



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER MO-2305-F**

## **Appeal MA07-163**

### **Hamilton-Wentworth District School Board**



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## **NATURE OF THE APPEAL:**

The Hamilton-Wentworth District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of:

...all documents relating to the condition of secondary school gym floors for the 2006-07 school year. This was referenced in a March 5, 2007 report to the Board by [a named superintendent and a named facilities manager]: “Information pertaining to the condition of gym floors in the system has been assembled.”

The Board located four responsive records and issued a decision providing access to two of them. In denying access to the other two records, the Board relied on the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 11 (economic and other interests) of the *Act*.

The requester, now the appellant, appealed this decision concerning the two undisclosed records, namely, Record 1, entitled “Gym Floor Replacement Summary”, dated January 30, 2007 and Record 2 entitled “Draft Executive Report to Board”, dated February 19, 2007.

Mediation was not successful and the file was moved to the adjudication stage of the inquiry process. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Board, initially, seeking its representations. I received representations from the Board. I then sent a Notice of Inquiry to the appellant, along with a copy of the Board’s representations. Portions of the Board’s representations were withheld due to confidentiality concerns. The appellant did not provide representations in response to the Notice of Inquiry. I then issued Interim Order MO-2267-I, in which I ordered the Board to:

- disclose both records at issue to the appellant, except for the recommendations in both records and Appendix “A” which is an attachment to Record 2;
- re-exercise its discretion with respect to the recommendations in both records and Appendix “A” which is an attachment to Record 2 in accordance with the discussion of that issue in the Order; and,
- provide an explanation of the basis for exercising its discretion, if the Board continues to withhold all or part of this remaining information in the records.

The Board complied with the terms of Order MO-2267-I, disclosing both records less the recommendations and Appendix “A” of Record 2 to the appellant. In compliance with Order MO-2267-I, the Board re-exercised its discretion. It continued to withhold the recommendations in both records that I had identified as subject to exemption by reason of the application of section 7(1) of the *Act*. However, the Board exercised its discretion to disclose all of the information in Appendix “A” of Record 2, except for the information under the column entitled “Renewal Year”. It exercised its discretion to continue to deny access to this information, which I had found subject to exemption under section 11(f) of the *Act*.

As ordered to do in Interim Order MO-2267-I, the Board provided an explanation of its exercise of discretion to both the appellant and me. Despite being allowed an opportunity to respond by reason of the provisions of Interim Order MO-2267-I, along with a follow-up phone call from this office, the appellant failed to provide representations in response to the Board's explanation concerning its re-exercise of discretion.

## **RECORDS:**

The records are described in the following chart:

<u>Record #</u>	<u>Description</u>	<u>Date of Record</u>
1	Gym Floor Replacement Summary	January 30, 2007
2	Draft Executive Report to Board	February 19, 2007

At issue are the recommendations in both records and the information under the column entitled "Renewal Year" in Appendix "A" which is an attachment to Record 2.

## **DISCUSSION:**

The sole issue is whether the Board exercised its discretion in a proper manner in not disclosing the recommendations in both records by reason of the application of section 7(1) and the information under the column entitled "Renewal Year" in Appendix "A" which is an attachment to Record 2, under section 11(f) of the *Act*.

Section 7(1) states:

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

Section 11(f) states:

A head may refuse to disclose a record that contains,

plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

The sections 7 and 11 exemptions 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, the Commissioner may determine whether the institution failed to do so.

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

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

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

Relevant considerations 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

In Order MO-2267-I, I found that:

[T]he Board did not exercise its discretion under sections 7 and 11(f) in a proper manner in denying access to the recommendations in both records and to Appendix "A" of Record 2. The Board did not take into account relevant factors and took into account irrelevant factors. In particular, the Board has not taken into account the wording of sections 7(1) and 11(f) and the interests these sections seek to protect.

Section 7(1) seeks to allow the institution to not disclose information that would reveal advice or recommendations. However, with respect to specific recommendations at issue, namely the renewal of the Board's secondary school gym floors, I note that several publicly available Board documents already contain recommendations concerning this issue. There are recommendations contained in the March 5, 2007 Executive Report to Board re: Secondary School Gym Floors report which was disclosed to the appellant with the Board's decision letter. In addition, both the minutes of the March 5, 2007 Committee of the Whole Board Meeting and the March 26, 2007 Minutes of the Open Session of the Regular Board Meeting are available on the Board's website. Both sets of minutes contain recommendations concerning the renewal of the Board's secondary school gym floors. The Board did not take into account this relevant publicly available information concerning the renewal of its secondary school gym floors. As the Board has not exercised its discretion in a proper manner concerning the recommendations in both records, I will order the Board to re-exercise its discretion under section 7(1) of the *Act* with respect to the recommendations in both records.

I also find that the Board has not exercised its discretion in a proper manner concerning the information I have found section 11(f) to apply to, namely Appendix "A" of Record 2. Record 2 was created after various members of the Board's Executive Council, which is comprised largely of Board superintendents, met to discuss and propose priorities for the development of a long-range plan regarding the Board's secondary school gymnasium floors in need of renewal. The Board's Superintendent of Business communicated a general proposal for renewal to the Director of Education. This proposal is outlined in Record 2, the Draft Report. The Draft Report attaches Appendix "A" which is entitled "Hamilton-Wentworth District School Board Gym Floor Assessment and Renewal Table".

As stated by the Board in its representations, Appendix "A" contains information about the prioritization for the renewal of its secondary school gym floors. I find that the Board has not taken into account in a proper manner whether disclosure of Appendix "A" will increase public confidence in the operation of the Board by revealing the priorities it has placed on the renewal of its secondary school gym floors. I also find that in the circumstances of this appeal, the Board has taken into account an irrelevant factor, namely its competitive position in the education

marketplace. As stated above, the Board has failed to demonstrate that disclosure of the records could reasonably be expected to lead to a corresponding decline in enrolment of students because parents would choose to enrol their children in a school in a different school board on the basis of the condition of certain secondary school gym floors.

The purpose of section 11 is to protect commercially valuable information of institutions. I find that the Board has not taken into account in a proper manner the wording of the section 11(f) exemption and the interests it seeks to protect. As the Board has not exercised its discretion in a proper manner concerning Appendix "A", I will order the Board to re-exercise its discretion under section 11(f) of the *Act* with respect to this portion of Record 2.

In its representations in response to Order MO-2267-I, the Board submits that it considered the following factors:

- 1) the purposes of the *Act*, including that information should be made available to the public and exemptions from access should be limited and specific;
- 2) the specific wording of sections 7(1) and 11(f) of the *Act*;
- 3) that the records do not relate to [the appellant's] personal information;
- 4) the nature of the information and sensitive nature of the material redacted from the record;
- 5) a determination as to whether disclosure will increase public confidence in the operation of the institution; and,
- 6) that certain information, even though otherwise possibly exempt from disclosure, has been previously released to the public...

[the information at issue is being] withheld because they relate specifically and directly to:

- advice or recommendations of an officer or employee of an institution (Section 7(1)); and/or,
- plans relating to the administration of an institution not yet put into operation or made public [section 11(f)].

With respect to the other information in the partially redacted records, please be advised that all information which may be severed therefrom because it relates to:

- (i) historical information;

- (ii) information which would increase public confidence;
- (iii) information which should otherwise be made available to the public and/or is the subject matter of decisions already undertaken or authorized by the [the Board],

has been or is with this letter disclosed to you.

Specifically, only those sections of the records which, in my reasonable opinion, fall specifically within the exemptions provided under section 7(1) and/or 11(f) above have been withheld, and even then, only if the applicable criteria considered in ... (i), (ii) and (iii) above do not apply.

### **Analysis/Findings**

I find that in denying access to the undisclosed portions of the records, the Board has re-exercised its discretion under sections 7(1) and 11(f) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

Further, I find that with respect to the remaining severances from both records, the Board has taken into account the information that is publicly available concerning the subject-matter of the records, as referenced in Order MO-2267-I. In the re-exercise of its discretion, the Board continues to withhold the recommendations in both records but has disclosed additional information from Record 2. In particular, the Board has disclosed all of the information in Appendix "A" to Record 2 except for the column entitled "Renewal Year". Disclosure of this information would reveal specific exempt information that has not yet been put into operation or made public.

Accordingly, I find that the Board's re-exercise of its discretion was proper.

### **ORDER:**

I uphold the Board's decision to withhold the recommendations from both records and the information under the column "Renewal Year" in Appendix "A" of Record 2, which I found to be exempt under the section 7(1) and section 11(f) exemptions, as itemized in Interim Order MO-2267-I and I dismiss this appeal.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ May 20, 2008