board's custody and/or control are subject to the Act. However, the Board has not raised this argument with respect to these records, and has made access decisions regarding all of the records at issue. Copies of the records are clearly in its custody. Accordingly, custody and control are not issues in this appeal.

However, the fact that the employees intended to keep these records for their own use, and did not intend them to be Board property, does not affect whether or not the records contain their personal information. Rather, it is the character of this information itself which must be considered. Because the information in the records about the principal, vice-principal and superintendent relate exclusively to their normal professional activities, I find that it does not qualify as their personal information.

I have found that all of the records at issue contain the appellant's personal information. Section 36(1) of the Act gives individuals a general right of access to records containing their own personal information which are held by a government body. Section 38 provides a number of exceptions to this general right of access.

The Board has claimed that the records are exempt from disclosure under section 14(1). In Order M-352, I determined that section 14(1) was not applicable to records containing the requester's own personal information. That order went on to find that where disclosure of such a record would constitute an unjustified invasion of the personal privacy of another individual, the applicable exemption is section 38(b). Accordingly, I will not consider the application of section 14(1) to the records. I will, however, consider the Board's arguments relating to invasion of personal privacy under section 38(b).

Section 38(b) provides that where a record contains the personal information of both the appellant and other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has 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 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 institution 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.

Representations by the Board and the Teacher

The Board argues that the incidents described in the record constitute the teacher's "employment history" and that, for this reason, the presumed unjustified invasion of personal privacy in section 14(3)(d) applies. In my view, the term "employment history" is intended to describe a complete or partial chronology of a person's working life which might appear in a resume or personnel file. Outside the context of such a chronology, it does not apply to descriptions of particular incidents which occurred in the workplace, whether or not they later become the subject of complaints about the employee. By analogy to the facts of this case, descriptions of incidents leading to workplace harassment investigations are also not part of a person's employment history (see Order M-82). Accordingly, I find that section 14(3)(d) does not apply to the records at issue.

The Board also submits that the following parts of section 14(2) apply, and that they are factors weighing against disclosure: sections 14(2)(e) (disclosure will cause the teacher to be unfairly exposed to pecuniary or other harm), 14(2)(f) (the information is highly sensitive), 14(2)(g) (the

information is unlikely to be accurate or reliable) and 14(2)(i) (disclosure may unfairly damage the teacher's reputation). The teacher's representations also refer to sections 14(2)(e) and (i).

Given that the records contain allegations of inappropriate teaching methods and classroom behaviour attributed to the teacher, I am satisfied that disclosure would cause her considerable personal distress. Accordingly, I find that the information in the records at issue is highly sensitive and the factor weighing against disclosure in section 14(2)(f) applies.

With respect to sections 14(2)(e) and (i), both require that "disclosure" could lead to the harms they seek to avoid. In this case, the appellant was at all of the meetings documented in the records. Therefore, he is already privy to the information which, according to the Board and the teacher, could lead to the harms mentioned in these two sections. It is difficult to see how this would be altered by disclosure of the records. I also note that sections 14(2)(e) and (i) require that the exposure to harm or the damage to one's reputation must be "unfair" before they apply. In my view, the Board and the teacher have not established that if these harms occur, this would be "unfair" in the circumstances. I find that sections 14(2)(e) and (i) do not apply in this case.

With regard to section 14(2)(g) (information unlikely to be accurate or reliable), the Board's representations dispute the accuracy of the comments recorded in the records, rather than the accuracy of the transcriptions. Given that the records consist of meeting notes, in my view the test of accuracy to be used is whether they correctly record the comments made during the meeting, not whether those comments are in fact true. Coming at this question from the other side, if the minutes are an accurate reflection of what was said, I would not find that they are inaccurate or unreliable for the purposes of section 14(2)(g). The Board's representations address a related issue when they allege that the meaning of some words used in the records is unclear. However, I do not view this as an effective challenge to the accuracy or reliability of the information in the records at issue. In the absence of any indication that the notes are not an accurate reflection of the comments made at the meetings, I find that section 14(2)(g) does not apply to the records at issue.

The Board also submits that the attendance of particular individuals at the meetings referred to in the records, and the comments made, were intended to be confidential. The Board states that this is particularly relevant to the meeting mentioned in Records 3 and 4. The Board does not specifically raise the factor in section 14(2)(h) (information provided in confidence), but these representations appear to raise its possible application. However, given that the appellant was present at each of these meetings, and is therefore aware of the comments made and the identities of those in attendance, I am unable to conclude that there was any expectation that this information would be kept confidential from the appellant. Therefore I find that section 14(2)(h) does not apply in the circumstances of this appeal.

Representations by the Appellant

The appellant states that he requires access to these records to ensure "... that any information that exists about [the appellant and his family members] is completely factual and not inadvertently or deliberately misleading". The appellant submits that the factors favouring disclosure in sections 14(2)(a) (public scrutiny of the Board), 14(2)(b) (access may promote

public health and safety), 14(2)(c) (access will promote informed choice of goods and services) and 14(2)(d) (the information is relevant to a fair determination of the requester's rights) apply in this case.

I will begin with section 14(2)(a). The teacher was disciplined and no longer teaches at the school, and I have not been provided with any information to support a view that the Board's handling of the matter was inappropriate in any way. For these reasons, I reject the appellant's claim that disclosure is "desirable for the purpose of subjecting the activities of the [Board] to public scrutiny" within the meaning of section 14(2)(a). In my view, the appellant's interest in these records, as indicated in the quotation from his representations set out in the preceding paragraph, is of a private, not public, nature. Therefore I find that section 14(2)(a) does not apply.

Turning to sections 14(2)(b) and (c), I have not been provided with any evidence that disclosure "may promote public health and safety", nor that it "will promote informed choice in the purchase of goods and services" and I find that sections 14(2)(b) and (c) do not apply.

With respect to section 14(2)(d), the appellant submits that "I need to know whether any member of my family has been misquoted, libelled or otherwise mistreated in any of the documentation." Although the law recognizes that libel is an actionable tort for which damages may be awarded, the appellant appears to be arguing that there is a "right not to be libelled" which should be seen as a "right" for the purposes of section 14(2)(d). According to this argument, section 14(2)(d) supports the appellant's entitlement to review the records to see whether this "right" has been violated. I do not agree.

Rather, in this situation, the "right" which might trigger the application of section 14(2)(d) would be the appellant's right to recover damages if he has been libelled. I have not been provided with any evidence or argument to support the view that the information in the records, or any part of it, is relevant to the determination of such a right, and I find that section 14(2)(d) does not apply.

Would Disclosure Constitute an Unjustified Invasion of Personal Privacy?

I must now balance the factors favouring access against those favouring privacy protection. I have found that the factor weighing against disclosure in section 14(2)(f) applies. I have not found that any listed factors favouring disclosure apply.

However, the preamble of section 14(2) requires that I consider "all the relevant circumstances".

In my view, the fact that the records at issue all document meetings attended by the appellant is such a relevant circumstance. The individuals attending the meetings are known to the appellant, as are the remarks which were made. I find that this is a circumstance which favours disclosure of the records.

In my view, in the circumstances of this case, the fact that the appellant was present at the meetings in question is determinative of this issue. The appellant was privy to all the "highly sensitive" information discussed at the meetings, and was well aware of the identities of those in attendance. One cannot automatically conclude that a requester's attendance at a meeting means that disclosure of information about the meeting will not be an unjustified invasion of the personal privacy of other individuals. However, in the circumstances of this appeal, I find that it would not be reasonable to conclude that disclosure of the records at issue would be an unjustified invasion of personal privacy.

Accordingly, I find that the exemption in section 38(b) does not apply. As no other discretionary exemptions have been claimed, and no mandatory exemptions apply, the records at issue should be disclosed.

REFUSAL TO CONFIRM OR DENY EXISTENCE OF ADDITIONAL RECORDS

As noted earlier in this order, the Board relies on section 14(5) to refuse to confirm or deny whether any records exist, other than those already identified. This section states:

> 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.

To facilitate this discussion, I will indicate at this point in the order that my conclusion below does not uphold the Board's reliance on section 14(5). Accordingly, I will now indicate that a record whose existence the Board has refused to confirm or deny does in fact exist. The record consists of a list of the parents who attended the private meeting with Board staff on February 13, 1995.

Section 14(5) is part of the exemption provided by section 14. This section can only be claimed with respect to personal information, since it is only the disclosure of personal information which can lead to an "unjustified invasion of personal privacy". The Board argues that this record contains the personal information of the individuals named in it. However, in an oddly inconsistent argument, the Board also submits (in its discussion of section 38(b)) that the record does not contain the personal information of the appellant. I disagree with this latter submission. The record refers to the attendance of the appellant and his wife, and a number of other parents, simply by listing their surnames. In my view, because the list identifies that the named parents attended the meeting, it constitutes the personal information of the individuals whose attendance it confirms, namely the appellant, his wife and the other parents identified.

In my discussion under the heading "Invasion of Privacy" above, I indicated that the section 14 exemption could not be claimed if the records contain the personal information of the requester. Rather, if the Board wishes to claim an exemption relating to "invasion of privacy" in that situation, the appropriate exemption is section 38(b). Section 38 contains no parallel provision to section 14(5). Since I have found that the record does contain the appellant's personal information, the question arises whether the Board can rely on section 14(5) in this case.

Section 37(2) provides that certain sections from Part I of the Act (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the Act.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I will now consider whether the Board's claim under section 14(5) is justified. Based on the wording of section 14(5), if I find that disclosure of the record is not an unjustified invasion of personal privacy, the Board would be unable to rely on section 14(5).

As noted above, the record consists of a list of parents who attended a particular meeting at which the appellant was also present. This fact is confirmed by the inclusion of the appellant's surname on the list. The Board argues that this information is highly sensitive, and that disclosure could unfairly expose the individuals named in the record to pecuniary or other harm, and also cause unfair damage to their reputations. These are references to sections 14(2)(f), (e) and (i), respectively.

I do not accept these submissions. With respect to sections 14(2)(e) and (i), I have not been provided with any information to support the application of these sections. In particular, I have been given no information about the potential harms, nor has the element of "unfairness", required by both these sections, been addressed in the submissions I have received. I find that sections 14(2)(e) and (i) do not apply to this record.
I am also not satisfied that the information is highly sensitive. The record names the parents who attended a meeting at the school on a particular date, and nothing more. Neither the nature of this meeting, its purpose, nor the topics discussed are disclosed by this record. In my view, the mere fact of attendance at this meeting, without more, does not convey any sensitive information about the individuals named. I find that the factor in section 14(2)(f) does not apply to this record.

In the circumstances of this appeal, I have not found that any factors favouring privacy protection apply to this record. Moreover, similar to my finding above with respect to the records at issue (i.e. the undisclosed records whose existence was confirmed to the appellant by the Board), I find that the appellant's presence at this meeting is a relevant circumstance favouring disclosure. Accordingly, I find that the disclosure of this record would not constitute an unjustified invasion of personal privacy. Therefore, based on the wording of section 14(5), it is not open to the Board to rely on this provision to refuse to confirm or deny the existence of this record.

With regard to disclosure of this record, however, I note that the appellant's representations indicate that his request is aimed at information relating to himself and his family, and not other individuals, for the purpose of ensuring that all statements attributed to members of his family are accurately recorded. In my view, these submissions amount to a narrowing of the request with the result that this record is not responsive. Its only reference to the appellant consists of the family surname, and as I have mentioned, it contains no information about the meeting whatsoever. Since this record is not responsive to the request, the Board is not required to disclose it.

REASONABLENESS OF SEARCH

As noted at the outset of this order, the appellant's letter of appeal queried the lack of notes for two meetings described in the request (January 24 and February 1, 1995). Notes for the January 24 meeting were subsequently discovered. Since access was denied, these notes became part of Record 5. In my consideration of section 38(b), above, I indicated that I would be ordering disclosure of Record 5. However, no notes have been located with respect to the February 1 meeting.

The letter of appeal also queried the lack of internal documentation with reference to the frequent correspondence sent to the Board by the appellant and his family.

The usual standard required of institutions with regard to this issue states that, where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a **reasonable search** to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

The Board's representations take issue with this approach, indicating that under section 22(1)(a)(ii), the proper issue to be appealed is "whether such a record exists", not whether a reasonable search was conducted.

I dealt with this exact same submission, also made by the Board, in Order M-315. The Board's role in that order was the same as in this order: it was the government organization whose response to an access request had been appealed. In that order, I stated:

> As the Board correctly points out, section 22(1) implicitly authorizes appeals on the question of whether additional records exist. I agree that this is the issue to be decided. As an aid to making such determinations, the Commissioner's office has developed standards from which to assess whether or not additional records exist. To that end, many orders have stated that institutions are not required to prove to the degree of absolute certainty that additional records do not exist, but rather they are required to demonstrate that the search for responsive records was reasonable

> in the circumstances (e.g. Order M-282). This standard is consistent with the expectations placed on institutions under section 17(1) of the Act.

In other words, the standard of a reasonable search, which derives from the wording of the Act, is the measure to be applied to the issue of whether additional records exist. I see no reason to depart from this approach.

The Board's representations regarding the possible existence of additional records are supported by the affidavits of the school principal and the superintendent. These affidavits indicate that these two individuals are knowledgeable about the record-keeping practices of the school and the education office, respectively, and that they both conducted searches for responsive records including, but not limited to, meeting notes. The principal conducted three separate searches. Both these individuals also indicate that they do not recall taking notes at the February 1 meeting. The only records located have been disclosed, or were at issue in this appeal.

I find that the Board's search for responsive records was reasonable in the circumstances.

ORDER:

1. In this order, I have disclosed the existence of a record whose existence the Board refused to confirm or deny under section 14(5). Because the Board and/or and affected persons may apply for judicial review, I have decided to release this order to the institution and the affected persons in advance of the appellant. The purpose for doing this is to provide the Board and/or the affected persons with an opportunity to review the order and determine whether to apply for judicial review.

2. 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 order the Board to disclose Records 1a, 1b, 2, 3, 4 and 5 to the appellant within thirty-five (35) days of the date of this order, but not earlier than thirty (30) days after the date of this order. A copy of this order will be sent to the appellant upon the expiration of the fifteen (15) day period referred to above, unless a Notice of an Application for Judicial Review has been served on me.

3. Since I have found that it is not responsive to the request, I uphold the head's decision not to disclose to the list of individuals who attended the meeting of February 13, 1995.

4. In order to verify compliance with Provision 2, I reserve the right to require the Board to provide me with a copy of the records which are disclosed pursuant to that provision.

Original signed by: October 17, 1995
John Higgins
Inquiry Officer