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

ORDER MO-1708

Appeal MA-020408-2

Durham District School Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Durham District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In November of 2002, the requester (now the appellant) made a request under the *Act* to the Board for information on first term student grades by class, by curriculum (Grade 12 New Curriculum v. Ontario Academic Credit, or "OAC") and by three named secondary schools, in English, Science and Math courses. The appellant is the parent of a student attending a secondary school in the Board at the time of the request. He was interested in comparing the marks of students in the two groups encompassed by the "double cohort" competing for entrance to university. The appellant also sought information about the number of students who dropped each course, also by class, by course and by school.

As background, the double cohort was created when reforms to secondary school education resulted in a graduating class in 2003 comprised of students in two groups, the last class of the five-year secondary school program (OAC) and the first class of the new four-year program (Grade 12 New Curriculum). Accordingly, courses in English, Math and Science at the secondary school level are classified as University level Grade 12 (New Curriculum) courses or as OAC courses. Depending on the number of students enrolled, a course may be further divided into several classes, taught by different teachers. The Board describes the notion of classes as an "organizational construct", used to group students with a teacher at a particular time in the student's timetable.

According to the Board, a class of students may number from fewer than 10 to a maximum of 33. Even the number of students enrolled in a course varies from as few as 12 to 15 students, to 200 students, depending on the school.

The appellant's original request was the subject of an appeal to this office. Upon being told that the information did not yet exist at the time of his request, the appellant withdrew the appeal and re-submitted his request on February 6, 2003.

The Board responded by providing the regional medians for first semester final marks in English, Math and Science courses in Grade 12 and OAC. The Board also stated that it "does not prepare reports of the number of students initially enrolled in these classes who have dropped the course during the semester."

The appellant appealed the Board's decision, on the basis that it did not respond to his request and on the basis that the information sought should exist.

During mediation through this office, certain matters were narrowed or clarified. The appellant stated that he had not requested the information disclosed to him, i.e., the regional medians. He also raised the issue of there being a compelling public interest in disclosure of the records he requested, under section 16 of the *Act* (public interest override).

The Board stated that it does not maintain a record of marks by class list. It stated that the class list of marks is submitted by the teacher to the principal for review and, upon approval, is

returned to the teacher. The Board stated that marks by individual class are "not maintained in a record at the board or school level." There is an individual student transcript for each student in the schools.

The Board also stated that the record of the final marks for individual classes would identify individual students and/or groups of students, and relies on section 14(1) (unjustified invasion of personal privacy) to exempt this information from disclosure.

In relation to the other information requested, the Board stated that a list of students who have dropped specific classes does not exist. Removals are done through personal appointments with guidance teachers who process the removal from the class list. The Board stated that it is not the practice in schools to track the process of removal from class lists on a class or course basis.

I sent a Notice of Inquiry to the Board, initially, inviting it to make representations on the facts and issues raised by the appeal. The Notice of Inquiry and the representations of the Board were then sent to the appellant, who was invited to and did make representations in response. I also asked the Board to address specific issues raised by the appellant, and received brief submissions from the Board in reply.

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Board will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records he is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Board to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this case, as noted above, the appellant was interested in obtaining information about student grades and withdrawals, sorted by class, course and school.

In its decision letter the Board indicated that it was providing the appellant with the regional medians. It did not indicate whether the information existed in the format requested by the appellant and, if it did, whether the Board was denying access to that information. The Board also indicated that it "did not prepare reports" of the number of students initially enrolled in these classes who have dropped the course during the semester.

The response of the Board was ambiguous, and further contacts with the Board helped to clarify its position somewhat. The Board has acknowledged that individual teachers have a record of the grades for their classes, at least until the time when these grades are submitted to the principal. The class list of grades is returned to the teachers after the grades are entered onto the students' transcripts. In response to this request, the Board has never asked the teachers in the secondary schools identified by the appellant for their records of class grades. Nor is it apparent that the Board has even investigated whether the records still exist in the hands of individual teachers.

Further, although the Board has indicated that it does not "prepare reports" of student withdrawals from specific classes, the sample course lists provided to me establishes that this information exists at the very least by course and by school. Individual teachers may also have some records about withdrawals by class.

On my review, it appears that the Board's position that the records "do not exist" is based on the fact that information about grades is not maintained "at the board or school level". However, the Board does not deny that the records may exist at the level of individual classroom teachers, and it has made no effort to determine whether they are still retained by these individual teachers. It also does not appear that the Board has made an effort to determine whether individual teachers retain information about the number of student withdrawals, by class.

On the basis of the above, I find that the Board failed to conduct a reasonable search for records responsive to the appellant's request. The appellant's request was unambiguous. The Board essentially disagreed that the information requested was useful for the purpose for which the appellant intended. Instead of responding to the request, the Board chose to re-interpret the appellant's request and provide regional medians instead of class grades on the basis of its opinion that medians are more reliable and accurate as indicators of student performance.

However, it is not for the Board to pass judgment in this manner. Under the *Act*, it has an obligation to search for the records as requested. Upon receiving the appellant's request, the Board ought to have asked individual teachers for their class grades and information about student withdrawals. This is not to say that the appellant would have been provided with access to this information, for once the records are located, the Board is in a position to make an access decision. In this case, the Board limited its search for records because of its views on access, in effect refusing to conduct a complete search because it had decided to deny access.

Ordinarily, once a finding is made that an institution has not made a reasonable search for records, another search is ordered. In this case, however, it is unnecessary to order any remedy with respect to the information about student grades. The parties have had the opportunity to

address in full the issue of whether the information, even if located, ought to be disclosed and I conclude below that it would be exempt from disclosure under the *Act*. It would serve no purpose, therefore, to order a further search for this information.

This does not apply to the information about the number of students who withdraw from each class. Again, the parties have had the opportunity to make full representations on whether this information, if it is located, ought to be disclosed. Below, I find that no exemption applies to this information. I am not satisfied that the Board has conducted an adequate search for this information, and I will therefore direct the Board to conduct a further search and disclose any responsive information to the appellant.

PERSONAL INFORMATION

Under the *Act*, "personal information" is defined, in part, to mean recorded information about an *identifiable* individual [my emphasis], 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 [paragraph (h)].

I am satisfied that information about the grades of an identifiable individual would constitute that person's "personal information". The issue raised by this appeal is whether information about grades without names, and organized in the format requested by the appellant, would also qualify as personal information. In Order P-230, former Commissioner Tom Wright stated:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

In the appeal before me, therefore, I must decide whether any students whose grades are released in the format requested by the appellant could reasonably be identified given the information contained in the record and the surrounding circumstances (see Order PO-2191; see also the decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300).

In the Notice of Inquiry sent to the Board, I noted that the appellant does not seek the names of any individual students. I asked the Board why it believes that individual students will be identified, if the information is provided to the appellant without names. As indicated above, the Board provided an explanation of the organization of students into classes and courses, and the difference between these two. The Board has stated that a class may have as few as 8 to 10 students, and a course as few as 12 to 15. The Board submits that if grades are released by class, or even by course, where there is a small number of students in the group, the achievement of the students in the group will become known with the public release of the marks. The Board submits that students know their own relative standing in a class by the end of the semester. Further, if there are failures listed, the group will know the identity of the students most likely to have failed.

The Board has no objection to providing the appellant all marks for all students in the Board, for each course requested.

With its representations, the Board attached samples of the results for specified courses at the three secondary schools which are the subject of the request. One course at one of the schools has a total of 12 students, one of which is shown as withdrawn. The grades for the remaining 11 students are listed. Other courses range in enrollment from 19 students to over 100.

The appellant disputes that the disclosure of grades by class or course will lead to the association of any given student with a grade. He states that "a group of 20 to 33 marks from an unidentified class in a school is not identifiable to the individual." He also states that he has been willing to accept the information in a form that does not name the school, for instance, by using the designations "School A, B and C".

Analysis

On my review of the representations and the material before me, I find that the release of data in the format sought by the appellant could reasonably be expected to lead to the identification of the grades of some students. I accept that some of the classes in these schools may contain as few as 8 or 10 students, and that even some of the courses at a school may contain as few as 12 or 15 students. Based on the material before me, it appears that in classes or courses of this size, the number of students given failing grades may number only one or two. I accept the Board's contention that students generally know their own relative standing in a class by the end of the semester, and that they will know the identity of the students most likely to have failed. The release of the grades for groups of this size could be expected to result in disclosure of the marks of those students, at the very least.

I therefore find that the organization of student grades into classes or courses at the specified schools could reveal the personal information of some students. In the format requested by the appellant, the information contains the personal information of identifiable individuals.

The appellant has indicated that he is willing to accept the grades by class or course, but without identification of the school. On my review of the material before me, I find that this would not serve to remove the likelihood of the identification of particular students with their grades. It is apparent that the schools for which the appellant has requested information vary in their size and, in my view, reasonable assumptions could be made about what schools the information is referable to.

Neither party made representations on whether information about the number of students who dropped each course, whether sorted by class or by course, contains personal information and my conclusion is that it does not. The appellant has merely requested aggregate numbers, without a link to individual students. Since it is not personal information, section 14(1) does not apply to exempt this information from disclosure. No other exemption has been claimed and I will therefore order disclosure of the information about the number of student withdrawals organized by class (if such information is found in a further search), by course and by school.

As I have found the information about student grades, in the format requested by the appellant, to contain the personal information of some students, I will turn to consider whether this information is exempt under section 14(1).

UNJUSTIFIED INVASION OF PERSONAL PRIVACY

Where a requester seeks the personal information of other individuals, as in this case, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In this case, the only relevant part of section 14(1) is section 14(1)(f), which permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Sections 14(2) and (3) provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Section 14(4) has no application in this case.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be applied in favour of disclosure.

The Board has referred to the presumption in section 14(3)(d) of the Act, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history;

The Board has also referred to the criteria in sections 14(2)(f) and (i). Although the appellant disputes the application of any of the provisions of section 14, on the basis that the information cannot be linked to any identifiable individual, in the alternative, he submits that section 14(2)(a) could apply. These provisions of section 14(2) state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(f) the personal information is highly sensitive;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The Board also cites the provisions of the *Education Act* in support of its position that the information is highly sensitive.

On section 14(2)(a), the appellant describes the concerns of parents over the marking of students in the "double cohort". Although various educational officials have expressed the view that the students in the two groups comprised in the double cohort have comparable grades, given the importance of individual grades for access to post-secondary education, he wishes to have the information in order to make his own comparison.

Analysis

I am satisfied that information about student grades is highly sensitive. The provisions of the *Education Act* support the Board's position in this regard. Section 14(2)(f) is therefore relevant to a determination of whether disclosure would constitute an unjustified invasion of personal privacy. Further, in my view, this criterion weighs heavily against disclosure.

Based on the representations of the appellant, I also find that section 14(2)(a) is relevant. Disclosure of student grades is relevant to and desirable for the purpose of subjecting the activities of the Board to public scrutiny, especially given the concerns about the "double cohort". However, it should be noted that the type of public scrutiny identified by the appellant could be served by disclosure of student grades in several different formats. It is not clear to me that the particular format in which the appellant has requested the information is the only one necessary to ensure this public scrutiny. Other types of disclosure, including that offered by the Board, would also allow for a measure of public scrutiny. In these circumstances, although I find section 14(2)(a) relevant, I do not find it a strong consideration in favour of disclosure.

After reflection, I am satisfied that the considerations weighing against disclosure are stronger than those in favour of disclosure. Although I make no specific finding about whether the presumption under section 14(3)(d) applies to the information, on an application of section 14(2), I find that disclosure of the information would constitute an unjustified invasion of personal privacy. I therefore find that section 14(1) applies to exempt this information from disclosure.

It remains to consider whether the application of section 14(1) is overridden by section 16.

PUBLIC INTEREST IN DISCLOSURE

Section 16 of the *Act* provides:

> 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. [emphasis added]

It has been established in a number of prior orders that section 16 applies only if two requirements are met. First, there must exist a *compelling* public interest in the disclosure of the record. Second, that public interest must *clearly* outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

It has been said that in order to find a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984, referred to in Order PO-1986).

The appellant submits that his interest in seeking the information is to ensure that the two groups that compose the "double cohort" are treated equally and that there is equity of grades and opportunity to apply to university. He states that he knows of no other mechanisms to serve the public on this issue. He submits that many parents wonder if there is equity in the grading practices as between these two groups, and if their children from the OSS (New Curriculum) part of the cohort will have an equal chance for admission to university. In order to be reassured that their children have had an equal opportunity for admission, there is a need to compare the marks between members of the two groups in the double cohort in a comparative setting or school.

The Board quotes from correspondence from the appellant in which he describes himself as "an advocate for his own child" and as seeking the information in order to "determine if my daughter has been discriminated against by the marking and grading practices of the [Board]." The Board states that the request does not appear to be based on a compelling public interest.

Analysis

Although the appellant clearly has a personal interest in the subject of the request, being the parent of a student in the double cohort, he has also identified a broader public interest. The impacts of the double cohort have been discussed in many a public forum, and the appellant has enclosed two newspaper reports documenting some of the public discussion on the issue. I am satisfied that the appellant has shown a public interest in the disclosure of the information sought.

Consistent with my views on section 14(2)(a) above, I am not, however, certain that disclosure of the information by *class* or by *course within a school* is "compelling" within the meaning of section 16. Moreover, I am not convinced that disclosure of the information by class or course within a school clearly outweighs the privacy interest protected by the section 14(1) exemption. The Board has indicated that it does not object to providing the marks for students in the courses, across the district. I find that this would, to some extent, serve the public interest identified by the appellant, in that it would allow for a comparison of the marks of the two groups in the double cohort. Although I recognize that the appellant would prefer the information to be provided in greater detail, I am not convinced that the public interest served by a greater level of disclosure justifies the incursion into personal privacy that it would entail.

In sum, I find the information about student grades in the format requested by the appellant to be exempt from disclosure under section 14(1).

The information about the number of student withdrawals is not exempt. Given my findings about student grades, it is not clear whether the appellant still wishes to receive this information in the format he originally specified (i.e., by class, course and individual school). I will therefore permit him some time to contact the Board about this. If the appellant still wishes to receive the information about student withdrawals in the manner specified in his request, the Board is to conduct a search for the information and disclose it to him.

ORDER:

1. I uphold the decision of the Board to deny access to the information about student grades.

2. I do not uphold the decision of the Board to deny access to the information about student withdrawals.

3. If the appellant contacts the Board within thirty days of this decision indicating that he wishes to have the information about student withdrawals in the format specified in his request, the Board is ordered to conduct a further search for this information. Any information located that is responsive to the appellant's request will be disclosed to him by no later than thirty days following the date on which the appellant contacted the Board pursuant to the above.

Original signed by: November 7, 2003
Sherry Liang
Adjudicator