



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

ORDER PO-2413

Appeal PA-030166-1

Education Quality and Accountability Office



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NATURE OF THE APPEAL:

This appeal arises from a decision of the Education and Accountability Office (the EQAO) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for access to a copy of his daughter's (the student) October 2002 marked grade 10 Ontario Secondary School Literacy Test (the OSSLT).

The EQAO denied access to four responsive records, consisting of the four booklets completed by the student that comprise the OSSLT, pursuant to sections 18(1)(h) (examination questions and answers) and 10(2) (severability) of the *Act*. In citing section 10(2), the EQAO stated that access to the test answers has been denied because they cannot reasonably be severed from the test questions without disclosing the test questions.

The appellant appealed the EQAO's decision.

No issues were resolved during the mediation stage of the appeal process and the file was referred to me for inquiry.

During the early stages of the inquiry process, Adjudicator Donald Hale issued Order PO-2179 in which issues very similar to the ones in this appeal are addressed. Adjudicator Hale found that section 18(1)(h) applied to the portions of the OSSLT at issue in that appeal.

In light of Order PO-2179, I decided first to seek representations from the appellant. I provided the appellant with a Notice of Inquiry as well as a copy of Order PO-2179 for review and comment. The appellant submitted representations on the application of section 18(1)(h) to the information at issue and also raised the application of section 23 (public interest override).

I then sent a Notice of Inquiry to the EQAO, seeking representations on the application of section 18(1)(h) and section 23. I also sought the EQAO's submissions on the relevance of Adjudicator Hale's findings in PO-2179 to the circumstances in this appeal. I included a copy of the non-confidential portions of the appellant's representations with the Notice. The EQAO also submitted representations.

Following the receipt of the parties' representations, Adjudicator Frank DeVries issued Order PO-2366-I, which also deals with a request for information similar in nature to the request at issue in this appeal. Accordingly, I decided to seek supplementary representations from the appellant and the EQAO simultaneously on the impact, if any, of Adjudicator DeVries' analysis and findings in Order PO-2366-I on the issues in this appeal.

In addition, I confirmed that the appellant has lawful custody of the student, within the meaning of section 66(c) of the *Act*, and therefore stands in the student's shoes for the purposes of this appeal. Accordingly, I invited the EQAO to address the possible application of section 49(a) since the records may include the student's personal information.

The EQAO provided supplementary representations, and identified that it had now decided to provide the appellant with Booklets 1, 2 and 3 of the student's OSSLT. In support of this decision, it states:

The EQAO has re-exercised its discretion under sections 18(1)(h) and 49(a) of the *Act* and has decided to provide access to the appellant's October 2002 Ontario Secondary School Literacy Test (questions and answers contained in Booklets 1, 2 and 3).

The EQAO continues to reserve the right under section 18(1)(h) of the *Act*, not to disclose those questions used for field testing purposes (Booklet 4), so that they may be incorporated into future tests.

The EQAO attached to its representations a copy of the cover letter it sent to the appellant, in which it stated that it was disclosing Booklets 1, 2 and 3 of the student's OSSLT to him.

In his supplementary representations, the appellant confirmed that he had received the EQAO's new decision letter and Booklets 1, 2 and 3 of the student's OSSLT. However, he indicated that the information received was not entirely responsive to his original request as the three booklets were not "marked". This raised a new issue of reasonable search regarding the existence of information that is responsive to the appellant's initial request for a "marked" OSSLT.

As a result of this new issue I sought further supplementary representations from the EQAO on its efforts to locate information responsive to the appellant's request for the "marked" or "graded" OSSLT completed by the student. In response, the EQAO provided our office with detailed information regarding the marking, recording and storing of OSSLT test result scores for Booklets 1, 2 and 3. This information included the "Individual Student Report (ISR)" and the "individual student mark sheet" for those parts of the student's OSSLT. The EQAO, subsequently, issued a new decision letter to the appellant along with this detailed marking, recording and storing information. Having now received this new information, the appellant confirmed that Booklets 1, 2 and 3 and the marking information corresponding with those booklets and Booklet 4 were no longer at issue. However, the appellant indicated that he was still interested in the contents of Booklet 4.

Recently, Adjudicator DeVries issued Order PO-2387 involving circumstances very similar to those in this appeal. In that case, the EQAO decided to disclose Booklets 1, 2 and 3, and to not disclose Booklet 4, in regard to the OSSLT completed by the appellant. After hearing from the appellant in that case on the EQAO's exercise of discretion, its decision to release Booklets 1, 2 and 3, and withhold Booklet 4, and the application of the section 23 public interest override, Adjudicator DeVries upheld the EQAO's decision to not disclose Booklet 4.

In light of Adjudicator DeVries' decision in Order PO-2387, I invited the appellant to submit supplementary representations on the EQAO's exercise of discretion, and in particular its decision to release Booklets 1, 2 and 3 but not Booklet 4, and the application of the section 23 public interest override. I provided the appellant with a copy of Order PO-2387 for review. The appellant submitted further representations in response.

RECORDS:

The one record remaining at issue is Booklet 4 of the October 2002 OSSLT completed by the student. The booklet contains questions and answers.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 49(a), read in conjunction with section 18(1)(h), may apply to exempt the information at issue in Booklet 4, it is necessary to decide whether this record contains "personal information" and, if so, to whom it relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the education of the individual (paragraph (b)), any identifying number assigned to the individual (paragraph (c)), and 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)).

The EQAO did not expressly make representations on this issue. However, I note that the circumstances in this case are very similar to those in Order PO-2366-I. In Order PO-2366-I, the information at issue was the OSSLT completed by the appellant, including the questions and answers for all four booklets, whereas in this case the information at issue is limited to Booklet 4 of the OSSLT completed by the student. In Order PO-2366-I the EQAO states:

The information requested includes four test booklets containing the test questions and the answers written by the appellant. While the test questions do not qualify as "personal information" under section 2(1) of the *Act*, the answers may seem to qualify under subsection (b) pertaining to "information relating to the education of the individual." The booklets have a bar code through which the personal information of the test writer may be accessed. Therefore, although this information cannot be obtained simply by providing access to the booklets, we are dealing with the personal information of an identifiable individual.

However, it is the position of the EQAO that at least some of the test answers could lead to an accurate inference being drawn about the test questions and therefore, since section 18(1)(h) would apply, the answers - though "personal information" - would qualify for exemption under section 49(a) of the *Act*, given the EQAO policy on re-use of test questions [outlined later in the representations - see below].

In Order PO-2366-I Adjudicator DeVries concluded that the records at issue contained the appellant's personal information. In reaching that conclusion Adjudicator DeVries states:

I am satisfied that the records contain the appellant's "personal information" as defined above. The appellant's responses to the questions clearly contain the appellant's personal information as defined in section 2(1), including paragraphs (b), (c) and (h) of that section. Furthermore, the request is for the exam booklets, which consist of both the questions and the appellant's answers. Accordingly, the records qualify as the appellant's personal information in the circumstances.

Clearly, if the request had simply been for the questions alone, the record would not contain the appellant's personal information.

On my review of Booklet 4 in this case I find that this information is identical in form to that considered by Adjudicator DeVries in Order PO-2366-I. Therefore, I apply Adjudicator DeVries' reasoning to the facts of this appeal. I find that the contents of Booklet 4, containing both test questions and the student's answers, qualify as her personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/EXAMINATION QUESTIONS AND ANSWERS

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The EQAO is relying on section 49(a) to exempt Booklet 4 from disclosure on the basis of the exemption contained in section 18(1)(h).

I will consider whether the records qualify for exemption under section 18 as a preliminary step in determining if section 49(a) applies.

EXAMINATION QUESTIONS AND ANSWERS

The EQAO submits that the records are exempt from disclosure under the discretionary exemption in section 18(1)(h) of the *Act*, which reads:

A head may refuse to disclose a record that contains,

questions that are to be used in an examination or test for an educational purpose;

In order for section 18(1)(h) to apply the EQAO must establish that the questions in Booklet 4 “are to be used in an examination or test” and that their use is “for an educational purpose”.

As indicated above, this office has recently issued two decisions (Orders PO-2179 and PO-2366-I) that have provided a clear and consistent interpretation regarding the application of the section 18(1)(h) exemption to the type of information at issue in this appeal.

In Order PO-2179, Adjudicator Hale found the information at issue, consisting of the questions contained in the four booklets that comprised the February 2002 OSSLT, exempt from disclosure under section 18(1)(h). In Order PO-2366-I, Adjudicator DeVries found the questions and answers in the four booklets that comprised the October 2002 OSSLT exempt from disclosure under section 18(1)(h) and under section 49(a).

As stated above, the Booklet 4 at issue in this appeal is identical in form to the one considered by Adjudicator DeVries in Order PO-2366-I. The difference is in the content of the answers.

In finding that section 18(1)(h) applied to the four booklets that comprised the October 2002 OSSLT in Order PO-2366-I, Adjudicator Devries states:

Based on the extensive information provided by the EQAO in support of its contention that the test questions which appear on the record at issue will, in fact, be re-used on future tests, and based on Adjudicator Hale’s finding in Order PO-2179, I am satisfied that the test questions in the record are to be used in an examination or test for the purpose of section 18(1)(h). I am also satisfied that the EQAO has provided me with sufficient evidence to establish that it intends to re-use the questions in future examinations. The description of the re-use protocol and the steps taken by the EQAO to ensure the integrity of the testing system demonstrate that the questions will be re-used.

In addition, and based on the reasoning of Order PO-2179, I find that the test questions in the record are to be used in an examination or test “for an educational purpose” within the meaning of section 18(1)(h). As identified in Order PO-2179, the mandate of the EQAO, described in the *Education Quality and Accountability Office Act*, includes an evaluation of the quality and effectiveness of elementary and secondary education. Part of that mandate, which clearly has an educational purpose, includes the development, administration and marking of testing materials completed by elementary and secondary students. The Test, which is the record at issue in this appeal, was created as part of that educational mandate.

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Accordingly, I am satisfied that the records at issue contain questions to be used in an examination or test for an educational purpose, and therefore qualify for exemption under section 18(1)(h) and, consequently, section 49(a).

In this case, as stated above, the EQAO has re-exercised its discretion and released Booklets 1, 2 and 3 to the appellant. Accordingly, the issue for me to determine is whether the reasoning in

PO-2179, which was applied in PO-2366-I, should be applied to the information contained in Booklet 4.

The parties' representations

Just as it did in Orders PO-2179 and PO-2366-I, the EQAO has provided very detailed submissions regarding the application of section 18(1)(h) in the context of this appeal. At the time it made its initial submissions Booklets 1, 2, 3 and 4 were all at issue. At this stage, only Booklet 4 remains at issue. However, the EQAO continues to rely on its representations to deny access to the contents of Booklet 4.

The EQAO has described in detail the protocol and formula developed to formalize its policy of re-using OSSLT questions and the structure of the test forms themselves.

In support of its position, the EQAO reiterates a number of the submissions it made in Orders PO-2179 and PO-2366-I. It states:

The EQAO submits that the material in question qualifies as a question or questions to be used in an examination or test.

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OSSLT test items are not single-use items. Due to the extremely high cost and length of time it takes to develop new test items [...], the EQAO has a policy of item re-use. The agency has recently developed a protocol and schedules to formalize this policy, to be implemented starting in October 2004, when the first cohort to have taken the test officially (those who entered Grade 9 in September 2000 and took the test in February 2002) shall have graduated. Under the protocol, all test questions, subject to very limited exceptions, are considered secure and may be re-used.

Ideally, test items and even whole tests (called test forms) could be re-used from year to year, a practice not uncommon in high school and university examinations. However, since a student who fails has two opportunities to retake the OSSLT before graduating, items cannot be re-used until at least the third year after their most recent use (in practice it will often be four years).

Test booklets are never returned to students, and in fact are void of grades or marks (which are entered by hand-held devices), a deliberate policy to minimize bias when marking is required. Students who fail the test are provided with feedback through the Individual Student Report, . . . [which] details the student's performance under the marking rubric but does not incorporate matter from the test itself. The re-use policy allows the EQAO to control long-term development costs and ensures that different tests are comparable over time and that high-stakes testing remains equitable and consistent.

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[T]he materials under appeal referenced in Order PO-2179 are *identical* to the material requested in this case. Based on the findings in PO-2179, EQAO submits that there has already been a finding of fact by the Information and Privacy Commission that OSSLT test booklets are exempt under section 18(1)(h) of the [Act].

With regard to whether the questions in Booklet 4 “are to be used in an examination or test”, the appellant states:

[This requirement under section 18(1)(h)] implies, not an open-ended time parameter but one of a more immediate nature...i.e...within the parameter of a year or so...if open-ended was the case, the section would read... “questions that are to be used in the future in any examination or test for an educational purpose”...this would reflect an open-ended intention of this discretionary exemption.

Regarding the “educational purpose” element under section 18(1)(h), the main thrust of the appellant’s representations appears to be that the OSSLT has no “educational purpose” since the marked tests are not returned to the students who write them and the students do not have the opportunity to evaluate where their mistakes were made so that the necessary corrective steps can be made to enable them to pass the test in the future.

The appellant views standardized tests administered at the elementary school level as serving more of an educational purpose because the marked tests are returned to the individual students with feedback to help them improve their scores.

The appellant questions how a test, developed by the EQAO, sent to high school students across Ontario and returned to the EQAO for marking, all under the cloak of secrecy, can provide any educational value. The appellant, therefore, concludes that the OSSLT does not meet the “educational purpose” component in section 18(1)(h).

In response to the appellant’s contention that the OSSLT does not meet the “educational purpose” element in section 18(1)(h), the EQAO states in reply:

The *Ontario Secondary Schools, Grades 9 to 12: Program and Diploma Requirements, 1999* (3.1.4, attached), incorporates successful completion of a "Provincial Secondary School Literacy Test" as one of the requirements to obtain the Ontario Secondary School Diploma (OSSD). It also describes the educational purpose of the test.

The test will serve both to determine whether students have acquired the reading and writing skills considered essential for literacy, and to provide confirmation that those students who have completed the test successfully have attained the provincial expectations for

literacy. The test will identify those students who have not demonstrated the required skills and will identify areas in which these students need remediation...

Reference is made to the representations above, and the following finding of adjudicator Hale in Order PO-2179:

Similarly, I have no difficulty in making a finding that the questions which form the record at issue are to be used in an examination or test "for an educational purpose" within the meaning of section 18(1)(h). The mandate of the EQAO described in section 3 of the *Education Quality and Accountability Office Act* includes an evaluation of the quality and effectiveness of elementary and secondary education. Part of that mandate, which clearly has an educational purpose, includes the development, administration and marking of testing materials completed by elementary and secondary students. The test which forms the subject matter of the request was created as part of that educational mandate. [emphasis added]

In its reply representations the EQAO makes the following comments in regard to its decision to not disclose Booklet 4:

[Booklet 4] is related to field testing and equating and [does] not form any part of the student's pass or fail mark. These questions could be used at a future date.

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The EQAO continues to reserve the right under section 18(1)(h) of the Act, not to disclose those questions used for field testing purposes (Booklet 4), so that they may be incorporated in future tests. With regard to the answers to the questions in Booklet 4, the EQAO maintains its original position that "at least some of the test answers could lead to an accurate inference being drawn about the test questions" and therefore section 18(1)(h) and section 49(a) of the Act would apply. The EQAO references Interim Order PO-2366-I, which refers to Order PO-2179, in support of this position regarding the questions in Booklet 4. Both of these Orders accepted the position that the test questions at issue were to be re-used in accordance with the Re-use Policy of the EQAO.

The appellant provides sur-reply representations in response to the EQAO's decision to continue to withhold Booklet 4. However, these representations do not directly address the EQAO's reliance on section 49(a), read with section 18(1)(h), to deny access to Booklet 4. The appellant expresses frustration with the EQAO's previous failure to disclose to students, teachers and school boards that only Booklets 1, 2 and 3 count towards a student's pass or fail mark. The appellant also disputes the EQAO's position on the number of "legitimate" opportunities a student has to rewrite the OSSLT in order to graduate on time.

Analysis and findings

I acknowledge the appellant's apparent frustration with the EQAO's rather late admission that Booklet 4 of the OSSLT does not form part of a candidate's test score. Perhaps the EQAO could have been more forthcoming with this information earlier in the process. Nevertheless, the issue for me to decide is whether Booklet 4 contains questions that are to be used in an examination or test for an educational purpose.

As stated above, in order for section 18(1)(h) to apply the EQAO must satisfy the following two elements: the questions in Booklet 4 "are to be used in an examination or test" and their use is "for an educational purpose".

Dealing with the first element, as in Orders PO-2179, PO-2366-I and PO-2387, the EQAO has provided detailed representations on its protocol regarding the re-use of test questions. I note that the appellant has also presented his views on the interpretation of this element. Adjudicator DeVries' analysis of this issue in Order PO-2387, with reference to Adjudicator Hale's findings in Order PO-2179, is helpful. Adjudicator DeVries states:

Adjudicator Hale reviewed the EQAO's representations, which described in detail the process of re-use of questions by the EQAO, and which also acknowledged that some questions may not be re-used, depending on whether the subject matter becomes stale-dated or if for some reason an item does not "play well" during the live administration. Notwithstanding the EQAO's acknowledgement that some questions may be "dropped" from future tests, Adjudicator Hale found that the questions qualified for exemption under section 18(1)(h) of the *Act*. He stated:

Based on the extensive information provided by the EQAO in support of its contention that the test questions which appear on the record at issue will, in fact, be re-used on future tests, I find that the questions in the record are to be used in an examination or test for the purpose of section 18(1)(h). I am satisfied that the EQAO has provided me with sufficient evidence to establish that it intends to re-use the questions in future examinations. The description of the re-use protocol and the steps taken by the EQAO to ensure the integrity of the testing system demonstrate that the questions will be re-used until such time as they are removed in accordance with the provisions set forth in the protocol.

Similarly, I have no difficulty in making a finding that the questions which form the record at issue are to be used in an examination or test "for an educational purpose" within the meaning of section 18(1)(h). The mandate of the EQAO described in section 3 of the *Education Quality and Accountability Office Act* includes an evaluation of the quality and effectiveness of elementary and secondary education. Part of that mandate, which clearly has an educational purpose, includes the development,

administration and marking of testing materials completed by elementary and secondary students. The test which forms the subject matter of the request was created as part of that educational mandate.

Furthermore, in Interim Order PO-2366-I, I found that the questions and answers qualified for exemption under section 18(1)(h), notwithstanding that not all of the questions would find their way into future tests according to the EQAO's re-use protocol. I stated:

The EQAO adds that the questions which comprise the record at issue are not simply "dumped" into a test bank for possible, unscheduled future use. Rather, the re-use protocol sets out in detail exactly when and under what circumstances questions would be re-used. It submits that 50% of the test questions in the record will find their way into future tests according to the re-use scheme set out in the protocol.

Based on the reasoning in Orders PO-2179 and PO-2366-I, I am satisfied that the information in Booklet 4 qualifies for exemption under section 18(1)(h) of the *Act*. Although I accept the appellant's position that the EQAO's submissions do not state definitively that the test questions from Booklet 4 will be used in future tests, in my view this does not mean that they do not qualify for exemption under section 18(1)(h). It is clear from the representations of the EQAO that Booklet 4 is the portion of the Test that is used by the EQAO for "field testing purposes ... so that the questions may be incorporated into future tests." As I read the EQAO's representations, including the information referenced in the previous orders provided to the parties, these questions will be used unless "an item for some reason does not 'play well' during the live administration or is found to be defective or flawed". On that basis, Booklet 4 was apparently used to provide this opportunity to allow the "live administration" of the questions to determine whether the questions would "play well" in future tests. It appears that the sole purpose of the questions in Booklet 4 is to review the adequacy of those test questions for future use – as no part of Booklet 4 is used to form any part of the student's pass or fail mark.

With regard to the first element, the appellant takes a narrow interpretation of the phrase "questions that are to be used in an examination or test", implying that the questions at issue must be re-used within a limited time-frame of "a year or so". I do not accept the appellant's view.

This issue has been addressed by the EQAO through its item re-use policy. I am satisfied that all of the test questions, subject to limited exemptions, may be re-used within a reasonable period of time as prescribed by the policy. Owing to the number of opportunities a student would have to retake the OSSLT before graduation, I accept that items cannot be re-used until at least the third year after their most recent re-use. The EQAO's item re-use policy has been explored

extensively in Orders PO-2179, PO-2366-I and PO-2387 and accepted in regard to establishing the first element under section 18(1)(h). I see no reason in these circumstances to depart from this view.

Accordingly, I am satisfied that Booklet 4 contains questions to be used in an examination or test and that, accordingly, the first element of section 18(1)(h) has been established in the circumstances of this case.

Turning to the second element, I must determine whether the questions in Booklet 4 are to be used for an educational purpose.

The appellant contends that the OSSLT does not meet the “educational purpose” component in section 18(1)(h) since the development and administration of the OSSLT is conducted under “the cloak of secrecy”. He, therefore, questions how the EQAO’s approach can provide any “educational value” to students completing the test.

In my view, the EQAO has provided strong evidence to support the conclusion that the OSSLT, and in this case Booklet 4 specifically, does meet the educational purpose component of section 18(1)(h). It is clear from the EQAO’s representations that the OSSLT serves as both a benchmark for literacy and a prerequisite for the attainment of a secondary school diploma. In addition, for those who do not receive a passing grade, the OSSLT helps to identify the reading and/or writing skills that require remediation. I note Adjudicator’s Hale’s finding in Order PO-2179, set out above, that the mandate of the EQAO as described in section 3 of the *Educational Quality and Accountability Office Act* has an educational purpose. This educational purpose encompasses the evaluation of the quality and effectiveness of elementary and secondary school education through the development, administration and marking of testing materials completed by elementary and secondary school students. Therefore, while the appellant may take issue with the EQAO’s development and administration of the OSSLT, I find that the questions in Booklet 4 meet the educational purpose element in section 18(1)(h) of the *Act*.

Having found above that Booklet 4 contains the student’s personal information, I am, therefore, satisfied that this information qualifies for exemption under section 18(1)(h) and, consequently, section 49(a) of the *Act*.

Having made these findings it does not necessarily follow that the exemption in section 18(1)(h) or section 49(a) should be relied on by the EQAO in the circumstances of this appeal. Both of these exemptions are discretionary and so I must review the EQAO’s exercise of its discretion in applying these exemptions.

EXERCISE OF DISCRETION

Introduction

As stated above, the section 18(1)(h) and 49(a) exemptions are discretionary, and permit the EQAO to disclose information, despite the fact that it could be withheld. On appeal, this office may review the EQAO’s decision to determine whether it exercised its discretion and, if so, to

determine whether it erred in doing so. However, this office may not substitute its own discretion for that of the institution [see section 54(2)]. This office may find that an institution erred in its exercise of discretion where, for example:

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations [Order MO-1573].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:
 - information should be available to the public;
 - individuals should have a right of access to their own personal information;
 - exemptions from the right of access should be limited and specific;
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking their own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

- the age of the information; and
- the historic practice of the institution with respect to similar information.

As indicated above, during the course of this inquiry the EQAO re-exercised its discretion, and disclosed Booklets 1, 2 and 3 to the requester. It also chose not to disclose Booklet 4.

The parties' representations

The EQAO provided the following representations regarding the re-exercise of its discretion in this appeal. It states:

The EQAO has re-exercised its discretion under sections 18(1)(h) and 49(a) of the *Act* and has decided to provide access to the [student's] October 2002 Ontario Secondary School Literacy Test (questions and answers contained in Booklets 1, 2 and 3).

The EQAO continues to reserve the right under section 18(1)(h) of the *Act*, not to disclose those questions used for field testing purposes (Booklet 4), so that they may be incorporated into future tests.

With respect to the difference in treatment between Booklets 1, 2 and 3 and Booklet 4, the EQAO states:

Common questions comprise approximately 80% of the test. The remainder of the test questions (Booklet 4 in this case) are related to field testing and equating and *do not form any part of the student's pass or fail mark*. These questions could be used at a future date. [emphasis added]

In response to the EQAO's representations, the appellant states:

The Commissioner may find that the EQAO has erred in holding back book 4 and has done so in bad faith or for the improper purpose of holding back some portion of the test so that a [precedent] will not be established where the EQAO must return all of the marked Grade Literacy test whenever a student requests it.

Under **Relevant Considerations**...full disclosure would also “**increase public confidence in the operation of the institution**”...a key factor that the EQAO should consider in its re-evaluation of the release of book 4.

Adjudicator Hale in his order PO-2179 had re-affirmed the EQAO's position that under their 50% re-use policy, any questions on this 2002 test would...**in practice it will often be four years**...probably not be used until at least 2006...by that time the 2002 students have finished grade 12.

Is it reasonable to allow the EQAO to withhold test questions that they may or may not re-use in 4 years?

Analysis and findings

I have carefully reviewed the representations of the parties on the exercise of discretion. In doing so, I have noted the fact that the EQAO has re-exercised its discretion in the circumstances of this appeal, and has decided to disclose Booklets 1, 2 and 3, in full, to the appellant, which are the only test results considered in determining the student's mark. The only booklet the EQAO has exercised its discretion not to disclose is Booklet 4. Although this Booklet contains test questions and the student's answers to those questions, the EQAO has stated that the test questions in this booklet "are related to field testing and equating and *do not form any part of the student's pass or fail mark.*" In addition, the EQAO has submitted that it chose "not to disclose those questions used for field testing purposes [...], so that they may be incorporated into future tests."

Based on the representations provided by the EQAO, I am satisfied that it considered all of the relevant factors in deciding to exercise its discretion not to disclose Booklet 4, including the need for students to be provided with meaningful feedback concerning their test results in order to identify areas of weakness for remediation purposes and the significant impact that passing or failing the test has on them. In my view, these factors were considered by the EQAO in its decision to provide students with all information relating to their pass or fail mark, and not with information that does not form any part of that mark.

In the circumstances, I am satisfied that the EQAO exercised its discretion in deciding not to disclose Booklet 4, and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant considerations. Accordingly, I uphold the EQAO's decision to withhold Booklet 4.

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that there is a compelling public interest in the disclosure of Booklet 4, and that section 23 of the *Act* applies to override the applicable exemption. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption (see 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.)). In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

With respect to the first requirement under section 23, the appellant makes the following representations:

The return of the marked tests to all students who have a learning challenge is a definite issue of public interest and is within the scope of Section 23...

.

The compelling public interest in disclosure is supported by a **resolution by the Ontario Parent Council**, an advisory council to the Minister of Education, which represents all parents and their children in Ontario, which totally supported the return of the marked grade 10 literacy test to all students.

The appellant submits that parents have a passionate interest in obtaining their children's test results both to assist them with remediation and to attempt to address the psychological impact of failing. The appellant believes that children who have failed the OSSLT are singled out and suffer embarrassment and humiliation before their peers and that this has an impact on their self-esteem. In support of this view, the appellant includes a letter from another parent, with an interest in the work of the Ontario Parent Council, who conveys the devastating impact that failing the OSSLT has had on her child's psyche.

The EQAO submits in response:

In an attempt to demonstrate that a compelling public interest exists, the appellant in the present case makes reference to the wishes of the Ontario Parent Council (an advisory body to the Minister of Education). EQAO submits that this reference does not support the first requirement for section 23 of the Act to apply. In Order P-984 (and affirmed in subsequent orders) former adjudicator Holly Big Canoe discussed the first requirement for section 23 to apply:

In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is 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.

EQAO submits that there is no compelling public interest to warrant invoking the section 23 override. In the present case, the appellant has requested disclosure of documents identical to those referred to in Order PO-2179. The reference to the Ontario Parent Council does not in itself create a public interest. It is the opinion of EQAO that the position of the Ontario Parent Council indeed reflects and supports a private interest, namely parents seeking to provide educational support to their children. Although this is a lofty intent, it does not in itself create a degree of compelling public interest that meets the first requirement of the test outlined above.

EQAO reiterates its argument that resulted in the decision in Order PO-2179, the disclosure of OSSLT results is a private interest, and that there is no public interest in the disclosure of test questions.

In his supplementary representations the appellant states that there is "sufficient compelling evidence" for the release of this information in recent statements made by the Minister of Education (the Minister). The appellant refers to an article that appeared in the *Windsor Star* on August 17, 2005, in which he states that the Minister revealed that "32% more students in Ontario in 2003-04...14,000 more than the previous year...and 49,000 in total, failed to qualify for their diploma and therefore did not graduate from high school." The appellant surmises that the "majority" of this increase in 2003-04 can "most likely be attributed to the fact that [students] were not able to pass the grade 10 literacy test, as this was the first year that it was compulsory." He states that the Minister "vowed to ensure more students get diplomas" and the appellant believes that "one important way to accomplish this is to provide every piece of information related to the [OSSLT]...which includes all the students' marked test books and the correct marking scheme for these test books to show where their weaknesses are."

Analysis and findings

The appellant's representations focus on the importance of providing students and their parents with the OSSLT results to assist with remediation and to address the psychological impact that failing the test has on a student's self-esteem. They also refer to an article in which the Minister identifies a concern regarding graduation rates in 2003-04. The appellant believes strongly that the decline in the graduation rate is directly attributable to the introduction of the OSSLT. On the other hand, the Minister appears to attribute the lower graduation rates to a number of factors, none of which include the OSSLT.

I acknowledge the appellant's emotional and compelling argument for the release of the student's OSSLT. However, during the course of this inquiry the EQAO has re-exercised its discretion and decided to disclose all portions of the student's OSSLT upon which her pass or fail mark was based. Accordingly, in this appeal the only information remaining at issue is Booklet 4 of the OSSLT, which contains questions relating to field testing and equating, and does not form part of the student's pass or fail mark. Therefore, Booklet 4 is the only information for me to consider in regard to whether the section 23 public interest override applies in this appeal.

In my view, the points raised by the appellant regarding the Ontario Parent Council relate to concerns about marks, remediation and the psychological impact that failing the OSSLT might have on a student. In my view, these issues are addressed by the release of Booklets 1, 2 and 3.

In addition, I have carefully read the recent *Windsor Star* article that the appellant relies on in support of his position. Nowhere in this article is the OSSLT raised, expressly or implicitly, as a factor impacting the sudden increase in the high school dropout rate. In my view, the conclusions that the appellant draws from this article are speculative at best.

For the above reasons, I find that I have not been provided with sufficient evidence to satisfy me that there exists a compelling public interest in the disclosure of Booklet 4. Booklet 4 contains the test questions and answers that "are related to field testing and equating". The EQAO has identified that this booklet does not contain any information that forms "any part of the student's pass or fail mark."

Accordingly, under the circumstances, I am not able to conclude that there is a public interest in the disclosure of Booklet 4 of the student's OSSLT.

ORDER:

I uphold the EQAO's decision not to disclose Booklet 4 of the student's October 2002 OSSLT.

Original Signed by: _____
Bernard Morrow
Adjudicator

August 31, 2005