

FINAL ORDER MO-1984-F

Appeal MA-040147-1

Ottawa-Carleton Catholic District School Board

NATURE OF THE APPEAL:

This appeal arises from a request made by the appellant to the Ottawa-Carleton Catholic District School Board (the Board) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following information pertaining to the sale of a school property at a specified address in the city of Ottawa:

1. The Board Report and related memos pertaining to, leading up and following-up to Resolution CW 167-06 on July 2, 2002, regarding the motion on sale of surplus schools.
2. The assessed value of the property at [a specified address] and date of this assessment.
3. The value of the successful bid resulting from the tendering process and date of the bid opening; the amounts and names of the successful bids.
4. The bidder's written submission with respect to the tendering process.
5. The chronology of actions taken and the dates of these actions which demonstrate that the Board complied with Ontario Regulation 444/98 regarding the "Disposition of Real Property".

The Board denied access to the requested records. The appellant appealed this denial of access. During mediation of the appeal, the Board agreed to disclose some of the records. At the conclusion of mediation, the only remaining issue was the application of section 6(1)(b) (closed meeting) to the records responsive to items 1 and 5 of the appellant's request.

I then conducted an inquiry into the appeal, and sought and received representations from the Board, an affected party and the appellant. During the course of my inquiry the Board agreed to release further information to the appellant, with the result that only six records remained at issue under section 6(1)(b).

The six records at issue were as follows:

1. Memorandum with attached document entitled "Action Plan - Surplus Schools: Staff Recommendation", dated January 29, 2002 (10 pages)
2. Memorandum entitled "Update on Process of Disposal of Surplus Properties" with the date shown as, "Presented to Board Meeting of May 28, 2002" (2 pages)
3. Memorandum with attachments entitled "Sale of Surplus Schools", with the date shown as, "Presented to In-Camera Board Meeting of July 2, 2002" (4 pages)

4. Memorandum entitled "Sale of Jean XXIII School", dated September 23, 2003 (2 pages)
5. Memorandum entitled "Projects Completed Under Delegated Authority", dated September 23, 2003 (2 pages)
6. Fax transmittal form from the Board to a law firm, dated March 30, 2004, with attached correspondence, dated March 30, 2004, a notice, letter dated July 24, 2002, three facsimile cover forms/notes, dated August 7, 2002, two "Tenderer's Acknowledgement and Agreement" forms and a letter dated August 8, 2002 (11 pages)

I subsequently issued Order MO-1926-I in which I agreed with the Board's decision that records 1, 2 and 3 qualify for exemption under section 6(1)(b) and ordered the release of records 4, 5 and 6. However, in my decision I found that the Board had not considered relevant factors in its decision to deny access to responsive information in records 1, 2 and 3 under section 6(1)(b). Therefore, I included a provision in my order returning the matter back to the Board for a proper exercise of discretion under section 6(1)(b), to be based on relevant factors, with respect to records 1, 2 and 3. I ordered the Board to provide me with representations on its exercise of discretion, and gave the appellant an opportunity to submit responding representations on this issue.

Prior to the date for disclosure of records 4 and 5, the Board wrote to me seeking a reconsideration of my decision to order the release of these records. The Board cited a "discrepancy" stating that "by mistake" the wrong evidence had been provided in support of its position on the application of the section 6(1)(b) exemption to records 4 and 5. In addition, the Board sought a stay of the re-exercise of discretion provisions in Order MO-1926-I pending my decision on its reconsideration request.

I granted an interim stay of certain provisions of Order MO-1926-I, including those dealing with the exercise of discretion issue and invited the Board to submit representations on why it believes I should reconsider my order. I, subsequently, issued Reconsideration Order MO-1958-R, in which I declined to reconsider Order MO-1926-I and ordered the Board to comply with the provisions of that order with new compliance dates.

The Board then provided representations on the exercise of discretion issue, and the appellant responded. The purpose of this order is to rule on the issue of whether or not the Board has appropriately exercised its discretion regarding its decision to deny access to records 1, 2 and 3.

DISCUSSION:

EXERCISE OF DISCRETION

General principles

The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional considerations that are not listed below 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 his or her 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
- the historic practice of the institution with respect to similar information

The parties' representations

Both the Board and appellant have provided detailed representations on whether or not the Board properly exercised its discretion in applying section 6(1)(b) to records 1, 2 and 3.

The Board states it “has given careful consideration to the issue of disclosure of these records and has concluded that it cannot disclose them.” In denying access, the Board reaffirms its position, as stated in its original representations, that the records at issue contain information which is “private and sensitive in nature.” The Board also submits that the appellant has “never provided any information to indicate that he has a sympathetic or compelling need to receive the information...” or that disclosure would have any impact on “public confidence in its operations.” The Board states that it was “mindful of the purposes of the *Act* but was also properly influenced by section 207(2) ... of the *Education Act*, which confirms [the Board’s] right to protect the deliberations of its *in camera* proceedings.” The Board reiterates its position, as expressed in its initial representations, that it has historically adhered to the practice of “all school boards in the Province of Ontario” of holding *in camera* meetings pursuant to section 207(2) of the *Education Act* to protect the “confidentiality of the information and documents properly discussed within the context of those meetings.”

In the Board’s view, there is nothing further for the appellant to gain through disclosure of records 1, 2 and 3. In making this statement the Board relies on comments made by the appellant in his initial representations that the information disclosed by the Board has been “extremely valuable to the community” and has helped it “understand the role and process of [its] school boards when schools are sold.” The Board concludes that since the “purpose of the request [has] been achieved”, the statutory protection provided to school boards under section 207(2) of the *Education Act* should not be “compromised”, as it “would achieve no practical purpose and would otherwise be prejudicial to the interests of the Board in this case” in its ability to “carry out its statutory functions.”

The Board states that it has “acted in good faith and for no improper purpose based on its understanding of its rights and obligations under the *Act* and section 207 of the *Education Act*.”

Under the heading “Additional Considerations” the Board contends that it “feared that early disclosure could result in a breach of a contractual obligation” with the purchaser in regard to the sale of the school property and notes that the appellant’s initial request for information was made prior to the closing of the transaction.

To summarize, the Board takes the position that

- the withheld information is private and sensitive
- the appellant has not demonstrated a compelling need for it or demonstrated that disclosure would impact public confidence in the Board
- legislation supports the practice of holding *in camera* meetings
- nothing would be gained by further disclosure because the purpose of the request has been achieved
- it acted in good faith
- premature disclosure might be a breach of its contractual obligations

The appellant makes the following five points in response to the Board’s representations on exercise of discretion:

1. The appellant takes issue with the Board’s contention that the records contain information that is private and sensitive in nature. The appellant interprets “private” to mean information that would reveal personal information about an individual.
2. In response to the Board’s view that the appellant never provided it with information to indicate that he has a sympathetic or compelling need to receive the information at issue, he states that he made it very clear in his initial representations that the information was needed to “understand the process and circumstances surrounding the loss of a school property in [the] community.”
3. The appellant questions the Board’s statement that he has never alleged that disclosure would have any impact on public confidence in its operations. The appellant clarifies that his objective was “always to seek a better understanding of the facts so that the community could react to plans for the property post-sale”. The appellant makes it clear that he never suggested that the community’s purpose in seeking the Board’s information was to question the Board’s operations. The appellant, therefore, takes issue with the Board’s “allegations that the community had a hidden agenda”. He considers this unfair, irrelevant and a demonstration of bad faith on the part of the Board.

4. Regarding the Board's conclusion that the appellant's request had been satisfied and that nothing of any practical significance could be gained through the disclosure of records 1, 2 and 3, the appellant states that it is for the community to determine the value of records 1, 2 and 3, not the Board.
5. With respect to the Board's fears that early disclosure could result in a breach of contract with the purchaser, the appellant states that this is no longer a relevant consideration since the sale of the property closed over a year ago and the winning bidder had open discussions in a community meeting prior to the closing date of the sale.

Analysis and findings

I have carefully reviewed the representations submitted by both the Board and the appellant on the Board's exercise of discretion regarding its decision to deny access to records 1, 2 and 3.

In my view, the Board's statement that this information is private and sensitive ought not to be construed as indicating the records consist of personal information as the appellant suggests. Rather, it is a comment about the Board's view of the confidential character of the withheld information.

In the absence of a claim involving the public interest override at section 16 of the *Act* (which is not available in a section 6(1)(b) situation), the Board's view that the appellant has not demonstrated a compelling need for the information would be irrelevant in assessing whether the information is exempt. So would any absence of evidence that disclosure would have a meaningful impact on public confidence in the Board. By contrast, in deciding whether to exercise discretion in favour of withholding information that qualifies as exempt, rather than disclosing it, these may be relevant factors. But the Board must bear in mind that there is no onus on the appellant to produce this information and should not read too much into its absence. In any event, as the appellant notes, he did attempt to provide information about this issue in his initial representations.

Nevertheless, in the overall circumstances of this appeal, I do not see the Board's reference to these factors as evidence that it took irrelevant factors into account. Although I agree with the appellant that it is ultimately up to the community to decide the value of information, I am satisfied that the Board's view of the effect of the disclosure that has been made could be a relevant factor in assessing whether to withhold Records 1, 2 and 3. This may not have been relevant to whether the Board initially decided to withhold all the records, but in view of the disclosure that has now occurred, I am satisfied that it is a relevant factor as regards the decision to continue to withhold Records 1, 2 and 3.

Moreover, under the circumstances, I do not agree with the appellant that the Board's reliance on section 6(1)(b), and its statement that the appellant has not provided evidence that disclosure of the information at issue would have an impact on public confidence in its operations, is a demonstration of "bad faith". In my view, the Board's statement merely demonstrates that it

considered and then ruled out this factor when considering the exercise of discretion issue. I find that the Board did not exercise its discretion in bad faith.

The appellant has also made a compelling argument that the Board's fears that early disclosure would negatively impact on contractual relations between the Board and the purchaser is no longer relevant, since the purchaser had open discussions with members of the community in a public forum prior to the closing date of the sale and the sale has been completed.

I can see how the appellant might feel that this factor considered alone might be mitigated by the passage of time. However, I am satisfied that it was a relevant factor at the time the Board made its decision on the application of section 6(1)(b) and exercised its discretion. At this time, I view this factor as one of many that the Board considered when it decided to exercise its discretion not to disclose the contents of records 1, 2 and 3 to the appellant.

I am satisfied that there are no irrelevant factors that the Board considered in making its decision regarding records 1, 2 and 3 and that the Board only considered relevant factors in making its decision not to disclose the records at issue in this case.

Conclusion

I find that the Board properly exercised its discretion in applying section 6(1)(b) in the circumstances of this appeal. Therefore, I uphold the Board's decision to apply section 6(1)(b) to records 1, 2 and 3.

ORDER:

I uphold the Board's exercise of discretion under section 6(1)(b) of the *Act* in regard to records 1, 2 and 3.

Original signed by: _____
Bernard Morrow
Adjudicator

October 25, 2005