



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2386-F

Appeal PA-030211-1

Education Quality and Accountability Office



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NATURE OF THE APPEAL:

This appeal arises from a request made to the Education Quality and Accountability Office (the EQAO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to 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, and the record at issue is the Test completed by him. It consists of four booklets containing questions and answers.

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.

Following mediation, I conducted an inquiry into the appeal, and sought and received representations from the parties. The issues raised in that inquiry included the possible impact a previous order (Order PO-2179) had on the issues; the application of section 49(a) to the appeal, and the possible application of section 23 (public interest override) to the records; as well as whether the records fall within the section 18(1)(h) exemption.

Following the receipt of representations, I issued Interim Order PO-2366-I in which I addressed a number of the issues. In particular, I reviewed the records at issue and determined that the records contained the personal information of the appellant. I then reviewed the EQAO's reliance on section 18(1)(h) and section 49(a) to deny access to the records, and stated:

... 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).

However, I then stated:

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.

I went on to review the EQAO's exercise of discretion and, after reviewing the relevant considerations the EQAO ought to have taken into account, and all the circumstances, I found as follows:

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).

I then stated:

... 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.

Accordingly, I ordered the EQAO to re-exercise its discretion under sections 18(1)(h) and 49(a) taking into account all relevant factors and circumstances, and using the principles set out in Interim Order PO-2366-I as a guide. I also ordered the EQAO to provide me with representations on the manner in which it exercised its discretion by a certain date, and identified that I was deferring my final decision with respect to disclosure of the records pending my review of the EQAO's re-exercise of discretion. I also remained seized of this appeal in order to deal with the exercise of discretion issue, and any other issues.

Further to the requirements of Interim Order PO-2366-I, the EQAO provided a response to the requirement that it re-exercise its discretion. The EQAO's response states that, with respect to the information provided to secondary school students about the literacy tests they have completed, it has implemented a number of changes to its procedures, some of which relate to improvements to the provision of information to students for remediation and instructional improvements. It identifies that one of the enhancements to this area is the release of "the common questions that all students attempt". The EQAO then 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.

These changes have implications for the Item Re-use Policy that was in place at the time of this request, as well as for the release of questions and answers under this appeal. ...

The EQAO then identifies that it re-exercised its discretion, and 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 is disclosing Booklets 1, 2 and 3 to him.

Upon receipt of the EQAO's representations and the information relating to its re-exercise of discretion, I sent a Notice of Inquiry, along with a copy of the EQAO's representations, to the appellant. I invited the appellant to provide representations on the EQAO's re-exercise of discretion in the circumstances of this appeal, and also on the issue of whether or not section 23 applies in the circumstances. The appellant provided representations in response.

The purpose of this order is to rule on the issue of whether or not the EQAO has appropriately exercised its discretion, and also to review the issue of whether section 23 applies in the circumstances.

DISCUSSION:

EXERCISE OF DISCRETION

Introduction

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 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.

In Interim Order PO-2366-I I also identified a number of additional factors that the EQAO should consider when exercising its discretion under both section 18(1)(h) and section 49(a). I stated:

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.

Representations

As set out above, the EQAO identifies that it has re-exercised its discretion in the circumstances of 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 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.

With respect to the difference between the first three Booklets and Booklet 4, the EQAO explained the reason why it chose to disclose the first three booklets, but not the fourth, as follows:

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]

The appellant was given a copy of the EQAO's representations, and in response provided substantial representations regarding his concern that, notwithstanding the EQAO's decision to now disclose three of the four Booklets to him, the EQAO has not properly exercised its discretion.

Firstly, the appellant is concerned that the EQAO does not specifically address all of the factors identified in Interim Order PO-2366-I in its decision to re-exercise its discretion. By failing to

specifically address all the factors, the appellant takes the position that the EQAO has failed to take into account relevant considerations, and has accordingly erred in exercising its discretion with respect to Booklet 4.

The appellant also takes the position that the EQAO took into account irrelevant factors in exercising its discretion. One particular factor the appellant refers to is the EQAO's earlier stated policy on their re-use protocol, and their decision to now amend the re-use protocol. The appellant identifies a concern that this suggests that any protocols now in place could be adjusted in the future. Finally, the appellant takes the position that the EQAO's qualified statement about whether it will use the questions in Booklet 4 on tests in the future renders this factor irrelevant, and suggests that this factor should not be referenced.

Findings

I have carefully reviewed the representations of the parties on the exercise of discretion. I have also considered 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 to the appellant. Furthermore, as identified by the EQAO, Booklets 1, 2 and 3 are the Booklets upon which the appellant's mark was based. The EQAO has now chosen to disclose those Booklets, in full, to the appellant. The only Booklet the EQAO has exercised its discretion not to disclose is Booklet 4. Although this Booklet contains test questions and the appellant'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.*"

Based on the information provided by the EQAO, I am satisfied that it considered all of the relevant factors in deciding to exercise its discretion not disclose Booklet 4. Implicit in its decision to disclose Booklets 1, 2 and 3, which contain all of the information upon which the appellant's pass or fail mark is based, the EQAO necessarily considered a number of the factors which I required it to consider in re-exercising its discretion. Many of those factors relate to the need for students to be provided with meaningful feedback concerning their test result, their ability to identify areas of weakness for remediation purposes, and particularly 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.

I also do not accept the appellant's position that the EQAO took into account irrelevant factors in exercising its discretion.

With respect to the appellant's concern that the EQAO is no longer following its earlier stated policy on their re-use protocol, and that any protocols now in place could be adjusted in the future, I am not satisfied that this makes their current protocol an irrelevant consideration. In my view, the EQAO's review of its assessment processes, and its decision to improve the provision of information for remediation and instructional purposes by releasing common questions that all students attempt (comprising approximately 80% of the Test, and all portions of the Test upon

which the student's mark is based) is a significant factor to take into account. As I understand the EQAO's revised process, students are now provided with all of the questions and answers which formed the basis of their mark on the Test. The only information not provided to the student relates to field testing and equating, and is not the basis of the student's mark. This significant adjustment in the EQAO's process is, in my view, a very relevant consideration, which the EQAO clearly took into account in deciding to disclose Booklets 1, 2 and 3, and not to disclose Booklet 4.

Finally, I do not accept the appellant's position that the EQAO's qualified statement about whether it will use the questions in Booklet 4 on tests in the future renders this factor irrelevant. 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 (see page 10). I also confirmed the importance of the integrity of the testing process as one of the purposes of applying section 18(1)(h). Accordingly, the EQAO's intentions regarding the re-use of the questions in Booklet 4 is not an irrelevant factor.

Based on the above, 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

In his earlier representations, the appellant took the position that there is a compelling public interest in the disclosure of the records. By identifying the public interest in the disclosure of the information, the appellant raised the possibility 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.

The EQAO addressed this issue in its earlier representations and, as set out above, I reserved my decision on the possible application of section 23, pending the EQAO's re-exercise of its discretion. The EQAO has now re-exercised its discretion and decided to disclose all of the portions of the Test upon which the student's pass or fail mark was based. Accordingly, it is not necessary for me to review the possible application of section 23 to that information. The only remaining issue is the possible application of section 23 to Booklet 4 of the Test, which contains questions relating to field testing and equating and does not form part of the student's pass or fail mark.

In the earlier representations provided to this office, the appellant's arguments on why there exists a compelling public interest in the disclosure of the records focussed on his view that the

feedback provided to students was inadequate to allow for informed decisions to be made on remediation. He also provided letters from others who had failed the Test supporting his position. In his most recent representations, the appellant maintains that there exists a public interest in the disclosure of Booklet 4 of the Test.

The appellant identifies that he requested his Test questions and answers because he wanted to understand why he had failed the Test, and wanted to know what he needed to do in order to remedy the situation in the future. He acknowledges that while his original interest was mostly private in nature, through the process of trying to access the information, he became aware that this matter had much broader implications than just a request to view his own records. The appellant refers to the following statement made by former Assistant Commissioner Mitchinson in Order MO-1564 regarding the “public interest override” provision:

Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.

The appellant identifies that this applies to the circumstances of this appeal. He states that he is not unique in his desire and need for adequate feedback for remediation purposes, and that the decisions made in this appeal will impact many other students who have taken the literacy test in the past or will take it in the future. In addition, he provides excerpts from other public documents which call into question the sufficiency of the feedback provided to students who take the test.

The appellant’s remaining representations on the “compelling” interest in the disclosure of the information focus on his concerns that the EQAO, by re-exercising its discretion and now disclosing the Booklets 1, 2 and 3, has changed its decision regarding the accessibility of this information. Based on his experience in this appeal, he views the current decision of the EQAO to disclose Booklets 1, 2 and 3 to him with suspicion. He states:

... the public interest in this instance will be served not so much by releasing [the records at issue in this appeal], as by establishing [the appellant’s] right (and by extension the right of other students) to access these personal records and by demonstrating to the EQAO that it may not arbitrarily refuse individuals access to their records.

...

It may be tempting, having read [the EQAO’s decision to re-exercise its discretion and disclose Booklets 1, 2 and 3] to suppose that the EQAO is now intending to alter its policy to allow students access to their exam paper.

It may seem that in view of this change, no future student will find themselves in the position of having to appeal to the IPC for help in obtaining access to these records.

The appellant then identifies that the EQAO's policy with regard to the disclosure of the Test questions and answers has changed, and may change again in the future. The appellant therefore states:

The individual student's right of access to their own personal information should not depend solely on the goodwill of the EQAO or on the particular form of the test the EQAO chooses to use in any given year.

Findings

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in 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.

As identified above and acknowledged by the appellant, the EQAO has now re-exercised its discretion and decided to disclose all of the portions of the Test upon which the student's pass or fail mark was based. Accordingly, in this appeal the only information remaining at issue is Booklet 4 of the Test, which contains questions relating to field testing and equating and does not form part of the student's pass or fail mark, and that is the only information for me to review in terms of whether section 23 applies in this appeal.

The appellant's actions in this appeal - particularly his pursuit of the information and detailed representations notwithstanding that he has now obtained a pass mark in the Test - speak to his determination in ensuring that students in general are provided with adequate feedback concerning their literacy tests.

The appellant's representations focus on two main arguments - the need for students to have adequate information upon which to focus their remediation efforts, and the concerns that the EQAO's decision to disclose the information may again change in the future.

With respect to the need for students to have adequate information regarding their marks in the Test to enable them to properly focus their remediation efforts, I am satisfied that the EQAO's revised decision, and the disclosure of all questions and answers in the Booklets containing specific information upon which the students' mark was based, address the concerns identified by the appellant. I have not been provided with sufficient evidence to satisfy me that there exists a compelling public interest in the further 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." The appellant's representations focus on the importance of students being provided with adequate information regarding their marks in the Test to enable them to properly focus their remediation efforts. I am not satisfied that there exists a compelling public interest in the further disclosure of Booklet 4 on that basis.

With respect to the appellant's concerns that the EQAO's decision to disclose the information may again change in the future, this is not an issue for me to review in this appeal. In this appeal, I must review the decision of the EQAO with respect to access to the requested records. The EQAO has re-exercised its discretion, and has decided to disclose all records containing specific information upon which the student's mark was based. The EQAO has also identified that this decision was made based on its decision regarding improvements to the provision of information to students for remediation and instructional improvements. It identifies that one of the enhancements to this area was the release of "the common questions that all students attempt". Although I appreciate the appellant's concerns regarding possible future changes to this policy, I must decide whether, in the circumstances of this appeal and regarding the records in this appeal, there exists a compelling public interest in the disclosure of the records. As stated, the sole record remaining at issue is Booklet 4, and I am not satisfied that a compelling public interest exists in the disclosure of this record to override the application of the exemption to that record. Accordingly, I find that section 23 does not apply to Booklet 4.

ORDER:

I uphold the EQAO's decision not to disclose Booklet 4.

Original signed by: _____
Frank DeVries
Adjudicator

_____ April 27, 2005