



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-1612-I

Appeal MA-020099-1

Toronto District School Board



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto District School Board (the *Board*), under the Municipal Freedom of Information and Protection of Privacy Act (the *Act*). The requester (now the appellant) seeks access to certain records relating to a public school in Toronto and the anticipated lease of that school to another party, including:

[a] copy of the **demographic analysis** of the surrounding community prepared by Facility Services of TDSB in relation to the closure of McNicoll Public School and the determination of the long-term requirements for student accommodation in the community as required by the **Administrative Procedures under G.05 of the Policy of TDSB** for Leasing of Surplus Properties. [emphasis in original]

The Board located records responsive to the request and provided access to some of them, but denied access to the demographic report prepared by a consultant, based on the application of the discretionary exemptions in sections 7 (advice or recommendations) and 11 (economic interests of an institution) of the *Act*, and the mandatory exemption in section 10 (third party information).

The appellant appealed from the decision of the Board. During the course of mediation through this office, certain issues were narrowed or clarified. The only record in dispute is the demographic analysis prepared for the Board by a consultant. The Board indicates that it is relying on sections 7, 10 and 11(a), (c), (d), (e), (f) and (g) with respect to this record.

I sent a Notice of Inquiry to the Board, initially, and to an affected party (the consultant), inviting them to submit representations on the facts and issues raised by this appeal. I received representations from both of these parties. The affected party has stated, among other things, that it would not be harmed in any way if the report were to be released by the Board to another party, and defers to the Board's assessment of whether release of the information would be harmful to the Board's interests.

I have decided to seek representations from the appellant, in response to those of the Board. As the Board has asked me not to provide the appellant with a copy of its representations, the purpose of this interim order is to rule on this request.

DISCUSSION:

SHARING OF REPRESENTATIONS

Sharing of representations procedure

IPC Practice Direction 7 provides a detailed description of the relevant procedures with regards to the sharing of representations, including affidavits. That Practice Direction states:

General

The Adjudicator may provide representations received from a party to the other party or parties, unless the Adjudicator decides that some or all of the representations should be withheld.

Request to withhold representations

A party providing representations shall indicate clearly and in detail, in its representations, which information in its representations, if any, the party wishes the Adjudicator to withhold from the other party or parties.

A party seeking to have the Adjudicator withhold information in its representations from the other party or parties shall explain clearly and in detail the reasons for its request, with specific reference to the following criteria.

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 a 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 the litigation.

The Board's confidentiality request

In the cover letter to its representations of October 10, 2002, the Board requests that its representations be withheld from the appellant in their entirety. The Board was provided with a further opportunity to provide detailed submissions on the sharing of its representations with the appellant, and the application of the criteria in Practice Direction 7. The Board subsequently provided further submissions, on October 24, 2002.

Following this, I sent the Board a copy of its representations, showing in highlighting the portions I proposed to withhold from the appellant. I indicated in this letter my preliminary assessment that “apart from the severances I have highlighted in the attached copy of your representations of October 10, the information in those representations does not fall within the criteria in Practice Direction 7.”

I invited the Board to respond to my preliminary assessment, and to provide further submissions with reference to each portion of its representations that it believes should additionally be withheld. For assistance, I also provided some examples of the portions of its representations on which I was inviting its submissions. The Board has provided further submissions, dated January 24, 2003, in which it requests that four additional extracts in its submissions, beyond those which I highlighted, be withheld from the appellant.

Analysis

In its submissions of October 24 and January 24, the Board refers to the decision of the Divisional Court in *Toronto District School Board v. Ontario (Information and Privacy Commissioner)*, [2002] O.J. No. 4631, which upheld the jurisdiction of the Commissioner to disclose parties’ representations. In that decision, the Court also approved of the criteria established in Practice Direction 7 as appropriate limitations on the exercise of the Commissioner’s discretion to disclose representations.

In its submission of October 24, the Board again requests that the entire October 10 letter be withheld from the appellant.

The Board submits that the October 10 letter was provided to the IPC in confidence. In order for it to make its submissions full, frank and forthright, the Board must have the assurance that its actual submissions will not be disclosed to any other person in such a way as to render the IPC adjudication moot. The assurance of confidence is necessary, it is said, to allow for candour between the IPC and parties making submissions to it. Fracturing the confidentiality of that relationship will cause parties to be cryptic in their submissions to the IPC to the detriment of a comprehensive process. Unless the submissions received by the IPC from a party are full, frank and forthright, the efficacy of the IPC’s role will be undermined.

As has been observed elsewhere, the processing of an appeal under the *Act* raises unique confidentiality concerns (see Interim Order PO-2013-I). These concerns are the underlying policy basis for section 41(13) of the *Act*, as well as for the process outlined in Practice Direction 7, particularly the confidentiality criteria set out there.

Although certain aspects of an appeal to this office are unique, other aspects are not. As with any administrative tribunal, the IPC has a responsibility to ensure procedural fairness in the processing of appeals. Procedural fairness includes providing the appellant with the basis for the Board’s arguments in this appeal, in order that he is given a meaningful opportunity to refute these arguments. As stated by the Divisional Court in *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (at par. 1):

The nature of the process under review ... requires the maintenance of confidentiality. There can be no hearing in the usual sense and the statute limits access to representations [under the municipal *Act's* equivalent of section 52(13)]. In considering the procedure adopted by the Commissioner, this court should accord curial deference in light of the difficult circumstances faced by the Commissioner *subject, of course, to the overriding concerns of procedural fairness.* [my emphasis]

I appreciate that the prospect of having its representations shared with an appellant may affect the manner in which an institution makes its submissions. If there is a detriment in this, it must be weighed against the potential detriment to an appellant of having to make his or submissions "in the dark". Rather than undermining the ability of the IPC to provide a comprehensive process or fulfill its role, as suggested by the Board, the sharing of representations in accordance with Practice Direction 7 contributes to ensuring fairness throughout the inquiry, and the provision of better and more complete submissions from all participants.

I therefore do not accept the Board's submission that all of its October 10 representations should be exempted from disclosure.

The Board submits, in the alternative, that if I am not prepared to accept its position that the October 10 letter should be withheld in its entirety, then specific portions of the letter should be withheld. The Board submits that those portions of the record which disclose either information or the substance of information exempted from disclosure under the *MFIPPA* should be severed.

Criterion (a) – reveal substance of a record claimed to be exempt

With its submissions of October 24, the Board has provided a copy of its October 10 submissions with portions highlighted. The Board submits that those portions should be severed on the ground, among other things, that disclosure would reveal the "nature and extent of the advice and recommendations received by the [Board] from its consultant". It is said that disclosure of those portions would render moot any determination by me with respect to the release of the record itself.

The application of this criterion must be determined with reference to the nature of the exemption claimed for the information in the record. Prior orders have not equated the "substance of a record" with *any* information found in a record for which an exemption is claimed. In Interim Order MO-1539-I, in an appeal raising the application of sections 10, 12 and 14 of the *Act*, Adjudicator Laurel Cropley found that the identification of the categories of information found in General Ledger Accounts simply described the nature of the record, without revealing the "substance" of the record. In Interim Order MO-1533-I, involving the section 12 (solicitor-client privilege) exemption, I held that disclosure of information about the nature of records, the positions held by their authors, and the purpose for which records were created would not reveal the substance of a record claimed to be exempt and, indeed, was necessary to enable an appellant to address the institution's arguments.

Similarly, I find that disclosure of the general subject matter of the purported advice and recommendations received by the Board from its consultant would not reveal the advice or recommendations given, as asserted by the Board. It should be noted that the appellant is already

aware of the subject matter of the report as the Board has acknowledged that it is a record responsive to his request, and described it as a “demographic report” in its decision. The Mediator’s Report also confirms to the parties that the scope of this appeal is limited to the “copy of the demographic analysis of the surrounding community in relation to the closure of McNicoll Public School and the determination of the long-term requirements for student accommodation in the neighbourhood”. I also do not find that disclosure of other information the Board has highlighted, such as the date of the report, the number of facilities covered by the report, or the methodology employed by the consultant, would reveal “the nature and extent of the advice or recommendations”, as asserted by the Board.

I agree with the Board that I ought not to disclose information in the representations revealing the specific findings of the consultant. I find that this information meets criterion (a).

In its submissions of January 24, 2003, the Board focuses on four additional extracts from its representations, which it asks that I withhold from the appellant. The Board states that the first and second of these extracts “summarize the areas in which these consultants were retained to provide advice”. It is said that there is no reasonable distinction to be made between these extracts and other portions of the representations which I have agreed to sever. The Board submits that the disclosure of these two additional extracts would effectively disclose the substance of the record at issue by identifying the areas in which advice was given.

I do not agree with the Board’s submissions. I am satisfied that these two extracts can be meaningfully distinguished from other extracts I have agreed to withhold, and that revealing the “areas” in which advice was sought does not reveal the “substance” of the purported advice or recommendations. As I have indicated above, in a prior order involving the application of the solicitor-client privilege, (Order MO-1533-I), I ordered disclosure of representations revealing the nature of records, the positions held by their authors, and the purpose for which records were created. I found that disclosure would not reveal the substance of a record claimed to be exempt within the meaning of Practice Direction 7 and, indeed, was necessary to enable an appellant to address the institution’s arguments that the solicitor-client privilege applied. Similarly, in the case before me, I am satisfied that there is a significant difference between revealing the “areas” of purported advice from a consultant, and the specific content of that advice. Finally, as indicated above, the appellant is already aware of the subject matter of the report, and that it relates to the “determination of the long-term requirements for student accommodation.”

With respect to the third and fourth extracts which the Board refers to in its submissions of January 24, the Board submits that they are a summary of the information contained in the record at issue. As descriptions of the record, they should not be disclosed.

I am satisfied that the third and fourth extracts which the Board seeks to have withheld are not essentially distinguishable from other parts of the Board’s representations which I have decided to disclose, or information already known to the appellant. Further, I am satisfied that the information in these extracts is so generalized that it does not reveal the substance of the detailed information presented in the report, but only the form in which it is presented as well as the nature of the methodology used by the consultant, described in the broadest of terms.

Criterion (b) – information would be exempt if contained in a record

The Board also submits that the information it seeks to withhold from the appellant would be exempt under the *Act*.

I am satisfied that some of the information in the representations arguably meets this criterion, on the basis of the material before me and in the specific circumstances of this institution. I refer to certain specific information about the Board's economic activities.

Other information in the representations does not meet this criterion. I am not satisfied that information about the general subject matter of the consultant's report, its date, the number of facilities covered by the report and the methodology employed by the consultant, including the information in the four extracts referred to in the January 24, 2003 letter, would in itself be exempt under the *Act*. Nor am I satisfied that the general description of harm found in the representations on section 11 would in itself be exempt under the *Act*.

Criterion (c) - information should not be disclosed for any other reason

I have already discussed this aspect of the Board's submissions above.

In sum, I find that certain portions of the Board's October 10 representations, as described above, meet confidentiality criteria (a) or (b) of Practice Direction 7. The rest of those representations do not. Further, I find that the information in the parts of the Board's representations that I intend to share is vital to the appellant's ability to make meaningful submissions on the issues raised by this appeal.

Finally, it should be noted that a portion of the October 10 letter (on page 1) which I have agreed to withhold is concerned with the issue of sharing of representations only. The above discussion does not relate to this portion. It is not the practice of this office to share submissions made by a party on the sharing of representations. They do not address the substantive issues raised by the appeal, and are not matters on which the response of the appellant is sought.

The same applies to information about the identity of the consultant found throughout the representations, as well as what appears to be counsel's internal file identifier on page 6 of the October 10 letter.

PROCEDURE:

I have attached to the Board's copy of this interim order a copy of its October 10, 2002 representations, in the form in which they will be sent to the appellant. I intend to send this information, along with a Notice of Inquiry, to the appellant no earlier than **February 27, 2003** for the purpose of seeking representations from the appellant.

Original signed by: _____
Sherry Liang
Adjudicator

February 14, 2003 _____