



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-1458-I

Appeal MA-000370-1

Toronto District School Board



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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*) from a decision of the Toronto District School Board (the Board). The requester, now the appellant, sought access to copies of the presentations of two named individuals in respect of the Board's proposed Human Rights Policy and Procedure. In particular, the appellant sought access to the presentations to the Board made (i) during a public consultation held on January 25, 2000 (Record 1) and (ii) at a meeting of the Standing Committee of the Board held on April 12, 2000 (Record 2)

The Board located the relevant records and notified two affected parties of the access request. Only one affected party provided a response. The Board, relying on section 15(1) of the *Act*, refused access to Record 1 on the basis that the information in the record is currently available to the public. The Board also refused access to Record 2 on the grounds that disclosure would constitute an unjustified invasion of personal privacy under section 14 of the *Act*.

The appellant appealed the decision of the Board.

At mediation, the appellant confirmed that it was no longer requesting access to Record 1 and the Board then agreed that it would not be relying on section 15 of the *Act*.

I initially sent to the Board and an affected party a Notice of Inquiry that set out the issues in the appeal. Both the Board and the affected party submitted representations in response. The Board requested that its representations not be shared with the appellant based on this Office's confidentiality criteria. I then sent the Board an edited copy of its representations with proposed severances. The Board would not agree to share the edited version of its representations. Subsequently, I sent a summary of the Board's submissions to the affected party who also objected to the release of the Board's severed representations.

ISSUE:

The Board has requested that I withhold all of its representations from the appellant. The purpose of this interim order is to rule on this request.

DISCUSSION:

Procedure for Sharing of Representations

In the Notice of Inquiry cover letter to the Board I stated:

The representations you provide to this Office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The Inquiry Procedure document states:

Adjudicator seeks representations from second party

The Adjudicator will send the same or a modified Notice of Inquiry to the second party, along with a copy of the first party's non-confidential representations, seeking representations from that party.

Second party submits representations

This second party then has **three weeks** to submit representations. In its representations, the second party must indicate clearly, and in detail: which information in the representations, if any, the party wishes the Adjudicator to withhold from the other party, and its reasons for this request (see confidentiality criteria below).

The document letter later sets out the criteria for withholding representations:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of the record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and

- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of this matter

The Board's confidentiality request

The Board addresses the issue of confidentiality of representations in its written submissions:

We note that following from the request stated in the document entitled "INQUIRY PROCEDURE AT THE ADJUDICATION STAGE", many if not all of the enclosed submissions:

- make reference to the form and substance of the record to which access is sought;
- make reference to the individual to whom the information relates.

Accordingly, the Board respectfully requests that the Adjudicator withhold these submissions from the "second party" pursuant to confidentiality criteria (a) and (b) listed on p.2 of the document "INQUIRY PROCEDURE AT THE ADJUDICATION STAGE" (ie. disclosure of the submissions would reveal the substance of the record; information exempt under MFIPPA).

I informed the Board that I intend to sever those portions of its representations that will reveal the substance of the record and the personal information of an affected party. Assuming the severance of this type of information from its representations, the Board further claims confidentiality based on the fact that:

- a great part of the submissions are made with direct reference [to] or quotation of the record
- another substantial part of the document is made with specific reference to the format and structure of the record (... detailed references to the headings and markings on the record are given eg. how it is titled, identification headings etc.)
- most of the material edited from the proposal seems to be specific identifiers of the individual to whom the information relates ...; as the appellant is well aware of the name of the person to whom the information relates, this provides few assurances of confidentiality
- description of a confidential letter
- appellant is well aware of the Board's position in this matter and does not require a copy of the Board's submissions in order to be able to respond
- most of the salient case law is provided by the Commission with the Notice of Inquiry, so as to enable the appellant to frame submissions
- concern that severing portions of the record may lead to a 'broken telephone' type of communication where the party's position (including the institution's) may be misconstrued

The affected party objected, but other than generalized concerns about his privacy, he provided no further detail on the application of the criteria or otherwise.

FINDINGS:

Having reviewed the Board's representations, and its submission on the issue of confidentiality, I find that only portions of the representations should be withheld based on the confidentiality criteria.

The Board relies on confidentiality criterion (a), where disclosure of its submissions would reveal the substance of the record. I find that parts of the representations reveal the substance of the record, but I am satisfied that once my proposed severances are made, the remaining portions, including those that refer to the format and structure of the record, will not reveal the substance of the record and therefore do not meet the requirements of paragraph (a).

Most of the Board's submissions in support of confidentiality (personal information, confidential letter) fall within criterion (b), that is, where the representations contain information that would be exempt if contained in a record that was subject to the *Act*. I accept that the representations contain the personal information of an affected party. Accordingly, these portions will not be shared with the appellant. While the appellant is likely aware of the identity of the affected party, the remaining information after the severances is either not personal information or could not in the circumstances constitute an unjustified invasion of personal privacy.

Confidentiality criterion (c) states that the information should not be disclosed to the other party for another reason. To meet the test under (c), the Board must establish that the information was communicated in confidence, this confidentiality must be essential to the relationship between this Office and the Board, the community must believe that the relation between the Board and this Office should be fostered, and the injury to the relationship from disclosure would be greater than the benefit gained.

The Board objects to providing the appellant with representations where portions are removed if the remaining information creates a type of "broken telephone" communication that may be misconstrued. The severances I propose leave entire pages intact or with only the name of an identified individual removed or with whole paragraphs or sections deleted. I am satisfied that the remaining portions can be read without being misinterpreted.

The Board states that the appellant will not benefit from receiving the non-confidential portions of the representations since the appellant is aware of the Board's arguments. I am not satisfied that this is the case since I have not been provided with any evidence by the Board to support this.

In response to the Board's submissions under confidentiality criterion (c), the Board may have provided its representations to this Office with an expectation of confidentiality. However, I find that any injury to the relation between the Board and this Office that would result from disclosure of the information would not be greater than the benefit gained from the correct disposal of this matter. Simply put, the appellant requires the severed representations for fairness purposes, in order to meet the case against it. As a result, I intend to provide the appellant with a

copy of the Board's representations with my proposed severances. I have highlighted on a copy of the representations those portions that will not be shared with the appellant.

PROCEDURE:

I have attached to the Board's and affected party's copies of this interim order a copy of the representations that I intend to send to the appellant. I intend to send this copy no earlier than August 14, 2001 for the purpose of seeking representations from the appellant.

Original signed by:
Dawn Maruno
Adjudicator

July 30, 2001