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

ORDER MO-1931

Appeal MA-040284-1

Peel District School Board

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NATURE OF THE APPEAL:

The Peel District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the requester's Ontario Student Record including all notes, correspondence and e-mails. The requester also sought access to a copy of any other records or files containing information about him.

The Board located 773 pages of responsive records and granted partial access to them. Access to the remaining records, and parts of records, was denied pursuant to sections 7(1) (advice or recommendations), 13 (danger to health or safety of an individual) and 14(1) (invasion of privacy) of the *Act*.

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

During the mediation stage of the appeal, the Mediator raised the possible application of the discretionary exemptions in sections 38(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) of the *Act* to the records at issue. The Board subsequently issued a revised decision letter in which it claimed the application of those discretionary exemptions, along with sections 7(1) and 13, to the undisclosed portions of Records 262, 263 and 329. At the conclusion of mediation, the appellant indicated that he was still pursuing access to certain notes from the school psychologist that were referred to in Records 324 and 325, the Teaching Assistant's notes referred to in Records 273, 331 and 338, the undisclosed portions of Records 17, 262, 263and 329 and Records 403, 405 and 406, in their entirety.

Further mediation was not possible and the appeal was moved into the Adjudication stage of the process. I sought and received the representations of the Board initially, by sending it a Notice of Inquiry setting out the facts and issues in the appeal.

In its representations, the Board clarified that it was claiming the application of sections 14(1) to the undisclosed portions of Record 17, sections 38(a) and (b), in conjunction with section 7(1) to the undisclosed information in Records 262 and 263, and sections 14(1) and 38(a), in conjunction with section 13, to the undisclosed portions of Record 329.

The Board also takes the position that with respect to Records 403, 405 and 406, it will only provide copies of these records to the appellant through his school principal. It appears that the Board is refusing to grant access to these records as part of this request and appeal on the basis that they are available through the disclosure mechanism in the *Education Act*. In addition, the Board has indicated that it is prepared to grant access to all of Record 329 "if the appellant agreed to access the record in person and with Board social work support present". The Board has agreed to grant the appellant complete access to these records, albeit including conditions on his right of access to the information. In my view, the Board has no authority to attempt to limit the appellant's access rights in a situation where it is not applying one of the exemptions or an exclusion in the *Act*. Accordingly, I will order that the records be disclosed to him without the conditions that the Board wishes to impose.

The appellant also provided representations in response to the Notice of Inquiry. I then shared these submissions with the Board, in their entirety. The appellant argues that additional records responsive to his request ought to exist, specifically notes from a school psychologist, referred to

in Records 324 and 325, and notes retained by a Teaching Assistant that are referred to in Records 273, 331 and 338. The Board was then given the opportunity to make additional submissions by way of reply and did so.

RECORDS:

The information remaining at issue consists of the undisclosed portions of Records 17 (which the Board also argues is not responsive) and Records 262 and 263, which the Board claims to be exempt under sections 38(b) and 38(a), taken in conjunction with section 7(1), respectively. The appellant also maintains that additional records, specifically notes taken by a Teaching Assistant and a Board Psychologist, ought to exist.

DISCUSSION:

PRELIMINARY ISSUES

Issues arising during the processing of the request and appeal

The appellant maintains that the Board did not comply with the provisions of sections 19 and 22 of the *Act* when responding to the request, as it failed to indicate the exemptions claimed to apply to the withheld records or parts of records. Specifically, the appellant points out that the Board only advised that it was relying on section 14(1) of the *Act* for certain records but did not specify which of the six subsections that follow were applied. The appellant also submits that the decision letter improperly advised that the fee for filing an appeal was $25 rather than the appropriate fee of $10 and referred the appellant to an out-of-date address for the Commissioner's office. In addition, a discrepancy in the charging of fees for photocopying of records was resolved at the mediation stage by the Board refunding a portion of the payment received from the appellant. The appellant continues to maintain that this should be the subject of my review.

Section 14(1) is the exemption claimed when an institution takes the position that the records contain the personal information of an identifiable individual other than a requester. Section 14(1) prohibits the disclosure of that information. The subsections referred to by the appellant are exceptions to that prohibition. The Board's decision was not, accordingly, deficient in this respect. In my view, the remaining deficiencies referred to by the appellant were regrettable but do not require further comment in this decision. The issue surrounding the refund of a portion of the fees paid was resolved and also does not warrant any further comment at this point.

Responsiveness of the information in Record 17

The Board takes the position that the information that was withheld from disclosure in Record 17 is not responsive to the appellant's request as it pertains only to other individuals. The Board notes that the request specifically refers only to "records or files containing information about

me" and that the undisclosed portion of Record 17 includes only personal information relating to other identifiable individuals.

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. I have reviewed the undisclosed portions of Record 17 and find that they do not reasonably relate to the request as framed by the appellant. This information does not relate to the appellant in any way and pertains only to other identifiable individuals. As a result, I find that the undisclosed portions of Record 17 do not reasonably relate to the request and are not, accordingly, responsive to the request. I will, therefore, not be addressing this record any further in this decision.

PERSONAL INFORMATION

The Board takes the position that Records 262 and 263, consisting of an email message passing between two Board staff, contains the personal information of the appellant and a Teaching Assistant. Section 2(1) of the *Act* defines this term as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Based on my review of the contents of Records 262 and 263, I agree with the position taken by the Board. This email refers to the appellant by name and includes certain observations and statements made about him by the Board's professional staff. It also describes other personal information about the appellant's conduct. I find that this constitutes the appellant's personal information within the meaning of section 2(1)(g) and (h).

The undisclosed information also relates to the Teaching Assistant as it reflects the views or opinions of the writer about the Teaching Assistant (section 2(1)(g)) and also contains her name and other personal information (section 2(1)(h)) relating to her in her personal, rather than her professional capacity. Accordingly, I find that Records 262 and 263 include the personal information of the Teaching Assistant. Because of the nature of the personal information and the fact that it was not disclosed, I am unable to refer to it in any greater detail.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

General principles

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), the Board has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information. The Board takes the position that the undisclosed portions of Records 262 and 263 are exempt from disclosure under section 38(a), taken in conjunction with section 7(1).

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

The parties' representations

The Board submits that the undisclosed portions of Records 262 and 263 represent a communication of advice from a Board employee, a School Principal, to the Superintendent of Special Education Support Services. Again, because much of the content of the information provided by the Board employee was not disclosed, I am unable to refer to it in any greater detail. However, the Board advises that the information supplied "supports the employee's opinion that educational programs should be provided" at a specified location and also indicates which Board staff ought to be involved in the delivery of that program to the appellant.

The Board maintains that the release of this information will adversely affect the ability of its employees "to provide candid advice to their superiors in order to make important decisions

regarding educational matters, including special education programming and service decisions to be made." It goes on to add that "[P]rofessional staff relies on the confidentiality that their recommendations attract in order to provide truthful . . . advice regarding specific special education student programming needs."

The appellant submits that the sender of the message "is not involved in the deliberative process of government decision making and policy making" as he indicated in the email that he is "not involved in the process". The appellant urges me to "stringently apply" the exemption in section 7(1) in this case.

Findings

The undisclosed portions of Records 262 and 263 contain the School Principal's suggestions to the Superintendent of Special Education Support Services with respect to the most appropriate course of action to follow for the appellant's coming school year. The information relates directly to recommendations respecting the appropriate placement for the appellant and the staffing complement to go with it. I find that the information contained in Records 262 and 263 was intended to freely and frankly advise the Superintendent on a suggested course of action that will ultimately be decided upon by that individual. I find that the School Principal has provided the Superintendent with the Principal's views on the best course of action and the likely outcomes of a decision to do as suggested. The ultimate decision on this course of action clearly belonged to the Superintendent, who obtained the Principal's input to assist him in making this determination.

I find that the undisclosed portions of Record 262 and 263 contain information which qualifies for exemption under section 7(1). I further find that none of the exceptions set out in sections 7(2) or (3) apply in the circumstances. As a result, I find that the undisclosed portions of Records 262 and 263 are exempt under section 38(a), in conjunction with section 7(1).

I have reviewed the manner in which the Board has decided to exercise its discretion not to disclose this information to the appellant. Given the nature of the information and its sensitivity, I am satisfied that the Board properly exercised its discretion in denying access to the appellant.

REASONABLE SEARCH

General principles

The appellant takes the position that additional records in the form of notes taken by his Teaching Assistant and a School Psychologist ought to exist and should have been disclosed to him.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried

out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations of the parties

The Board takes the position that it has met its obligation under the *Act* to conduct a reasonable search for records responsive to this part of the request. It indicates that upon receipt of the request, the Board's Freedom of Information and Protection of Privacy Co-ordinator (the Co-ordinator) contacted the principal of the school the appellant was attending at the time, the Superintendent of Special Education Support Services (and her secretary) and the Special Education Secretary to request that responsive records be located and forwarded. The Co-ordinator also contacted the principal of the appellant's former school requesting that any notes or other "informal behaviour tracking records" be forwarded to her. The Board indicates that the responsive records were received by the Co-ordinator and a decision letter was provided to the appellant.

With respect to its search for the Teaching Assistant's [the TA] notes, the Board submits that:

> . . . the TA would have had no use for these notes once her work with the Appellant ceased, as it did prior to the request for access.
>
> . . . there is no requirement of Board staff to centrally file personal notes, nor is staff required by the Board to retain their personal notes for a specific period of time.
>
> . . . it is reasonable to assume that a Teaching Assistant with no further involvement with a student, and no duty to continue to retain personal notes, destroyed such notes.

With respect to its search for notes taken by a School Psychologist, the Board asserts that:

> . . . [the Co-ordinator] identified the Psychologist assigned to the Appellant's school during the relevant period, and made further inquiries with that individual. [The Co-ordinator] spoke with that individual, who indicated that he did not have a personal psychology file regarding the Appellant, and had no reference to a

> meeting at that time. He did confirm that the Appellant had been assessed in 1995 by a Board psychologist.
>
> . . . the file with documents supporting the Appellant's psychoeducational assessment can be requested by the appellant by directly contacting the Chief Psychologist of the Board.

The appellant points out that it is within his personal knowledge that the Teaching Assistant maintained notes of her observations and activities involving himself during the relevant period when she was working with him. The appellant also points out that the Board's representations do not address whether the records were created and by whom, as well as the circumstances surrounding their use or "destruction". The appellant also argues that any notes made by a Board employee, such as the Teaching Assistant, in the course of their employment responsibilities with the Board are not "personal" to the employee. The appellant draws an analogy with the notes maintained by police officers in the course of the exercise of their duties.

The appellant also submits that section 30(1) of the *Act*, and section 5 of Regulation 823 prescribe that institutions maintain records containing personal information for a minimum period of one year after their use. Accordingly, he suggests that since the request was made on May 20, 2004, records used in the period May 20, 2003 to May 20, 2004 ought to exist and should have been made available to him.

With respect to the psychologist's notes, the appellant relies on a reference in Record 324 to substantiate his claim that this individual was involved in a meeting at which the appellant's situation was discussed. The appellant has also presented a number of other arguments in favour of his position that notes of some kind ought to exist. More tellingly, however, is the appellant's contention that any records maintained by the "Chief Psychologist of the Board", as referenced in the Board's representations, ought to have been made available to him as they are responsive to the request.

In its reply representations, the Board takes the position that any notes maintained by the Teaching Assistant:

> . . . were not made for the benefit of other staff at the School or Board nor is there any requirement that the notes be maintained and retained in a particular way. Any notes made by the TA were made for the TA's own work related use, were not required to be retained by the *Education Act*, nor were they required by Board policy or procedure to be retained, and thus, could be disposed of by the TA subject to the requirements of [the *Act*].

The Board also apparently takes the position that the request for notes taken by the School Psychologist ought to be made in accordance with the access provisions in the *Personal Health Information Protection Act* (*PHIPA*) which came into existence only after the appellant's original request.

Findings

I do not accept the Board's position that it has met its obligation under the *Act* with respect to its search. The glaring omission in the Board's arguments is that the Teaching Assistant herself was apparently never approached to ascertain whether she continued to maintain any records or notes relating to her work with the appellant. Similarly, the Board has not provided me with persuasive evidence to demonstrate that the record-holdings of the school attended by the appellant during the pertinent time period were searched. I have not been provided with sufficient evidence to enable me to make a determination as to whether any such searches were adequate. Without evidence of the extent and results of these searches, I am unable to find that the Board conducted a reasonable search for such records.

Similarly, the Board has not adequately searched its record-holdings for records that were created by a "School Psychologist" if it has failed to examine whether any records pertaining to the appellant reside in the office of the Chief Psychologist of the Board.

Further, the Board cannot rely on arguments that the request ought to be resubmitted by the appellant following the enactment of *PHIPA* because some of the responsive records may contain health information relating to the appellant. The right of access to personal health information under *PHIPA* came into existence on November 1, 2004. The appellant's request predated the existence of this right. I find that the enactment of *PHIPA* has no effect on a request made to an institution prior to November 1, 2004 under the *Municipal Freedom of Information and Protection of Privacy Act*.

By way of summary, I will order the Board to address the deficiencies in the manner in which it has conducted its searches for responsive records and to provide the appellant with a decision letter following the conclusion of these inquiries.

ORDER:

1. I uphold the Board's decision to deny access to Records 262 and 263.

2. I order the Board to disclose Records 329, 403, 405 and 406 to the appellant by providing him with copies by **July 6, 2005** but not before **June 28, 2005**.

3. I order the Board to conduct further searches for records responsive to the request by contacting the Teaching Assistant in question and requesting that she consult her record-holdings in order to determine whether additional responsive records exist. Upon receipt of the outcome of the Teaching Assistant's search for records, which is to be undertaken in accordance with the time frames set out in section 19 of the *Act*, I order the Board to provide the appellant with a written decision respecting access to any records that are located, in accordance with sections 19 and 22 of the *Act* and without recourse to a time extension under section 20 of the *Act*.

4. I order the Board to conduct a search of its office of the Chief Psychologist for records relating to the appellant. I further order the Board to provide the appellant with a decision respecting access to any responsive records in accordance with sections 19 and 22 of the *Act* and without recourse to a time extension under section 20 of the *Act*.

5. I remain seized of this matter should it be necessary to adjudicate any outstanding issues relating to the disclosure of additional records located as a result of the searches undertaken pursuant to Order Provisions 3 and 4.

Original signed by: May 31, 2005
Donald Hale
Adjudicator