



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2413

Appeal MA07-427

Ottawa-Carleton Catholic School Board



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NATURE OF THE APPEAL:

The Ottawa-Carleton Catholic School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

1. Any and all documents, in any form, contained in [the requester's named child's] OSR [Ontario Student Record]
2. Any and all digital materials contained in any database or software system or stored on any server with regards to, or mention of [the named child] or any member of her family
3. Any and all records, notes, communication, letters, emails, minutes, sent or received, or documentation in any form with regards to [the named child] maintained by any employee of the [Board] or contracted to work with the [Board]
4. Any and all records, documents, minutes, emails or information in any form contained in any file (paper or electronic) maintained by [13 named individuals] making mention of [the named child] or her family, or not making specific mention of but clearly in reference to [the named child] or her family
5. Any and all records with respect to special education resources (financial, human, material) allocated to [the named child]
6. Information with respect to the resources and allocation of special education services at [named school] (# children receiving services, # children identified and the categories of identification, # children receiving withdrawal services, # children receiving EA [Educational Assistant] support and the hours, EA schedule, special education budget allocated and expenses and purchases)
7. Information with respect to the special education requirements in the grade [#] classes, including # of grade [#] children identified and the categories of identification, # children in each grade [#] class and # of identified children in each grade [#] class
8. Any and all information with respect to the criteria used at [named] school to allocate, distribute, rationalize special education services, programs, resources

The Board located responsive records and issued a decision indicating that in addition to records already disclosed to the requester under a previous request or sent to or from her by the Board, that the only responsive file was the requester's child's OSR file. It confirmed that other records had been shredded or not maintained by the Board. The Board provided access to a copy of the elementary transfer record, email correspondence, handwritten notes, an Independent Education Plan (IEP), an incident report form and an EP Accommodations to Address Identified Needs form.

The Board also noted that some records may be subject to the discretionary exemption in section 12 (solicitor-client privilege) as there is ongoing litigation between the requester and the Board.

The requester, now the appellant, appealed this decision.

After the appellant filed her appeal, the Board issued a new decision, disclosing six additional emails to her.

During mediation, the appellant provided the mediator with an example of specific records which she believed she has not received. The Board also provided access to the appellant's child's OSR, and provided an explanation for why the deleted emails are not accessible. The appellant accepted this explanation and deleted emails are no longer at issue in this appeal.

The Board issued a new decision letter addressing the other points raised by the appellant and provided access to the responsive records that existed.

In response, the appellant advised that the Board had not provided a decision on the final three points of her request. The Board agreed, and subsequently issued a final decision addressing these points. In this decision, the Board denied access to the responsive records under section 14 (personal privacy) of the *Act*, and indicated that no records exist concerning the special education budget as the school does not have a school-based budget.

The appellant asked that the file be moved to adjudication on the basis of reasonable search and the exemptions claimed. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the Board initially. I received representations from the Board. In its representations, the Board pointed out that the records may contain the personal information of the appellant's child. This raised the application of sections 54(c) and 38(b) of the *Act*, which read:

38. A head may refuse to disclose to the individual to whom the information relates personal information,

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

54. Any right or power conferred on an individual by this Act may be exercised,

(c) if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

As a result, I sought and received supplemental representations from the Board on sections 38(b) and 54(c), as well as on the Board's exercise of discretion. I received supplemental representations from the Board. In its representations, the Board recognized that sections 38(b) and 54(c) were relevant and also provided representations on its exercise of discretion. The Board also provided the appellant with a supplemental decision letter, disclosing additional information from the records responsive to the last three points of her request.

I sent a copy of the Board's initial and supplemental representations to the appellant, along with a Notice of Inquiry and sought her representations. I received representations from the appellant. I then sought reply representations from the Board. I received reply representations from the Board and then sought and received surreply representations from the appellant. I sent a portion of the appellant's representations to the Board and sought further reply representations, which I received.

RECORDS:

There are three records consisting of eight pages, which are responsive to points 6 to 8 of the appellant's request. Portions of these records are being withheld by the Board under section 38(b) (personal privacy).

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

I will first determine whether the Board conducted a reasonable search for records.

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.

The Board was asked to provide a written summary of all steps taken in response to the request. In particular, the institution was asked to respond to the following, preferably in affidavit form:

1. Did the Board contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the Board did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the

request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Board submits that it sought responsive records from the following Board staff who were associated with the two schools that the appellant's child attended: the Deputy Director of Education, the Superintendent, the Principal and the former Principal for one of the schools (School #1), the Principal and a Resource Teacher for another school (School #2), the Superintendent for Special Education and Student Services, a Special Education Consultant and the Superintendent, Information Technology.

These Board staff all replied to the Board's Freedom of Information Coordinator (FOIC), either directly or indirectly. The Board submits that all the records that were in the custody or control of these staff members were located and disclosed to the appellant, subject to any claimed exemptions. The Board advised that certain emails no longer exist based on the Board's record retention policy. The Board states that:

...it is the Board's understanding that the appellant agreed with the Board's policy on the retention of emails and withdrew this request. Any available and/or responsive emails have been disclosed.

The appellant submits that the Board did not perform a reasonable search for responsive records and that the following responsive records should have been located in the Board's search:

- Emails between the former vice-principal of School #1 to the Deputy Director of Education
- Communications between the current and former Deputy Director of Education
- Notes of closed Board meetings where the Board reviewed the Special Education Appeal Hearing (SEAB) and tribunal decisions as well letters she sent to Board trustee members.

- Records from the Superintendent, Special Education and Student Services resulting from meetings the appellant had with principals and other superintendents in other tribunal proceedings
- A copy of the policies and procedures for maintaining hard copies of email communication and procedures for maintaining records of communication when there are on-going issues.
- Records from certain persons, both named and not named in her request
- Records from the occupational therapist that treated the appellant's child
- The "School Health Support Services Reference Form" for the appellant's child
- The Identification, Placement, and Review Committee (IPRC) register from all four of the appellant's child's IPRC's decisions
- The completed forms for the IPRC process for the appellant's child
- The Specialized Equipment Checklist, which includes the following:
 - ...the comprehensive information about equipment (size, make, model, company info), report, specialized equipment checklist application cover sheet, quotes, purchase order [PO], requisition, processed PO and requisition, changed school budget, approval, final receiving report, invoice, packing slips, warranties, equipment documentation, and arrangements with technical staff.
- Records of all grant applications made to the Ministry of Education in regards to the appellant's child.
- The financial trace from the source of money used to purchase equipment for her child. She claims that:

In the case of bulk purchasing, provide the information for the bulk purchase for the equipment provided to [the appellant's child] and the same financial trace... If the hardware cannot be traced to [the appellant's child], then records of the aggregate number of ...grants used to apply for laptops, number of laptops purchased and number of laptops assigned (per board, per school).

The laptop does not have the software or operating system that was installed at purchase. Please provide the information with respect to the software license for this laptop and records of what happened to the original software. The records for the other software installed in the laptop are also requested.

The appellant also claims that she should have received copies of the "statistical information" of the number of children assigned to each of the placements identified on their IEP form, broken down by exceptionality, as well as:

...the actual human resources that were allocated to [the appellant's child] and the actual time spent specifically and individually ... (this does not include time spent by regular classroom teachers or resource teachers with other children in class, activities, etc).

For the category "Multiple Exceptionality" the number of children with this identification at the Board, and the number of children with this exceptionality in each of the placement options on the Board's IEP form.

After reviewing the appellant's request, the Board's decision letters, the mediator's report and the parties' representations, I sought reply representations from the Board on certain items, namely: whether seven named individuals (three named in part 4 of the request and four teachers) had responsive records and whether records responsive to points 6 to 8 of the appellant's request exist in statistical format. In reply, the Board submits that:

...requests for information from personnel at [School #2] were undertaken by contacting the principal of [this school] and asking for all material that staff may have in their possession. Also, [name] Director of Education, had been asked for any information that he might have in his files. Material provided [had] been forwarded to the appellant in previous correspondence.

The Board contacted the three individuals named in part 4 of the appellant's request. Two of these individuals did not have responsive records and one had copies of records already provided to the appellant. As well, the Board provided a copy of a personal note located by one of these individuals written in preparation for an IEP meeting.

With respect to the four teachers, the Board replied that requests for information from personnel at the school these individuals taught at had been undertaken, requesting all material that staff may have in their possession. It also stated that after receipt of the request for reply representations, another search for responsive records was made at the school where three of the named teachers are on staff. The Board provided a copy of one new record, which was the numerical data for a test result done by a resource teacher. The Board also stated that despite searches of the Board records, including making inquiries of the principal where this teacher had allegedly worked, no record could be found of the fourth individual.

Concerning the appellant's claim that further responsive statistical records, including teacher and Educational Assistant (EA) schedules and charts, should exist, the Board replied that it maintains statistical records based on Ministry of Education requirements and that this information requested by the appellant does not exist.

I then provided a copy of the Board's reply representations to the appellant. In response, she submits that the Director of Education has been involved in many meetings with respect to her

child and she has been told that he is responsible for many decisions with respect to her child. Concerning the fourth teacher who could not be identified by the Board, the appellant claims that this person supply taught her child in 2007, and she sent home notes and the former vice-principal at School #1 may have records that respond to this request.

Concerning the former vice-principal at School #1, she submits that “there is still no response as to whether the Board has asked [her] to search and provide her records”.

The appellant maintains that statistical information and Resource Teacher and EA schedules that respond to her request should exist.

In particular, she is aware that the Resource Teacher and EA schedules exist and have been in several meetings where these schedules have been referred to. She submits that these schedules would be necessary for resource teachers and EA's to know which children they were to be working with at any given time.

I then provided a copy of the appellant's surreply representations to the Board and sought further representations on the availability of records from the Director of Education, the former vice-principal at School #1 and the person who the appellant claimed supply taught her child, as well as the Resource Teacher and Educational Assistant Schedules.

In reply, the Board submits that:

...there are no further records to be provided which are in its possession and which are responsive to the request. Every possible effort has been deployed in order to respond to the multiplicitous requests by this appellant.

The Board has no knowledge of the allegations and speculation the appellant is making with respect to all of the records she is now requesting. As stated above, there are no further responsive records in the possession and control of the Board.

Analysis/Findings

In response to the appellant's eight part request, the Board has provided the appellant with disclosure of responsive records on numerous occasions, including several decision letters which enclosed responsive records. These decision letters consist of the original decision letter December 11, 2007, three decision letters issued during mediation dated January 31, April 14 and May 8, 2008 and one decision letter issued during adjudication, dated September 18, 2008.

In her representations, the appellant claims that the Board responded literally to her request and should have contacted her to clarify her request. However, the appellant has not indicated which portion of her request she believes required clarification, nor how the Board limited the scope of the request. Instead, the appellant has attempted to significantly broaden the scope of her request at adjudication, seeking answers to questions and responsive records concerning information that is well beyond the scope of the request. In addition, the appellant is seeking disclosure of records that she has already received from the Board.

An example of the appellant's attempts to broaden the scope of her request is set out in her representations, wherein she seeks information about whether a named person "is currently employed at the Board, her employment status with the Board and the associated dates..."

The appellant also claims to have not received responsive financial information. However, the only reference to financial resources in the appellant's request is in part 5 of her request, where she seeks "Any and all records with respect to special education [financial] resources... allocated to [the appellant's child]".

I find that the Board has responded to the "financial" part of the appellant's request and has provided the responsive records. In its April 14, 2008 decision letter, the Board provided the appellant with 33 pages of records concerning the purchase of equipment for use by the appellant's child while attending a Board school. These records include information on what was purchased and what grant money was used for these purchases.

The appellant claims to not have received records related to the occupational therapist (OT) that treated her child. I asked a staff member from this office to contact the FOIC at the Board to confirm whether the appellant has received this information. In response, the FOIC advised that the appellant has received her child's Ontario Student Record (OSR). In the OSR there is an OT referral form, an OT letter, dated June 7, 2007 and an OT report from a named hospital that the appellant provided to the school. The FOIC confirmed that there are no further OT related records.

The appellant also claims that she has not received the IPRC register and forms. I also asked a staff member to ask about these documents when she contacted the FOIC. In response, the FOIC advised that the appellant has been provided with this documentation from staff/school files.

The appellant claims that she has not been provided with responsive records concerning the specialized equipment purchased for her child. I note that the appellant did not specifically request the financial trace for the specialized equipment purchased for her child. The closest part of request that matches this is contained in part 5 of her request where the appellant seeks records with respect to "material" special education resources allocated to her child. The Board has responded to this part of the request.

In the Board's disclosure of April 14, 2008, there are numerous records concerning the specialized equipment utilized by the appellant's child while attending a Board school, including a list of this equipment, the invoices and purchase orders for this equipment, a specialized equipment summary and equipment quotation. I find that the other information requested, such as the financial trace from the source of money used to purchase the specialized equipment, the equipment specifications and warranties, the software licences, packing slips, and the policies for maintaining hard copies of email and other communications, are not records responsive to the appellant's request. The appellant's request relates to records concerning her child. The records that the appellant claims to have not received, are records related to specific equipment or policies, and are not records responsive to the appellant's request.

Furthermore, the appellant is seeking statistical information that has not been compiled by the Board, nor specifically requested in her request. She submits that she should have received copies of the “statistical information” of the number of children assigned to each of the placements identified on their IEP form, broken down by exceptionality, as well as:

...the actual human resources that were allocated to [the appellant’s child] and the actual time spent specifically and individually ... (this does not include time spent by regular classroom teachers or resource teachers with other children in class, activities, etc).

If the appellant wants disclosure of this or other detailed statistical information then she should make a new request to the Board specifically seeking this information. If the Board does not have this information available in the format requested by the appellant, then the Board will need to provide the appellant with information as to whether, under section 2(1) of the *Act*, responsive records are capable of being produced from a machine readable record under the control of the Board by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the Board [*Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, 93 O.R. (3d) 563 (C.A.)].

The appellant submits that additional responsive records should exist originating from the Superintendent, Special Education and Student Services, the Deputy Director of Education, the Superintendent of School #1, the Principal of School #1 and the former vice-principal at School #1, as well as from other Board members or employees who may have discussed her child.

I find that the Board has conducted a reasonable search for responsive records originating from these individuals. In particular, the Board asked the following individuals to search in their school or department for responsive records:

- Deputy Director of Education
- Superintendent for School #1
- Principal, School #1
- Former principal, School #1
- Principal, School #2
- Superintendent, Special Education and Student Services
- Resource Teacher, School #2
- Special Education Consultant
- Superintendent, Information Technology

In addition, during adjudication the Board specifically asked certain named individuals, which were not specifically mentioned in the Board’s initial representations, to search for responsive records in their custody or control.

The appellant also seeks the notes of closed Board meetings where the Board reviewed the Special Education Appeal Hearing (SEAB) and tribunal decisions. She refers specifically to the Board meeting of January 2008; however, as the appellant’s request is from November 2007, this information falls outside the scope of the request.

Based upon my review of the appellant's representations and the records disclosed to the appellant, I find that the Board has conducted a reasonable search for responsive records. I find that the Board has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the appellant's request [Order P-624].

The Board has provided a comprehensive description of the steps it undertook to locate the information sought by the appellant. I find that the appellant has not provided me with a reasonable basis for concluding that additional responsive information exists in response to her request as worded. If the appellant wishes to obtain information not mentioned in the request, or outside of the time period covered by this request of May 2006 to November 2007, she will have to submit a new request to the Board and, in accordance with section 17(2) of the *Act*, provide the Board with sufficient detail to enable an experienced Board employee, upon a reasonable effort, to identify the responsive records.

PERSONAL INFORMATION

I will now determine whether the records responsive to points 6 to 8 of the appellant's request contain "personal information" as defined in section 2(1) and, if so, to whom it relates.

There are three records at issue, details of which are as follows:

- Record 1 contains the Special Education Summary for one school. Severed from this record are the numbers of students who are "Identified" or "Not-identified", the number of students who require "Resource Assistance", "Withdrawal Assistance", and the number of "Identified students in each Grade [#] Class" categorized by impairment or exceptionality.
- Record 2 contains a summary of the "Categories of Exceptionalities for Identified Children" and totals for the category of "Non-identified" special education students for one school. Severed from this record are the numbers under each category, as classified by gender.
- Record 3 contains the details of students receiving "Resource Assistance" and "Withdrawal Assistance" in a named school. Severed from this record are the student names, student numbers, grades and other statistical data. The Board has released the information in this record that concerns the appellant's child. This is the only record that contains the names of students.

The Board submits that the information requested is personal information as it meets the statutory criteria set out in sections 2(1)(a), (b), (c) and (h) of the *Act*. These sections read:

"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,
- (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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Board submits that individual pupils will be identified if the records are disclosed. With respect to Records 1 and 2, these records:

- specify the total number of students and the number of special needs students in a particular grade and class within a named school of the Board; and
- outline specific data regarding the overall makeup of each class; specify the number of students receiving special education programming and delineate the types of exceptionalities.

The Board submits that this appellant was a parent of a child in this school and class. She was familiar with these children and as a result it would be a simple task for her to link the data within [these records] to identifiable pupils.

Record 3 contains students’:

- Names
- Ontario Education Numbers
- Gender
- Grade
- School
- Program
- Exceptionality (medical, psychological)

With respect to Record 3, the Board states:

...that it is reasonable to expect that individual pupils may be identified, notwithstanding the removal of their names.

The appellant submits:

I did not, nor do I now, know any of the parents, families, children in that community or school. I have no desire to ever return to this school or contact any individuals at this school. I have no desire to know these children or obtain their personal information. To my knowledge, none of the children have a severe physical disability or a disability that in any way identifies them. The children involved have invisible disabilities and there is no physical evidence linking them to their disability...

[Concerning Record] 3, I am not requesting names, [student] #, or gender, and therefore it is impossible to identify the children. I am not asking that the name, [student #], gender, grade, program or exceptionality information be grouped by person, for each person and therefore the child would not be identifiable...

The statistical information in no way identifies any children, as it is numbers that are being requested.

Analysis/Findings

Record 1

This record is the Special Education Summary for a particular grade in one named school. Although only numerical values have been severed from this record, the information severed from this record refers to a small number of students in a particular grade at one school. The severed information is categorized into four categories: “Non-identified”, “Language

Impairment”, “Learning Disability” and “Multiple Exceptionalities”, as well as the type of assistance required by the student who has been categorized as disabled or exceptional.

Regardless of whether the appellant is familiar with the particular students in the identified grade, I must decide whether the students whose information is reflected in the records may nonetheless be identifiable given the information contained in the record and the surrounding circumstances (see Orders PO-2191 MO-1472- F; see also the decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300). On my review of the representations and the material before me, I find that the release of data in Record 1 could reasonably be expected to lead to the identification of some students in the particular grade at the named school. The named grade reflected in this record is comprised of 27 students. It appears that in a grade of this size, the number of students with a specific type of disability or exceptionality may be a very limited number, such that the release of the information at issue may lead to the identification of a particular student [Order MO-1708].

As the release of the severed information could reasonably be expected to lead to the identification of some of the students, I find that the severed information is of a personal nature and is personal information [Orders P-644, MO-1415 and MO-1708]. The personal information in this record includes the medical, educational or psychological history of identifiable individuals in accordance with paragraph (b) of the definition of “personal information” in section 2(1) of the *Act*.

Record 2

This record contains information concerning identified students and non-identified students in a named school that require special education assistance. There are two major categories in this record: the “Categories of Exceptionalities for Identified Students” (the “Identified” category) and the “Non-Identified Students with Special Needs and Supported by the Special Education Grant” (the “Non-identified” category) for a named school.

The “Identified” students are categorized in this record by disability, exceptionality or special education needs and, as such, are identified as to whether a student has been assessed as having a behaviour, hearing, language or learning problem, or autism, giftedness or multiple exceptionalities. Each of these categories is further divided into gender. The “Non-identified” category is only divided into gender.

Based on my reasoning for Record 1, I find that disclosure of the severed information in the “Identified” category could reasonably be expected to lead to the identification of some of the students, as the number of students with a specific type of disability or exceptionality may be a very limited number. This information is of a personal nature and is personal information. However, as the “Non-identified” category has not been subdivided into categories for exceptionality or disability and also as the students in this category are attributable to a much larger group, namely, the entire school, I find that disclosure of the information severed from the latter category could not reasonably be expected to lead to the identification of some of the students. Nor could the “Grand Total” information reveal such information. Therefore, I find that the information in the “Non-identified” category and the “Grand Total” category is not

personal information, and as no other exemption has been claimed for this information, I will order the severed information in the “Non-identified” and “Grand Total” category to be disclosed to the appellant.

Record 3

This record contains the details of students receiving “Resource Assistance” and “Withdrawal Assistance” in the school. Severed from this record are the student names, student numbers, grades and other statistical data. The appellant has received the information in this record concerning her child. She is not requesting the names, student numbers or gender of the students identified in this record. She is also asking that the remaining severed information not be grouped by person. However, the information in this record is compiled by student. The information that remains in the record, after removing the student’s name, student number and gender includes the grade of the student, whether the student has an IEP, the student’s exceptionality or disability and information concerning withdrawal or resource assistance.

Although the information in this record pertains to the entire school, the information has been subcategorized. As such, this record lists the name of every student in the school receiving special education assistance, along with the reason this student is receiving the assistance and the type of assistance being provided. As the information is listed by reference to individual students, this record cannot be severed to allow the appellant to obtain the responsive information as she has asked for, namely, not “grouped by person”.

Therefore, based on the same reasoning as for Record 1, I find that the release of the severed information in Record 3 could reasonably be expected to lead to the identification of some of the students, as the number of students with a specific type of disability or exceptionality may be a very limited number. The severed information is of a personal nature and is personal information.

I will now determine whether disclosure of the records would constitute an “unjustified invasion” of the student’s personal privacy, except for the portions of Record 2 that I found not to contain personal information.

PERSONAL PRIVACY

Section 36(1) of the *Act* 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(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal

information against the other individual's right to protection of their privacy. See Issue E below for a more detailed discussion of and questions regarding the exercise of discretion issue.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information at issue does not fall within section 14(1)(a) to (e) nor does section 14(4) apply.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. As stated above, section 14(4) does not apply and the appellant has not raised the application of section 16.

The Board relies on the presumptions in sections 14(3)(a), (d) and (g) of the *Act*. These sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations

The Board submits that:

The records relate to identifiable pupils, their educational history, assessments or evaluation of educational ability including medical, psychological diagnosis, and condition within the educational context of an Ontario school. Therefore, it is respectfully submitted that to disclose these documents would constitute an unjustified invasion of personal privacy.

The appellant submits that:

These are legitimate requests considering these programs incur financial expenditures and are funded at public expense. The Board already provides this type of statistical information. Example - in the November 2007 Board minutes,

the # children per class was posted. On the school web sites, EQAO statistics are provided. In matching these two documents, parents can easily find out how many special education children participated in the testing... This example only serves to emphasize that this type of statistical information exists, is published and does not infringe upon the protection of the children, as it is impossible to identify them by numbers.

Analysis/Findings

Although, as claimed by the appellant, someone may adduce the number of special education students in a particular class by comparing certain publicly available Board documents, the information at issue goes well beyond this. Disclosure of the information at issue would reveal other information, such as a particular student's medical, psychological or educational history.

Based on my review of the portions of records at issue, I am satisfied that section 14(3)(a) applies to all of them. The personal information relates to a medical or psychological condition, treatment or evaluation. I am also satisfied that section 14(3)(d) applies as the personal information in the portions of the records at issue as it relates to the students' educational history. Disclosure of the records is therefore presumed to be an unjustified invasion of personal privacy.

I am also satisfied that section 14(3)(g) applies to the information at issue. The thrust of section 14(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question [Order P-171]. The information at issue includes evaluations of various students' abilities.

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above].

Accordingly, subject to my discussion of the Board's exercise of discretion, I find that disclosure of the information at issue in the records would constitute an unjustified invasion of personal privacy under section 38(b).

EXERCISE OF DISCRETION

I will now determine whether the Board exercised its discretion under section 38(b) and, if so, whether I should uphold this exercise of discretion.

The section 38(b) exemption is discretionary, and permits 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

The Board submits that:

Its decision has taken into account its statutory duty under the *Education Act* and its interest in providing its pupils with a safe and caring learning environment. The Board considers that the protection of the individual privacy of pupils is essential and the Board cannot knowingly allow for a breach to occur. The disclosure requested by the appellant would constitute such a breach...

[T]he documents remaining at issue in this appeal contain information about identifiable individuals, other than the appellant or her [child], that is particularly sensitive.

The appellant did not provide representations on this issue.

Analysis/Findings

Based on the Board's representations, I find that it exercised its discretion with respect to portions of the records at issue in a proper manner taking into account relevant factors and not taking into account irrelevant factors. The appellant has received the personal information in Record 3 that is directly attributable to her child. The privacy rights of the other identifiable individuals in the records should be protected. Accordingly, I find that the Board's exercise of discretion was reasonable.

Therefore, I find that disclosure of the information at issue in the records would constitute an unjustified invasion of personal privacy and the personal information is exempt under section 38(b).

ORDER:

1. I uphold the Board's search for responsive records and dismiss that part of the appeal.
2. I order the severed information in the "Non-identified" and "Grand Total" categories in Record 2 to be disclosed to the appellant by **May 29, 2009**. For ease of reference I have highlighted the portions of this record that should be disclosed to the appellant on the copy of this record sent to the Board with this order.
3. I uphold the Board's decision to not disclose the undisclosed information from the remaining records.
4. In order to verify compliance with provisions 2, I reserve the right to require the Board to provide me with a copy of the portions of Record 2 that it discloses to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

_____ April 30, 2009