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

ORDER MO-2349

Appeal MA-060202-2

Rainbow District School Board

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NATURE OF THE APPEAL:

The requester represents the school council of a school under the jurisdiction of the Rainbow District School Board (the Board). Throughout this order, I will refer to the school council as the requester/appellant. The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Board for access to "the Board's Five-Year Capital Plan referred to in the Agenda of [an identified] Regular Board Meeting", as well as various other records relating to background information, certain committees, and expenditures and costs relating to certain identified schools.

In response to the request, the Board initially identified approximately 975 pages of records responsive to the request, and indicated the estimated fees. The requester (now the appellant) appealed the Board's fee decision to this office, and appeal file MA-060202-1 was opened.

During the mediation of that appeal, the Board issued a final decision letter. In its letter the Board indicated that access was granted to a number of responsive records, and that certain requested records did not exist. Concerning the request for access to the Five Year Capital Plan, the Board provided the appellant with a copy of the Table of Contents for the Five-Year Capital Plan, and stated that partial access was granted to the Plan, and that portions of it were denied on the basis of the exemptions in section 7(1) (advice and recommendations), and sections 11(c), (d), (f) and (g) (economic and other interest) of the *Act*. The Board also identified that access to certain portions of other responsive records was also denied on the basis of those same exemptions. The Board also revised its fee estimate decision.

The fee estimate appeal (MA-060202-1) was eventually resolved; however, the appellant then appealed the Board's final decision relating to the application of sections 7(1) and 11 to the records to which access was denied, and the current appeal file was opened. In addition, the appellant took the position that the exception to section 7(1) found in section 7(2)(h) applied.

During mediation of the current appeal, the Board released additional information to the appellant.

Mediation did not resolve the remaining issues, and this file was transferred to the adjudication stage of the appeal process.

The adjudicator previously assigned to this appeal sent a Notice of Inquiry, setting out the facts and issues on appeal, to the Board, initially. The Board provided representations in response, and the Notice of Inquiry, along with a copy of the Board's representations, were then sent to the appellant. The appellant also submitted detailed representations in response.

This file was then transferred to me to complete the adjudication process.

After reviewing the appellant's representations, I decided that they raised issues to which the Board ought to be given an opportunity to reply. I therefore provided the Board with a copy of the appellant's representations, in their entirety. In addition, although the appellant did not specifically raise the possible application of the "public interest override" in section 16 of the *Act*, the appellant's representations clearly used language that suggested that this section may apply. I therefore included section 16 as an issue in this appeal.

The Board submitted extensive representations in response.

Summary

In processing this appeal, both the Board and the appellant provided considerable representations on the issues. In order to place the issues, representations, and my findings in perspective, it is helpful to provide some background relating to the Board's Five-Year Capital Plan, and to summarize the approaches taken to the issues in this appeal by the parties and by me in reaching the conclusions I have.

The key points relating to the record at issue can be identified as follows:

- The record at issue consists of information contained in the Board's Five-Year Capital Plan which relates to the possible closure, demolition, consolidation or expansion of certain identified schools.
- The Five-Year Capital Plan was prepared by the Board as a result of the 2005 Ministry of Education (the Ministry) document "Good Places to Learn: Renewing Ontario's Schools", in which the Ministry announced that, in order to support program excellence, boards would be required to file comprehensive capital plans to support program objectives by October 2005.
- The Ministry identified that the plans should indicate specifically the new schools planned, the schools that would be subject to school valuations, the schools that may be subject to school closing procedures, and challenges where facilities were causing program limitations, among other things.
- The Ministry indicated that the plans should be created through community engagement and then submitted for public consumption prior to board approval.
- The Board provided the Ministry with its Five-Year Capital Plan because it was required to do so by the Ministry.
- The Board did not conduct a public consultation prior to submitting the Five-Year Capital Plan to the Ministry.

Throughout its representations the Board focuses on the harms that may result from the disclosure of the Five-Year Capital Plan. The Board also identifies that the plan at issue is a hypothetical, theoretical plan, and that it does not reflect actual decisions that will be made on schools closures, consolidations or expansions, because there has been no public consultation or discussion on the plan. The Board's representations identify the possible consequences and harms that may result if the plan is made public, and if the public were to believe that the plan was a *fait accompli*. The Board's representations focus specifically on the impact decisions about school closures or expansions have on the public, and the importance of these types of decisions for the public.

The Board also identifies that, where decisions about specific school closures or expansions have now been made, the portion of the Capital Plan relating to those schools has been disclosed.

The appellant's representations focus on its concerns regarding why public consultation did not occur prior to the Five-Year Capital Plan being provided to the Ministry. In addition, the appellant's representations identify that, even though the portions of the Five-Year Capital Plan were disclosed for those schools for which decisions regarding closures or expansions have now been made, and even though these decisions were eventually made with public consultation, the final decisions made for those schools reflected the information contained in the Five-Year Capital Plan for those schools. The appellant's concerns therefore relate to the possible impact the undisclosed Five-Year Capital Plan may have on decisions regarding other schools, and believes the public should be aware of the specific information regarding the other schools contained in the Five-Year Capital Plan.

In this order, I review the arguments provided by the Board regarding the confidentiality of the information in the undisclosed portions of the Five-Year Capital Plan, and find that these portions do not contain "advice or recommendations" for the purpose of section 7(1), nor do these portions of the records qualify for exemption under sections 11(c), (d), (f) or (g).

RECORD:

There are 25 pages or portions of pages remaining at issue in this appeal. These pages are numbered 1a, 1b, 1i, 1ii, 1c, 1d and 2 – 20.

All of the pages or portions of pages remaining at issue appear to consist of undisclosed portions of the database (data capture elements referred to below) which form part of the Five-Year Capital Plan.

Some of the portions of the pages remaining at issue are set out in table format (including boxes of text information) and are printed from an electronic record. The Board indicated that, due to formatting issues, the Board was unable to print all of the information contained in the tables on certain pages and, in those instances, the Board provided a copy of the complete text of the missing information that appears in the boxed areas (which could not be printed in those boxes). For example, portions of the printed boxes in the tables on pages 1a and 1b are cut off, and the Board provided the complete text of the information contained in those boxes on pages 1i and 1ii of the records. In other places where information was cut off, the Board also provided copies of the complete text of the missing information.

Background to the record

As I indicated above, the portions of the record remaining at issue comprise the Board's Five-Year Capital Plan, and the Board has provided some background information relating to the Plan. The Board states:

> In December 2003, the Ministry of Education asked Ontario school boards to honour a moratorium on school closings to permit an integrated review of facility needs.

> In February 2005, the Ministry of Education released "Good Places to Learn: Renewing Ontario's Schools" … and announced that in order to support program excellence boards would be required to file comprehensive capital plans to support program objectives by October 2005.
>
> [The Board was] required to input information about [its] schools into an online database (data capture) made available by the Ministry, including existing enrolment, projected enrolment, the capacity of each school and existing/projected space utilization for each school. [The Board is] required to update this data annually.
>
> In light of declining enrolment (which means reduced grants), surplus space and aging buildings, [the Board was] asked to propose "supplemental measures for declining enrolment boards". … This process required [the Board] to look ahead and propose some possible or *hypothetical* scenarios for the utilization of school buildings in the future - based on program needs.

The Board provided this office with a copy of the document "Good Places to Learn: Renewing Ontario's Schools". Under heading "D" of that document, entitled "Open and Transparent Decision-Making", the Ministry describes the "Planning Process" for this new approach as follows:

> Good decisions about school buildings and grounds can only be made with long-term planning. These plans should serve as a comprehensive and sustainable forecast for our schools and our communities.
>
> To ensure more accurate demographic projections, more opportunity for public engagement and more consideration for education and community trends, boards will now be required to set and maintain rolling five-year capital plans as a condition of ministry facilities funding. The first of these plans is due in October 2005.
>
> … the ministry will provide resources and support to assist boards in expressing outcomes. The ministry will not micro-manage this process. The information that will be required will be the kind that is useful to board operations and planning.

Also under heading "D" of the document, the Ministry sets out the "New Capital Planning 10-Step Process". Steps 2, 8 and 9 are particularly relevant to the creation of the Five-Year Capital Plans:

2. Community Engagement

Public engagement will ensure that communities take full advantage of school facilities and are active participants in long-term school and community planning. Boards will strike a capital planning advisory committee, overseen by trustees, with municipal, school, community and public representations. The committee will help provide feedback from the broader community at an early stage.

8. Five-Year Action Plan

The plan should indicate how The Good Places to Learn fund resources were used in the first and second phases. School valuations should be conducted for schools that are candidates for replacement if applicable.

The plan should indicate concretely:

- Five-year renewal plans from regular funding using life-cycle planning
- New schools planned under New Pupil Places or other sources
- Identify schools that will be subject to school valuations
- Identify schools that may be subject to school closing procedures
- Identify schools that may be available for regional use
- Direct and indirect implications for operational grants from facilities decisions.
- The plan should clearly identify challenges where facilities are causing program limitations.

9. Community Input on Action Plan

The action plan should be submitted for public consumption prior to board approval.

Board approval is the final step to be followed under the Ministry's guidelines. The Ministry also states in this document that once the capital plans are complete, the Ministry will review and approve them. Moreover, the Ministry states that the plans will be "a basis to talk back to the ministry in areas where a board may feel particular or unique need and where facilities 'gaps' may exist outside of existing provisions." As I understand it, the Ministry intends that the Five-Year Capital Plans function as not only a planning tool for boards, but also as a communication tool between boards of education and the Ministry.

DISCUSSION:

ADVICE TO GOVERNMENT

The Board takes the position that all of the withheld portions of the record qualify as "advice or recommendations" and qualify for exemption under section 7(1) of the *Act*.

General principles

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

The representations

The Board submits that the record contains "specific advice of how to best meet the program needs of students in Rainbow Schools and reduce surplus space." Moreover, it contends that the record contains a recommended course of action, which includes possible or hypothetical scenarios including consolidating schools, closing schools, building new schools, creating additions to existing schools, demolishing school buildings, and relocating school programs and students. The Board notes that the "hypothetical recommendations" pertain to named schools.

The Board submits further that the specific advice and recommendations are contained in the record at issue because it presents possible or hypothetical scenarios as they relate to identifiable schools and school areas. Additionally, the Board takes the position that disclosure of the charts contained in some of the records could reveal the advice or recommendations, as it would be possible to infer the recommended course of action by extrapolating the data contained in them. With respect to its obligations under the Ministry's new capital planning 10-step process, the Board states:

> The advice was given by a Capital Planning Advisory Committee established in accordance with the letter dated June 15, 2005 [from the Chief Financial Officer of the Board to the Ministry]. The committee was made up of the Chair of the Board, the Chair of the Policy and Finance Committee, the Director of Education, the Chief Financial Officer, appropriate Supervisory Officers, the Manager of Plant, the Assistant Manager of Plant, elementary and secondary school principals and a third party firm. The committee considered many possible or hypothetical

> scenarios, not all of which were captured for submission to the Ministry. In the letter dated June 15, 2005, [the Board] indicated to the Ministry that *"For the time being, because of the short timeline to prepare this plan and the summer holidays, it is not feasible to involve community representatives other than trustees. We propose that we would seek this representation once we are in a position to implement our plan."*

The Board admits that the record at issue was not communicated to "the person being advised" by the Capital Planning Advisory Committee, and explains that:

> An *overview* of the Five-Year Capital Plan was presented to trustees at the Policy and Finance Committee meeting held on November 28, 2005. The presentation focused on planning areas and required outcomes (i.e. the amount of space reduction needed in a specific planning area). No hypothetical scenarios were mentioned. The presentation did not indicate how the reduction in pupil space would be achieved. The presentation did indicate that each planning area would be looked at, in time, when it is realistic to do so. An executive summary of the presentation was subsequently posted on [its website]. The presentation made at the Policy and Finance Committee meeting is attached….

Even though the information in the record was not communicated to the person being advised, the Board notes that it developed the Five-Year Capital Plan in accordance with Ministry of Education directives/guidelines, and submits that the disclosure of the information contained in the records will inhibit the free flow of advice or recommendations from the Board to the Ministry of Education in the future. The Board states further:

> History has shown that closing schools or altering school programs in any way are highly sensitive situations that mobilize communities to action. Disclosing possible or hypothetical information would cause undue anxiety among students, parents, employees and the communities that we serve. It would also disrupt our focus on teaching and learning and stretch our limited resources as we attempt to deal with public enquiries. It would have a negative impact on school-community partnerships.
>
> In October 2006, the Ministry outlined a clear process to be followed when conducting a review of accommodations. This process calls for the creation of an Accommodation Review Committee made up of community stakeholders (parents, educators, municipal representative, business representative). The process includes extensive public consultation.
>
> We have indicated clearly throughout this process that there are no "preconceived notions" regarding the future of any school or program within the system. To release the "advice and recommendations" in the Five-Year Capital Plan would leave the community to believe otherwise. This would significantly erode public confidence in the Board, the Ministry and the collaborative School Valuation

> process. We have asked our communities to develop options for our consideration in the context of resources available. We are committed to the community consultation process. (For more information, log on to rainbowschools.ca and click on "accommodation" under "highlights".)

Emphasizing that at no time in the past, present or future has or would it ever close or build a school without extensive public consultation, the Board states that "[g]ood governance, however, demands that school boards plan for the future by outlining capital needs, calculating maintenance costs, and reviewing enrolment projections." The Board points out that it looks at trends in demographics and, on an annual basis, considers options for maximizing the use of space/reducing surplus space within its inventory of facilities in order to meet the educational needs of students. The Board indicates that it holds a public Accommodation Meeting annually to determine if any schools or school areas will be reviewed.

The appellant contends that the record does not contain advice or recommendations. Referring to a letter from the Minister of Education, dated October 31, 2006, addressed to School Board Chairs, the appellant submits that the record is, "a draft document that provides the first step in the ongoing Capital Planning process." The appellant notes that the Minister of Education indicated that the Capital Plan is intended to enable the boards, the community and the Ministry of Education to review capital needs together. The appellant states further that:

> The [Board] has made it clear that the Capital Plan does NOT determine the future of a school or schools. That is done through the Accommodation Review process. The Capital Plan was submitted to the Ministry of Education. Correspondence from the Ministry suggests they will work with boards and the community. It suggests a collaborative approach to find practical solutions. We maintain therefore, that the Capital Plan contains options. We believe the Capital Planning Committee used advice and recommendations to create a Capital Plan and submit it to the Board of Trustees.

The appellant submits further that once the Board of Trustees approved the Capital Plan, it became a final plan for 2006; providing a broad framework from which Accommodation Reviews may arise. The appellant notes that the Minister of Education refers to the capital plans as "draft plans" in her letter to the appellant, dated March 27, 2007, and states that "the plans are subject to a local public consultation process." The appellant submits that, contrary to the Board's position, the Minister does not ultimately accept or reject the plans. Rather, the appellant argues, it is a collaborative effort between the Ministry of Education, school boards and the public that they are accountable to.

The appellant concedes that the Capital Planning Advisory Committee would have considered "advice or recommendations" in order to arrive at their final document, that being the Capital Plan. The appellant notes that the information that became the Capital Plan was given by the Capital Planning Advisory Committee, and finally approved by the Board of Trustees at the December 12, 2005 regular Board meeting.

In response to the appellant's submissions, the Board reiterates that disclosure of the "options/possibilities/hypothetical scenarios in the capital plan" would hinder the free flow of information. To emphasize this point, the Board states:

> Just look at the position the Board now finds itself in... spending countless hours responding to this appeal. It is also important to note that the Board, on many occasions, invited the appellants to come in and meet face-to-face to address concerns. Please see the string of email correspondence between the appellant, the Chair of the Board, the Director of Education and the Chief Financial Officer. It is our goal to build public understanding not to thwart or circumvent public process.
>
> The appellant has indicated: "Since the public is to have input into the plan, it is a public document. It is unfair that the Rainbow Board has chosen to 'skip' the public input part due to time constraints." Again, we explained this clearly in our first submission. The public did NOT have input into the capital plan. We have engaged the public in extensive dialogue through the accommodation review process.

The Board states further that the record at issue (the data capture) was not the capital plan approved by the Board of Trustees. The Board points out that the Trustees received an overview of planning areas with appropriate data (enrolment, facility condition index, capital needs, etc.) only and consequently did not approve any options.

Analysis and findings

I find the Board's submissions relating to this issue to be somewhat contradictory. It is very apparent that the Board does not wish the information contained in the Capital Plan to be released to the public. In defending its decision to withhold the information, the Board has simultaneously argued that the Capital Plan contains "plans", "options", "advice", "recommendations" and "hypothetical scenarios". The Board appears to be saying that the Capital Plan was prepared in accordance with the Ministry's guidelines, but argues that it did not follow those guidelines, notably with respect to public consultation. The Board would appear to indicate that the Capital Plan had all the requisite approvals prior to submission to the Ministry, but then states that the actual plan was never submitted for Board of Trustees approval. The Board also stresses its reliance on the public participation in the accommodation review process as a basis for justifying the non-disclosure of the information contained in the Capital Plan, which in my view, confuses the two processes and fails to explain how or why the Capital Plan would be perceived as containing "advice or recommendations."

Based on the submissions in the appeal and my review of the record, I am not persuaded that the Capital Plan contains advice or recommendations. It is clear that the Capital Plan was developed at the request of the Ministry as a planning and communication tool. While I do not doubt that advice and recommendations were made and received during the development of the plan, the

resultant document reflects decisions already made at the Board level, at least with respect to the plan itself, which all parties seem to recognize forms part of a dynamic planning process. The evidence does not suggest that the Board finds itself in an "advisory" position vis-à-vis the Ministry. Nor does the evidence suggest that the record at issue contains any kind of suggested course of action that would be subject to consideration during the deliberative action of government decision-making, either at the Ministry or Board level.

It is apparent, from my review of the record at issue, that it contains data elements that are of a factual nature. The record also contains information which, as the appellant notes, contains "strategies" for possible action. The Board strenuously argues that these strategies and options are strictly hypothetical scenarios developed for the purpose of responding to the Ministry's directives. Previous orders of this office have found that the inclusion of "options" alone in a document, without additional information suggesting a course of action, is insufficient to attract the protection of the exemption in section 7(1) of the *Act*.

Support for this approach to the interpretation of section 7(1) can be found in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at p. 292:

> A second point concerns the status of **material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations.** Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16].
>
> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. **The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.** [emphases added]

As I indicated above, the information contained in the Capital Plan is of a factual or background nature and/or contains hypothetical scenarios or options. Based on my review of the record and the Board's representations, I find that in and of themselves, the various data elements contained in the record do not "advise" or "recommend" anything, nor can they be seen as predictive of the advice or recommendations that would ultimately be given. It would not be accurate to view them as advice or recommendations in the sense required by section 7(1). On this basis, I find that section 7(1) does not apply to the portions of the record at issue.

ECONOMIC AND OTHER INTERESTS

General principles

The Board claims that sections 11(c), (d), (f) and/or (g) apply to the information at issue in the current appeal. Those sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11 (c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The Board provides general submissions on this issue and then addresses each of the section 11 subsections claimed. In its general submissions, the Board states:

> Naming schools for possible closure, demolition, consolidation or expansion - when those decisions have not been made in accordance with due process - would have a negative impact on the Board, its students and parents, and the affected school communities. In fact, it would be the equivalent of needlessly "spreading rumours" and "wreaking havoc" which we believe would be irresponsible as a public institution. Such a move would detract from our core purpose - teaching and learning - and impact our economic interests.
>
> It would also cause the public to lose faith in the long-term viability of programs. This will further erode enrolment. There are currently four school boards in our jurisdiction (English Public, English Catholic, French Public, French Catholic.) Since grants are tied directly to student enrolment, there is competition for students. This would threaten the viability of our English and French Immersion programs.
>
> Disclosure of the information could reasonably be expected to prejudice the economic interests of the Board and its competitive position as an institution. Disclosure of the information could reasonably be expected to be injurious to the financial interests the Board.
>
> Any plans relating to the management of personnel or the administration of an institution have not yet been put into operation or made public.
>
> Disclosing the proposed plans, policies or projects of the Board could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.
>
> Would you send your child to a school that you thought was closing when, in fact, that decision had not been made?
>
> Would you not fight to keep your child's school open even when no such consideration had been given by the board through an approved accommodation review process?

> If you had just purchased a new home in a subdivision with a school within walking distance, would you not be upset to learn that it might be demolished? Would you not be concerned about how this could impact the value of your home in the marketplace?
>
> If the school that you attended, your mother attended and your children now attend was being targeted for closure, would you not be tempted to do what you could to preserve the rich history for your grandchildren?
>
> If you were a teacher or custodian or secretary and heard that your school was closing, would you not be concerned about losing your job and not being able to provide for yourself and your family?
>
> Schools are reflections of the communities that they serve. They are also places where memories are made. We value all of our schools and we are proud to know that our families will "fight for them". We don't want to call the community into action until there is a reason to do so. And, when we do, it will be with a collaborative decision-making process and full disclosure of all pertinent information (i.e. enrolment projections, maintenance/capital costs, programming options, local economic considerations, etc). Public education is the very foundation for a democratic, prosperous, humane, just and respectful society. Collaboration is critical to the democratic process.

After providing these general representations on the possible application of the section 11 exemptions, the Board also provides specific representations on the application of some of those exemptions. My review of each of these exemptions and my findings are set out below.

Section 11(c) prejudice to economic interests

Section 11(c) reads:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].
In support of its claim regarding the application of section 11(c), the Board states:

> Schools are property and property has value on the marketplace. Proposed construction and renovation projects have costs associated with them. Any projects must be tendered in accordance with board procedures to ensure a fair and competitive bidding process. Any information regarding proposed projects that has not gone to tender or been approved by the Board should not be released as this could hamper the competitive bidding process with contractors.
>
> Speculation, based upon hypothetical information, will have a negative impact on the local economy.

Findings

On my review of the representations provided by the Board, I am not satisfied that the Board has provided the type of "detailed and convincing" evidence necessary to establish a "reasonable expectation of harm" that disclosure could prejudice the economic interests of an institution or the competitive position of an institution. The Board refers to "proposed construction and renovation projects", the costs associated with them, and the need for fair and competitive tendering and bidding process; however, in its representations set out above, the Board has clearly stated that the information contained in the record is hypothetical and that closures and renovations would never occur without extensive public consultation. In these circumstances, I find that the exemption in section 11(c) does not apply to the records at issue.

Section 11(d): injury to financial interests

Section 11(d) reads:

> A head may refuse to disclose a record that contains,
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

As noted above, for section 11(d) to apply, the Board must demonstrate that disclosure of the records "could reasonably be expected to be injurious" to its financial interests. As with section 11(c) above, to meet this test, the Board must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

With respect to the application of section 11(d), the Board submits:

> School boards are funded on a per pupil basis. If parents believe that schools are closing, they will choose to not send their children to those schools.
> Declining enrolment has a significant impact on the Board's operating budget. Declining enrolment threatens the very viability of a school. It impacts the programs offered, the number of teachers that are hired, the number of support staff that are hired, and our ability to generate revenue to maintain the facility.
>
> As a public institution, Rainbow District School Board must be accountable to taxpayers. Disclosing hypothetical scenarios that are not rooted in reality will no doubt lead our taxpayers to question our accountability. What do you mean they plan to spend our tax dollars to build a new school? How can that be when there are empty spaces in existing schools?
>
> We believe that disclosure to one is disclosure to all. The media exposure alone, should the hypothetical scenarios be released, will have a significant impact on our students, the staff in our schools, our parents/guardians and the community at large. It will also undermine the public accommodation review process currently underway.

Findings

Similar to my finding under section 11(c) above, I find that the Board has not provided sufficiently "detailed and convincing" evidence necessary to establish a "reasonable expectation of harm" that disclosure could be injurious to the financial interests of an institution. Although I accept the Board's general position that declining enrolment impacts the Board's operating budget, I am not satisfied that, given the nature of the record at issue, its disclosure could reasonably be expected to result in this declining enrolment. Again, throughout its representations the Board has clearly stated that the information contained in the record is hypothetical, and that no closures or renovations will occur without extensive public consultation. In these circumstances, I am not persuaded that the disclosure of the record could reasonably be expected to result in declining enrolment.

The Board also seems to take the position that disclosure of the hypothetical scenarios "not rooted in reality" will lead its taxpayers to question the Board's accountability. Although this may be true, this is not the type of harm set out in section 11(d), nor am I satisfied that the section 11(d) harms could reasonably be expected to occur if the Board's accountability is questioned. Accordingly, I find that the records do not qualify for exemption under section 11(d).

Section 11(f): plans relating to the management of personnel

Section 11(f) reads:

> A head may refuse to disclose a record that contains,
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

In order for section 11(f) to apply, the Board must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

The Board's representations on the application of this section focus on the possible harms or consequences that may result from the disclosure of the record; however, section 11(f) does not require that a particular harm will result from disclosure, rather, the section simply identifies a type of record which qualifies for exemption. The records exempted by this section are plans relating to the "management of personnel" or the "administration of an institution" that have "not yet been put into operation or made public."

Findings

I have carefully considered whether the record at issue is the type of record covered by section 11(f). It is clearly entitled a "plan" (the Five-Year Capital Plan). Its focus is on the possible closure, demolition, consolidation or expansion of certain identified schools, which in my view would relate to the management of personnel or the administration of an institution. Furthermore, the plan has clearly not yet been put into operation or made public. Accordingly, on a cursory review of this record, it appears to meet the three requirements of the test set out above from Order PO-2071.

However, consistent with the wording and interpretation of section 11(f) referred to above, and based primarily of the representations of the Board itself, I am not satisfied that the record qualifies for exemption under section 11(f).

As identified above, previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348]. Although on reviewing the record it appears to contain what I consider to be a fairly detailed method by which something is to be done, the Board has clearly contradicted this impression by stating in its representations that the record does not contain a method by which something is to be done. The Board has described the Five-Year Capital Plan in a number of ways, but one of the clear themes from its representations is that the information contained in the record is a hypothetical, theoretical plan that does not reflect the actual decisions that will be made. The Board repeatedly points out that the plan does not reflect actual decisions that will be made on schools closures, consolidations or expansions, because there has been no public consultation or discussion on the plan.

In these circumstances, I find that the Five-Year Capital Plan does not contain a formulated method by which a thing is to be done, as the Board has confirmed that the detailed actions set out in the record do not reflect the actual decisions that will be made, nor the method by which these things will be done.

One of the purposes of the exemption in section 11 is to protect certain economic interests of institutions and avoid creating an unfair advantage for those with whom the institution may do business by the premature disclosure of plans to change policy or commence projects. The Williams Commission Report explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.
> …
>
> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.
> …

In addition, in Order PO-2635 Adjudicator DeVries reviewed the application of section 18(f) of the *Freedom of Information and Protection of Privacy Act* (equivalent to section 11(f) at issue in this appeal). In that order, the institution (a University) claimed that the exemption ought to

apply to a draft budget. Adjudicator DeVries rejected the view that this section could apply to a draft budget, and stated:

> The University might be taking the view that the draft "plans" contained in the record do not necessarily contain the final "plan" that was made public, and that the draft "plans" have therefore not been made public, and qualify under section 18(1)(f). However, the word "yet" in section 18(1)(f) suggests that the "plans" which qualify under it will at some point in time be put into operation or made public. Clearly the draft "plans" contained in the records at issue were drafts of the 2006/2007 budget, which has been made public, and I have no information from the University suggesting that the drafts will be put into operation or made public in the future. They are simply the drafts of the Budget which was made public.
>
> I find support for this approach to section 18(1)(f) in the words set out above from the Williams Commission Report which explain the rationale for including the "valuable government information" exemption, where it states:
>
> > There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project. [emphasis added]
>
> In my view, this reinforces the position that the premature disclosure of plans would lead to unfairness, and that this premature disclosure is what section 18(1)(f) is designed to guard against.

I adopt the approach to application of this section set out above. The Board's evidence clearly supports the finding that the information contained in the Five-Year Capital Plan is not "a formulated and especially detailed method by which a thing is to be done"; but rather a hypothetical, theoretical "plan" that does not reflect the actual decisions that will be made. On this basis, and based on my view of the purposes for which the exemptions in section 11 were enacted (as reflected in the quotations above), I find that the record does not qualify for exemption under section 11(f).

Section 11(g): proposed plans, policies or projects

Section 11(g) reads:

> A head may refuse to disclose a record that contains,

> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order for section 11(g) to apply, the Board must show that:

> 1. the record contains information including proposed plans, policies or projects of an institution; and
>
> 2. disclosure of the record could reasonably be expected to result in:
>
> (i) premature disclosure of a pending policy decision, or
> (ii) undue financial benefit or loss to a person.
>
> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

The Board's representations on this section state:

> On March 19th, 2007, the Board approved Policy 3.09 - Pupil Accommodation Review. The policy outlines a process for the review of a school. This process involves extensive community consultation.
>
> Disclosing the records would undermine the process.
>
> The community will question the credibility and integrity of the Board in establishing Accommodation Review Committees. Members will, no doubt, say: Why is the Board establishing an Accommodation Review Committee when the decision to close our school has already been made?
>
> This, in fact, is not the case.

Findings

I have carefully considered whether the record at issue is the type of record covered by section 11(g). Section 11(g) clearly requires that, for a record to qualify under this section, it must contain proposed plans, policies or projects. Based on the Board's representations, including the specific representations made under this section, the Board has stated that the record does not contain a decision that has already been made. The Board reiterates that the record contains hypothetical scenarios, and not decisions of the Board. While the plan, policy or project need

only have been "proposed," and may not yet be Board policy, and still be exempt under this section, "hypothetical" scenarios fall far short of qualifying as a "proposed plan."

In addition, the Board has reiterated that the record does not contain a "pending policy decision", and I have not been provided with sufficient information to satisfy me that the disclosure of the record could reasonably be expected to result in undue financial benefit or loss to a person. The Board has repeatedly stated that the information in the records is "theoretical" and "not rooted in reality", and the harms identified by the Board relating to the questions which may be asked by the public do not persuade me that the record qualifies for exemption under section 11(g).

In summary, I find that the record does not qualify for exemption under sections 7(1) or 11(c), (d), (f) or (g), and I will order that the records be disclosed.

Because of the findings I have made in this order, it is not necessary to consider whether the public interest override in section 16 applies. Nevertheless, I would like to comment on the expectations of the public and the Ministry with respect to transparency in the Board's decision-making insofar as it pertains to the Capital Plan and the Board's approach to dealing with it.

I have included the detailed information set out above to provide a framework for my understanding of the Capital planning process. It appears clear from the material provided by both parties that the development of the Capital Plan is part of a fluid process.

It is also clear that the Ministry expectations are that Boards will consult with the public about the Capital Plan prior to submitting the Plan to the Ministry. The Ministry has identified the importance of public involvement in the planning process. As I noted in a previous discussion above, in the Ministry document "Good Places to Learn: Renewing Ontario's Schools", under heading "D" of that document, entitled "Open and Transparent Decision-Making", the Ministry describes the "Planning Process" for the new approach as follows:

> Good decisions about school buildings and grounds can only be made with long-term planning. These plans should serve as a comprehensive and sustainable forecast for our schools and our communities.
>
> To ensure more accurate demographic projections, *more opportunity for public engagement* and more consideration for education and community trends, boards will now be required to set and maintain rolling five-year capital plans as a condition of ministry facilities funding. The first of these plans is due in October 2005. [emphasis added]

The two letters from the Minister of Education, referred to in my earlier discussion under section 7, elucidate both the nature of the five-year capital plans and the expectations of the Ministry and the public regarding their dissemination. The first letter, dated October 31, 2006, addressed to School Board Chairs is in reference to the government's new *Pupil Accommodation Review*

Guidelines. Speaking to the guidelines and the five-year capital plans, the Minister makes the following comments:

> I recognize that some communities are concerned about the future of specific schools. The new board of trustees may want to hold a public meeting to inform the community about the process and timelines outlined in the *Pupil Accommodation Review Guidelines*, and to explain the board's next steps. If the board has any updates on previously announced timelines for review, such as those included in capital plans, you could share that information with the public as well. It may be necessary to clarify that the Ministry of Education views the board's long-term capital plan as an interim document that provides a first step in the ongoing capital planning process, and that this document is intended to enable boards, the community and the Ministry to review capital needs together and determine priorities for investment.
>
> As public officials, we share an obligation for transparency when building strong relationships with the public…

In a letter, dated March 27, 2007, addressed to the appellant, the Minister of Education explains the nature and purpose of the capital plan:

> School boards submit their capital plans to the Ministry of Education in draft form. The draft plans provide a first step in the ongoing capital planning process to determine the capital needs of boards across the province. The Ministry is working with boards to review and analyze the plans. Once this review is completed, and subject to a local public consultation process, boards are required to post their capital plans on their websites.

In its Reply representations, the Board notes that school boards across the province have interpreted and defined the words "Capital Plan" differently, as is evident from the information that is posted on the websites of different boards. Accordingly, the Board contends that each board's website will have a different look and contain different information. The Board indicates that it has posted some information about its Capital Plan on its website. I note that the information contained in this Board Report is considerably different from the information in the records at issue and does not contain the data elements indicated in item 8 of the Ministry's "New Capital Planning 10-Step Process". The Board reiterates that:

> The records at issue in this appeal are a 'data capture' submitted to the Ministry of Education as requested. We put forth a range of accommodation options or possibilities because we were <u>required to do so.</u> We indicated in out initial submission to the IPC that we did NOT conduct a public consultation to determine these options or possibilities. Public consultation has come later in the process based upon the Accommodation Review Guidelines and our annual Accommodation Review Meeting.

The appellant's representations stress the importance of transparency in both the capital planning process and accommodation review process:

> …The community consultation that is done during the Pupil Accommodation Reviews, only invites the community from that particular area. However a community needs to see the entire plan to know how each area fits into the puzzle and to be able to determine if other areas have greater or lesser needs than their own.
>
> The Capital Plan is what we believe shows the whole picture. It provides the broad framework that allows the board and the community together. In essence, we believe the Capital Plan is the board's opportunity to say to the community, "this is our vision, and these are the options that we believe are best, now what is your vision?" That is why we believe it is a draft document. Then from that spirit of collaboration, Accommodation Reviews may arise. The [Board] has much expertise that enables them to arrive at options. However, the community's contribution should not be undervalued. We as community members can also bring many strengths to the table so that together we can create a vision that we can all live with. In order to share the vision, both sides need access to all relevant information. The Board's options are we believe, very relevant. Not releasing the plan and then finding out after the fact, the contents of the plan is what was actually done, is what undermines the process and weakens the public's trust…Openness and transparency is the only way to ensure no process is undermined.

In reading the Board's submissions, I am concerned that the Board's approach contradicts the Ministry's emphasis on the importance of public consultation. In my view, the Board's attitude towards disseminating the information in the Capital Plan is contrary to the transparency principles advocated by the Ministry in establishing the capital planning process.

ORDER:

1. I order the Board to disclose the record at issue to the appellant by providing the appellant with a copy of the record by **November 3, 2008**.

2. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, only upon request.

Original Signed By: October 10, 2008
Laurel Cropley
Adjudicator