



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER PO-2366-I**

**Appeal PA-030211-1**

**Education Quality and Accountability Office**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Education Quality and Accountability Office (the EQAO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the requester's exam booklets from the October 2002 Ontario Secondary School (OSS) Literacy Test (the Test). The requester is a Secondary School student who had taken the Test in October of 2002.

The EQAO responded to the request by denying access to the Test in its entirety, on the basis of the exemption found in section 18(1)(h) of the *Act* (examination questions).

The requester (now the appellant) appealed the EQAO's decision.

No issues were resolved during mediation, and this file was transferred to the inquiry stage of the process.

While this appeal was in the inquiry stage of the process, Adjudicator Hale of this office issued Order PO-2179, in which issues similar to the ones in this appeal were addressed. That request was for a copy of the February 2002 OSS Literacy Test taken by a student, who was the requester in that appeal, and Adjudicator Hale decided that the exemption found in section 18(1)(h) applied to the portions of the Literacy Test at issue in that appeal.

Because of Adjudicator Hale's decision in Order PO-2179, I decided to send a Notice of Inquiry to the appellant, initially. In the Notice of Inquiry I identified the facts and issues in this appeal, referred to Order PO-2179, and invited the appellant to address the issues.

The appellant (through his representative) provided representations in response to the Notice of Inquiry. One of the issues raised by the appellant concerned the possible application of section 23 (public interest override) to the records in the circumstances of this appeal.

I then sent the Notice of Inquiry, along with a copy of the relevant portions of the appellant's representations, to the EQAO. I included section 23 as an issue in the Notice, and also identified in the Notice of Inquiry that, unlike the records at issue in Order PO-2179, which appeared to consist of only the test questions, in this appeal, the records included both the test questions as well as the appellant's responses to the questions. I therefore identified that the records may include the appellant's personal information, and I invited the EQAO to address the possible application of section 49(a).

The EQAO provided representations in response.

## **RECORD:**

The record at issue is the October 2002 Ontario Secondary School Literacy Test completed by the appellant. It consists of four booklets containing questions and answers.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

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)).

EQAO's representations state:

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].

The request leading to this appeal is for a copy of the appellant's exam booklets from the Test, consisting of the test questions and answers which the appellant filled out in response to the questions.

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.

## **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/EXAMINATION QUESTIONS**

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, 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 the records at issue 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;

As identified above, I sent a copy of Order PO-2179 to the parties in this appeal, along with the Notice of Inquiry.

### **The Appellant's representations**

The appellant is a Secondary School student who had taken the Test in October of 2002 and was advised in March of 2003 that he had failed the written portion of the Test. His representations focus on his interest in viewing the Test that he took to assist him in determining what areas of the Test he should focus on to assist him in passing the Test in the future. He notes that students who fail the Test are required to retake the Test in order to meet the requirements of the Ontario Secondary School Diploma. He identifies that he was at a loss as to why he failed Test, and wanted to view the Test to assist him.

The appellant also summarizes the various steps he took to try to get information to assist him in pursuing remedial actions, and to prepare for the Test in the future. He identifies the lack of information which he was able to obtain in trying to find out why he failed the Test and what remedial actions to take. He identifies that the lack of information provided to him resulted in the request for the information under the *Act*.

The appellant also states that, during the processing of this appeal and after an earlier unsuccessful application for review, he was advised that, under the "request for review" process, the decision was made that he in fact passed the Test. The EQAO confirms that this occurred. However, although he has now passed the Test, the appellant is still interested in obtaining the requested information. He identifies his concern that the decision that he has now passed the Test could also be changed in the future. Furthermore, he remains interested in reviewing the Test to determine where remedial action may be required, particularly as he may want to pursue post-secondary education. In addition, he states:

I am concerned that by abandoning this appeal now we would set an example which would serve to make it more difficult for anyone trying to obtain similar information in the future.

The appellant's representations focus on the importance of passing the Test in order to meet the requirements of the Ontario Secondary School Diploma and the lack of sufficient feedback to provide students who fail the test with the ability to take appropriate remedial actions.

### ***The sufficiency of the feedback***

Concerning the sufficiency of the feedback, as identified above, the appellant is a Secondary School student who had taken the Test in October of 2002 and was advised in March of 2003 that he had failed the written portion of the Test. Shortly after being advised of that, the student was provided with his Individual Student Report.

The appellant identifies that the EQAO provides this report to individuals who take the Test to provide feedback to them. He refers to the position taken by the EQAO in Order PO-2179, where the EQAO states: "Parents in general are not lacking sufficient performance feedback to enable appropriate remedial activity. EQAO provides parents of unsuccessful students with detailed feedback, through the Individual Student Report."

The appellant then provided me with copies of the Individual Student Report provided to him after he failed the Test. The Individual Student Report is a four-page Report, described as follows:

- Page one identifies the student and that he has not passed the Test (in particular, the writing component). It also identifies that the student will be required to retake the Test in order to meet the requirements of the Ontario Secondary School Diploma.
- Page two summarizes in point form the 11 requirements and portions of the Test.

- Page three is the page that provides the main charts which provide the specific feedback to the student from the Individual Student Report, and I will describe it in more detail below.
- Page four generically summarizes the methods used by the EQAO and the standards for passing and how they were determined.

*Page Three of the Individual Student Report*

Page three of the Individual Student report consists of two charts and some additional information.

One chart is entitled “Step 1: Holistic Scoring”. It has three columns and four rows. The first column identifies the four “writing tasks”. The next column provides a “Holistic Score” for each of the four tasks, and the last column provides a ”Description”, which includes a one or two line description of the student’s writing task.

Under this first chart is a box identifying the total writing score the student achieved, and the score necessary to pass the writing component.

Under this box is a second chart entitled “Step 2: Analytic Feedback”, described in the subheading as:

If you did not pass writing, each compliant piece of writing was scored analytically. The analytic feedback below is intended to support the remediation process.

The second chart is then set out. The chart again has four rows, which relate to four characteristics identified as: “Main idea”, “Supporting details”, “Organization”, and “Spelling, Grammar, and Punctuation”. The chart then includes four columns relating to the four characteristics.

In this particular Analytic Feedback chart, intended to “support the remediation process”, the sole notation in each row under both the “Summary” column and the “Information paragraph” column is “No feedback possible”. Under the remaining two columns (entitled “Paragraphs Expressing an Opinion” and “News Report”), the notation “Few errors” is made twice, and the notation “Substantial” is made twice. The remaining four notations, of one or two words each, are equally brief.

After providing me with a copy of this Individual Student Report, the appellant, through his representative, states:

If you received this report ... would you know what to do to [pursue remedial actions]?

...If you look in the “Analytic Feedback” chart ... you may begin to grasp the reason for the extreme frustration [felt]. [The student] did indeed answer those questions, in English, and yet there is “no feedback possible”.

Successful completion of the OSSLT is a requirement to obtain an Ontario Secondary School Diploma. This is not a minor or frivolous matter. Failure in this Test can seriously affect a student’s future.

If these tests were intended solely to provide feedback to various agencies on the effectiveness of the education systems or programs, or as a method of collecting statistical information, there *might* be some justification for denying individuals access to their records. Since the test is a requirement to obtain a diploma and is intended to give feedback to unsuccessful students, however, it is my view that the educational needs of the student should take precedence over the convenience of the EQAO.

Since the feedback provided by the EQAO was insufficient to allow for suitable remediation we requested access to [the exam booklets]. The EQAO refused this request.

The appellant then identifies a number of other requests for assistance which were made to the EQAO and which, according to the appellant, did not provide sufficient additional information to allow for suitable remediation. In addition, the appellant refers to information available on the EQAO’s public website which confirms the importance of feedback and the need to identify areas of weakness for remediation purposes. The appellant identifies that this was not provided by the EQAO.

After reviewing the frustration faced by the appellant in attempting to obtain information to assist him in understanding why he failed and how to improve in the future, the appellant provides specific submissions on the application of section 18(1)(h).

***Appellant’s representations on the application of section 18(1)(h)***

The appellant (through his representative) takes the position that section 18(1)(h) does not apply to the records. He states that, as section 18(1)(h) refers specifically to questions that “are to be used” in an examination or test, the main purpose of the exemption is to prevent someone from obtaining a copy of an exam which has been set but not yet administered, and that it has no application to questions which have already been used in a completed test. The appellant does acknowledge, however, that it may apply to questions which have been used in previous exams in circumstances where the material being tested is very limited (and he refers to Order PO-1284 as such an example). The appellant distinguishes that situation from the records in this appeal. The appellant takes the position that the exemption should not apply where the institution chooses to limit the number of questions because of convenience or cost considerations.

The appellant also states:

In addition, the exam in question was given to **over 125,000** students so these questions have had wide exposure. These questions are not a secret, the only secret is if or when they will appear on future tests. Allowing [the appellant] access to his own answer books will not give any information about the possible re-use of these specific questions.

In addition, the appellant refers to Order M-1116 and states that he “strongly disagrees with the view of the adjudicator in that appeal”. The appellant states:

In Order M-1116 the adjudicator stated: “I find the suggestion by the appellant that I consider the appropriateness of the Board’s re-use of examination questions to be outside the purview of my authority under the Act.”

... It is [my] belief that by using the method of setting the test, as a justification for claiming an exemption to the Act, the institution brings that method within the scope of the adjudicator’s authority. While the adjudicator does not have the authority to control the institution’s method of setting the exam, it is our view that he does have the authority to reject that method as justification for use of exemption 18(1)(h).

The appellant also relies on Order P-351, where section 18(1)(h) was also at issue. The adjudicator in that order stated:

The fact that the college may, at some point in the future, choose to re-use the same questions on a subsequent examination is not, in my view, sufficient to satisfy the requirements of section 18(1)(h).

Finally, the appellant has provided copies of a number of letters from parents of other students who did not pass the Test. These letters identify that the letter-writers share the appellant’s view that the information provided in the Individual Student Report is inadequate to define the student’s weaknesses or to allow them to make informed decisions on remediation. The appellant identifies that it is generally only students who fail the Test who may be interested in obtaining the results to pursue remediation efforts, and that it is difficult to identify many students who fail the Test, as few students readily admit to failing. The appellant states:

Eventually, we did locate some students who admitted to failing the test, and some parents who were willing to tell us that their children had also failed the [Test]....

Due to the limited time and resources available to us, we were only able to speak with a limited number of people, all of whom reside in this immediate area. ... [I believe] that if we look across the whole province, we would find very, very many



parents disagreeing with the EQAO's claim of "sufficient" and "detailed" feedback.

Parents and students do not generally go around bragging about a failure in the literacy test. [The appellant], though determined to find out what had gone wrong in his test, did not want his friends to know he had failed. It was not until he found out, by accident, that a friend of his, who he knew was a good student, had also failed, that he became slightly more comfortable talking about the situation openly. We believe, were it not for fear of the stigma of being judged "illiterate", many more people would be speaking out against the lack of information and high handed attitude adopted by the EQAO.

### **The EQAO's representations**

The EQAO provided very detailed submissions concerning the application of section 18(1)(h) to the records. Just as it did in the appeal resulting in Order PO-2179, it 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.

The EQAO reiterates a number of the submissions it made to Adjudicator Hale in the appeal resulting in Order PO-2179. As it did in that order, the EQAO states:

EQAO has always had a policy of re-using OSSLT test questions after their initial 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.

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.

Furthermore, as it did in Order PO-2179, the EQAO provides a detailed outline of the structure of the OSSLT test forms themselves and the techniques employed by the EQAO in ensuring that the tests which are administered are "equitable and consistent over time." It also identifies that the object of this exercise is to ensure that the test forms used are rendered interchangeable.

In describing the protocol which it has developed for the re-use of test materials, the EQAO states:

Ideally, test items and even whole tests could be re-used from year-to-year, a practice not uncommon in high schools 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). New forms will consist of an equal number of newly developed and re-used items. Rarely, an item can be dropped if the subject matter by its nature becomes stale-dated or irrelevant (items of this type are no longer being developed), or if an item for some reason does not 'play well' during the live administration or is found to be defective or flawed. As indicated previously, some items are made public in order to develop field supports and are never re-used.

The EQAO re-use protocol has the following principal components:

- Items and not test forms are re-used, new test forms consisting in equal part of re-used items and newly field-tested items (the 50% re-use rule);
- The reading component of each new test form shall consist of six re-used reading selections (three selections being re-used from each of two previous forms) and six newly field-tested reading selections;
- The writing components of each new test form shall consist of two re-used writing prompts and two newly field-tested writing prompts;
- Items cannot be re-used until at least the third year after their most recent use; and
- Items may be dropped from the schedule only if they contain material that is no longer current or relevant to students or if a defect or flaw is identified.

The EQAO also identifies what it calls the "critical" role of Form 3, which includes the Test at issue in this appeal. It states that this form is the anchor form to Forms 4 to 7.

The EQAO then refers to previous decisions, and specifically Order PO-2179, in support of its position that section 18(1)(h) applies to the records. In addition, the EQAO refers to the decisions in Orders P-1284 and M-1116 where the records included a series of questions which were to be used in future examinations. In both those decisions, it was held that the examinations were for an educational purpose and that the questions were exempt from disclosure under section 18(1)(h) and the equivalent provision in the *Municipal Freedom of Information and Protection of Privacy Act* respectively.

To summarize, the EQAO submits that it has provided "specific supporting evidence" that the questions included in the records will be re-used in future tests. It suggests that the re-use protocol described in its submissions "is not mere speculation or a series of general statements".

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.

Concerning the assistance that the EQAO provides to students and others in preparing for the literacy tests, the EQAO states:

... although the students who took the test do not, under EQAO policy, have access to the test booklets or their own answers, the EQAO recognizes the need for providing information to assist parents and educators. Therefore, sample test questions requiring a written composition (called writing prompts) from [a previous test] were subsequently incorporated into a resource for teachers and students entitled *Annotated Student Responses* .... which is available from the EQAO’s internet site.

### *Severance*

In its representations the EQAO also addressed the issue of the possible severance of the information, or severing the test answers from the test questions. The EQAO takes the position that, with respect to questions which required a constructed response answer, the answers could lead to an accurate inference about both the questions and the content of the passage on which the questions were based. The EQAO therefore takes the position that the constructed response answers should not be severed because doing so would disclose exempted questions.

In the case of the short answers, where the response consists only of a few words or a phrase, the EQAO states that the disclosure of some of the short answers could lead to an accurate inference being drawn about the test questions and the content of the passage. Alternatively, the disclosure of other short answers that would not lead to an accurate inference are merely “a series of disconnected words or phrases with no coherent meaning or value” and therefore should not be severed.

With respect to answers with a multiple choice response, the EQAO states that the disclosure of the chosen multiple choice options would provide no useful information to the requester, and should not therefore be severed.

In support of its position on the possible severance of the information, it relies on Orders P-1107 and P-1284, as well as the Divisional Court’s decision in its judicial review of Order M-91 (*Board of Education of Lincoln County v. Information and Privacy Commissioner (Ont.) et al.* (1995), 85 O.A.C. 23).

### **Findings under section 18(1)(h)**

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.

In addition, I am satisfied that, with respect to questions which required a constructed response answer, the disclosure of the answers could lead to an accurate inference about both the questions and the content of the passage on which the questions were based. Similarly, the disclosure of some of the short answers could lead to an accurate inference about the nature of the questions.

As well, I accept the EQAO's position that the disclosure of the chosen multiple choice options would provide no useful information to the requester.

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).

Having made this finding, however, 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 I will review the EQAO's exercise of its discretion in applying these exemptions.

### **EXERCISE OF DISCRETION**

#### **General principles**

Both section 18(1)(h) and 49(a) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion.

On appeal, this office may determine whether the institution failed to do so. In addition, this office 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

If any of these circumstances are present, the matter may be sent 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 54(2)].

### **Relevant considerations**

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 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

### **Findings**

#### ***Introduction***

I have carefully reviewed the representations provided by both the EQAO and the appellant, to decide whether the EQAO properly exercised its discretion in the circumstances of this appeal.

If I find that the EQAO erred in exercising its discretion in that it did so for an improper purpose, took into account irrelevant considerations, or failed to consider relevant considerations, I may send the matter back to the EQAO for a re-exercise of discretion.

*Did the EQAO exercise its discretion for an improper purpose?*

I find that the EQAO did not exercise its discretion for an “improper purpose”. The EQAO provided significant representations in support of its position that the disclosure of the records would result in economic harm, one of the purposes for the section 18 exemption. The EQAO also identifies the integrity of the testing process as one of the purposes of applying section 18(1)(h). In my view, these are not “improper purposes”.

*Did the EQAO fail to take into account relevant considerations?*

Upon my review of the representations of both parties, and of the circumstances of this appeal, I find that the EQAO has failed to take into account a number of relevant considerations in deciding to withhold the record under sections 18(1)(h) and 49(a).

The appellant has identified a number of factors in his representations in support of his position that he should have access to the record.. Although these factors are referred to throughout the appellant’s representations and under various headings, in the Notice of Inquiry I sent to the EQAO, I invited the EQAO to identify the factors it considered in deciding to exercise its discretion to apply section 18(1)(h) in the circumstances. I also specifically referred to a number of issues identified by the appellant which raise questions concerning why the EQAO exercised its discretion to apply the exemption in section 18(1)(h) in the circumstances of this appeal. These included:

- that the requested tests were given to over 125,000 students;
- that passing the literacy test is a requirement to obtain an Ontario Secondary School diploma;
- that the appellant experienced difficulty in obtaining answers to questions concerning the marking of the test and the reasons for failing the test;
- that the EQAO’s interest in re-using certain test questions in the future, for monetary savings or other purposes, should not outweigh the right of individuals to access the questions and answers; and
- that the amount of material available to test literacy skills is very broad.

As I review the representations of the EQAO, the focus of their representations is the fact that the section 18(1)(h) exemption has applied to records of this nature in the past, the EQAO’s established policy of re-using test questions, the financial impact that the disclosure of the record or portions of the record may have on the EQAO, and the integrity of the testing process.

With respect to the factors which the EQAO should have taken into account in reviewing the exercise of its discretion under section 18(1)(h), in my view the EQAO failed to take into account a number of factors, including:

- the number of individuals who have seen, studied and answered the test questions. As identified by the appellant “the exam in question was given to over 125,000 students so

these questions have had wide exposure. These questions are not a secret, the only secret is if or when they will appear on future tests”;

- the impact on any student who fails to pass the Test and rectify the situation in the future. As clearly set out by the EQAO in the Report provided to students who fail, the student will be required to retake the Test in order to meet the requirements of the Ontario Secondary School Diploma;
- whether disclosure will increase public confidence in the operation of the institution; and
- 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.

In addition, it is my view that in exercising of its discretion under section 49(a), the EQAO failed to take into account a number of factors, including:

- one of the primary purposes of the *Act*, that individuals should have a right of access to their own personal information;
- one of the stated purposes of the Test, to identify areas of weakness for remediation purposes;
- the scarcity of “feedback” provided to the appellant in these circumstances;
- 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 impact of failure to pass the Test and rectify the situation in the future (inability to meet the requirements of the Ontario Secondary School Diploma);
- the options that may be available in terms of providing limited or restricted access to an individual’s own personal information (with restrictions/undertakings). (It should be noted that, although the EQAO refers briefly in its representations to the possibility of allowing the appellant to inspect the records at the EQAO offices, it submits that access in this manner should also be denied); and
- the interplay between the interests of an individual accessing their own personal information, and the interests of the institution.

In addition to the above, one additional factor which, in my view, the EQAO should take into account in deciding to exercise its discretion is the very nature of the Test itself, and the position of the individuals who are most interested in obtaining their own test results. Individuals requesting their own test results are secondary students who are required to pass the literacy test in order to obtain their Secondary School diploma, a very significant matter for most secondary school students. The EQAO identifies for the students whether they have passed or failed, but denies these students access to their own test. It is likely that the students most interested in viewing their test results have failed the literacy test, placing them in either an actual or a perceived vulnerable position in relation to the EQAO, which administers the test. They may be in an actual position of vulnerability, as they have failed the literacy test (suggesting that their literacy skills require remediation), and pursuing access to information for remediation purposes may be a daunting process for them. They may be in a perceived position of vulnerability, as

they are pursuing access to information from an agency which ultimately determines whether they pass or fail the test.

Accordingly, in my view, the EQAO should take into account the fact that significant rights and significant potential prejudice to individual students are at stake, and that the EQAO and a student requester are in positions of relative power and weakness respectively, in deciding whether to exercise its discretion to withhold this information.

Finally, it strikes me that the EQAO is in a unique position as a decision-making body in these circumstances. The EQAO administers the literacy test which all secondary students in Ontario must take. This may be the first significant direct exposure students have with the workings of an agency of the government of Ontario. In my view, this provides the EQAO with a unique opportunity to model the principles of openness, accountability, and the right of access to one's own personal information.

Based on all of the above, I have decided to order the EQAO to re-exercise its discretion under sections 18(1)(h) and 49(a) of the *Act*, taking into account all of the relevant factors, including those set out above.

I have decided to reserve my determination of the other issues raised in this appeal, including the possible application of section 23, pending the EQAO's re-exercise of its discretion.

## **ORDER:**

1. I uphold the decision of the EQAO that sections 18(1)(h) and 49(a) of the *Act* apply to the records, subject to the re-exercise of discretion referred to below.
2. I order the EQAO to re-exercise its discretion under sections 18(1)(h) and 49(a) of the *Act*, taking into account all relevant factors and circumstances of this case, using the above principles as a guide.
3. I order the EQAO to provide me with representations on its exercise of discretion no later than **March 7, 2005**.
4. I will defer my final decision with respect to disclosure of the records pending my review of the EQAO's exercise of discretion as required by Provision 2.



5. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

February 3, 2005 \_\_\_\_\_