



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

ORDER MO-2453

Appeal MA08-264

Grand Erie District School Board



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NATURE OF THE APPEAL:

The Grand Erie District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

Any and all information related to the charge of harassment made by [the requester's son's teacher] against [the requester], and any subsequent investigation by [the principal].

The Board issued a decision on access, in which it identified records responsive to the request. The Board granted the appellant partial access to the records and denied access to the remaining records on the basis that disclosure would constitute an unjustified invasion of personal privacy under section 14(1) of the *Act*.

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

During mediation, the Board advised the mediator that it was prepared to release one of the documents attached to the complaint form - the principal's note to file (attachment #23). However, the teacher objected to the release of this document on the basis that disclosure would constitute an unjustified invasion of her personal privacy. Accordingly, no records were disclosed to the appellant during the mediation process.

As no further mediation was possible, this file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry, setting out the facts and issues in dispute and inviting representations to the Board and the teacher, initially.

The Board and teacher provided representations to this office. Due to confidentiality concerns, the teacher's representations were withheld from the appellant. However, I sent a Notice of Inquiry enclosing the non-confidential portions of the Board's representations to the appellant and advised her that the teacher continued to object to the release of the records and invited the appellant's representations. The appellant provided representations in response and confirmed that she seeks access to the all records responsive to her request.

RECORDS:

The records at issue consist of a total of 24 documents – the complaint form and 23 attachments, described below:

- a) Harassment of an Employee by a Visitor Complaint Form, dated April 18, 2008
- b) Attachments:

 Emails Between the Appellant and Teacher

- 1) *E-mail from appellant to teacher, dated October 15, 2007*

- 2) *E-mail from teacher to appellant, dated October 17, 2007*
- 3) *E-mail exchange between appellant and teacher, dated October 17, 2007*
- 4) *E-mail from teacher to appellant, dated October 17, 2007*
- 5) *E-mail from appellant to teacher, dated October 19, 2007*
- 6) *E-mail from teacher to appellant, dated October 22, 2007*
- 7) *E-mail from appellant to teacher, dated January 15, 2008*
- 8) *E-mail from teacher to appellant, dated January 15, 2008*
- 9) *E-mail from appellant to teacher, dated January 16, 2008*
- 10) *E-mail from teacher to appellant, dated January 17, 2008*
- 11) *E-mail exchange between appellant and teacher, dated January 17, 2008*
- 12) *E-mail from appellant to teacher, dated January 28, 2008*
- 13) *E-mail from appellant to teacher and principal, dated January 28, 2008*
- 14) *E-mail exchange between teacher and appellant, dated January 29, 2008*

Correspondence Between the Appellant and Principal

- 15) *Letter from Principal to appellant, dated February 4, 2008*
- 16) *Letter from appellant to Principal, dated March 25, 2008*
- 17) *Letter from Principal to appellant, dated March 31, 2008*
- 18) *Description of communications prepared by the appellant*
- 19) *Letter from Principal to appellant, dated April 23, 2008*
- 20) *Letter from appellant to Principal, dated May 8, 2008*
- 21) *Draft Letter to appellant from Principal, dated May 22, 2008*

Notes to File

- 22) *Telephone Notes prepared by teacher, dated April 18, 2008*
- 23) *Meeting Notes prepared by principal, dated February 4, 2008*

DISCUSSION:

The Notice of Inquiry sent to the Board and the teacher asked them to explain why disclosure of the e-mails and correspondence to and from the appellant would result in an unjustified invasion of personal privacy. The Board and the teacher did not provide representations addressing this issue.

In my view, the records appear to contain the appellant's and her son's information. Accordingly, I added the possible application of section 38(b) as an issue to this appeal. Section 38(b) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information. [Order M-352]

PERSONAL INFORMATION

In order to determine whether sections 14(1) or 38(b) may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

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

Section 2(3) also relates to the definition of personal information. This section states:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

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 and 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 and MO-2344].

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.)].

Representations of the parties

The Board submits that the records contain the personal information of the teacher. In particular, the Board claims that the records contain the “personal opinions of the teacher relative to the appellant”. The Board’s representations state:

The information is about the teacher in her professional capacity; however, statements and actions of the appellant over the time leading up to the harassment complaint being completed, also concern the teacher’s personal ethics.

The teacher’s representations support the Board’s position.

The appellant’s position is that the context in which the information relating to the teacher was provided to the Board should determine whether the information constitutes “personal information”. In support of her position, the appellant states:

I believe that when a teacher fills out the “Harassment of an Employee by a Visitor Complaint Form” that it should be assumed that this information will have to be shared with the person accused; otherwise, there is no accountability for what is said on this form. The accused should have the right to see what the *alleged* harassment is. I believe it is no longer just the “personal information of the teacher” once it is a formally lodged complaint.

Decision and Analysis

Do the records contain the personal information of other identifiable individuals?

The information contained in the records relating to the teacher and the principal identifies them by their name, job title and contact information. Also contained in the records is information which generally describes the teacher's complaint and the events and discussions leading up to the teacher's decision to file a complaint. The information also documents the discussions the teacher and principal had with the appellant after the complaint was filed. Most of the records constitute e-mails and letters exchanged between the appellant and the teacher and/or principal. The only records which were not exchanged with the appellant are the complaint form, the teacher's notes of a telephone discussion she had with the appellant (attachment #22) and the principal's note of a meeting she had with the appellant and her husband (attachment #23).

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. The request relating to this appeal was filed after April 1, 2007.

Accordingly, information contained in the records which identify teachers or school administrators by name, title, contact information or designation does not constitute their "personal information".

Further, 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]. Following the analysis set forth in Order PO-2225 the first question I must ask is: "*in what context do the names of the individuals appear*"? The second question I must ask is: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"?

With respect to the first question, I am satisfied that the information contained in the records relate to the teacher and the principal only in a professional or business context. The information at issue was compiled in the course of the fulfillment of their roles at the school.

As a result of this finding, the next question I must ask is whether there is anything about this information which, if disclosed, would reveal something of a personal nature about the teacher or the principal.

I have carefully reviewed the records and I find that disclosure of some portions of the telephone note prepared by the teacher (attachment #22) would reveal information that is inherently personal in nature about her. In my view, some portions of the teacher's notes contain her personal opinions about the situation she complained about. In particular, these portions refer to how she dealt with the situation outside of school hours. In my view, these portions of the notes contain the teacher's personal information as defined in sections 2(1)(g) and (h). Accordingly, I find that this information constitutes the teacher's "personal information".

With respect to the remaining information which describes the complaint and the teacher's and principal's involvement before and after the complaint was filed, I find that disclosure of this information would not reveal something that is inherently personal in nature about them. In making this decision, I considered the Board's evidence that the records concern the teacher's "personal ethics". However, I found no evidence in the records themselves which support the Board's position. Accordingly, I find that the remaining information contained in the records which relates to the teacher and the principal does not qualify as their "personal information" within the definition of that term in section 2(1). As the exemption at section 14(1) can only apply to "personal information" and the Board has not claimed that any further exemptions apply to this information, I will order the Board to disclose this information to the appellant.

With respect to the portions of the records which contain only the teacher's personal information, I will determine whether that information is exempt under section 14(1).

Do the records contain the personal information of the appellant and/or her son?

Most of the remaining information at issue consists of correspondence exchanged between the appellant, the teacher and/or the principal. As previously stated, the only records at issue which were not exchanged with the appellant are the teacher's and principal's notes of discussions they had with the appellant. I have carefully reviewed these records and am satisfied that they contain the personal information of the appellant and her son. In particular, the records contain information relating to the education history of the appellant's son, thus constituting his personal information, as defined in paragraph 2(b) of the definition in section 2(1). I am also satisfied that the records contain the appellant's views and opinions about the teacher along with other personal information which relates to her as defined in paragraphs (g) and (h).

With respect to the information I found constitutes the appellant's and her son's personal information, I will review whether this information qualifies for exemption under section 38(b).

For the remainder of this order, I will refer to the appellant and her son's personal information as the appellant's 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.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The only exception that can apply in the circumstances of this appeal is section 14(1)(f). Section 14(1)(f) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none 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 14. 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].

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]. Neither the Board nor the teacher claim that any of the presumptions at section 14(3) apply in the circumstances of this appeal and I am satisfied that none apply.

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

In the circumstances of this appeal, the Board claims that the factors weighing in favour of privacy protection at sections 14(2)(f), (h) and (i) apply to the records. The teacher provided representations in support of the Board's position. The appellant claims that the factors weighing in favour of disclosure at sections 14(2)(a) and (d) apply to the records.

Sections 14(2)(a), (d), (f), (h) and (i) state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

14(2)(a): public scrutiny

The appellant submits that section 14(2)(a) could apply to the circumstances of this appeal as “the public school system needs to held accountable for their actions”. The Board responded to the appellant’s representations, as follows:

I agree that a public school system needs to be held accountable for its actions; however, scrutiny must be conducted in a meaningful and fair manner. However, our employees have a right to a reasonable expectation of privacy concerning certain matters regarding their welfare.

Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny [Order P-1134].

In my view, disclosure of the information I found constitutes the personal information of the teacher would not serve to subject the Board’s response to the teacher’s complaint to public scrutiny. The information I found constitutes the teacher’s “personal information” does not contain information which describes the Board’s activities, only those of the teacher in her personal capacity.

Having regard to the above, I find that section 14(2) has no application in this appeal.

14(2)(d): fair determination of rights

In support of her position that section 14(2)(d) applies, the appellant states:

I believe that “the personal information is relevant to a fair determination of rights affecting the person who made the request” could apply as I was found to be guilty of harassment by the principal who used this information in her investigation. I deny that I harassed anyone. I have not yet been given the opportunity to answer to the specific claims of the teacher.

For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

The appellant’s representations do not refer to a legal proceeding which is either existing or contemplated. Accordingly, there is no evidence before me to suggest that the appellant requires the personal information at issue relating to the teacher to prepare for a legal proceeding or ensure an impartial hearing. Further, based on the evidence provided by the appellant, I am not satisfied that the right in question the appellant seeks to exercise is a legal right, as opposed to right based on moral or ethical grounds.

Having regard to the above, I find that section 14(2)(d) has no application in this appeal.

14(2)(f): highly sensitive

To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

The Board submits that disclosure of the telephone note prepared by the teacher could reasonably be expected to cause her “mental and emotional harm ... and significant personal distress.” The teacher provided confidential representations in support of the Board’s position. In particular, the teacher submits that disclosure of the records may hamper her relationships with other students, parents and members of the school community.

The appellant’s response questioned whether the records contained *highly* sensitive information.

I have carefully reviewed the records and the representations of the parties and am satisfied that there exists a reasonable expectation of significant personal distress if the portions of the teacher’s notes I found contains her personal information were disclosed. In making my decision, I took into consideration the fact that the information contained in these documents describes the teacher’s personal opinions about the situation she complained about. This information is contained in the telephone note prepared by the teacher (attachment #22). Accordingly, I find that section 14(2)(f) applies to this information.

In determining the appropriate weight to attribute this information, I considered the appellant’s evidence that the information at issue does not contain *highly* sensitive information. In particular, I considered the fact that the teacher’s note itself indicates that she shared her personal opinions with the appellant during the telephone call in question. However, notwithstanding the fact that the teacher communicated her opinions to the appellant verbally over a year ago, I am satisfied that disclosure the portion of her telephone notes which describe her personal opinions to the appellant would cause her significant distress. Accordingly, I will attribute significant weight to this consideration when balancing the teacher’s privacy rights against the appellant’s right of access.

However, I do not find that the factor at section 14(2)(f) applies to the remaining records which contains the personal information about the appellant. I will go on to determine whether the factors favouring privacy protection at section 14(2)(h) or 14(2)(i) apply to the appellant’s information.

14(2)(h): supplied in confidence

This factor applies if both the individual supplying the information and its recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

The Board and the teacher appear to take the position that everything attached to the complaint form should be kept confidential because the complaint form is marked “private and confidential” on the top and describes a process on the bottom of the form in which the completed form is to be placed in a sealed envelope also marked “private and confidential”. I disagree. In my view, evidence that the teacher had a reasonable expectation that her complaint would be treated confidentiality only applies to the portions of the records which contain information which reveals something of a personal nature. However, I already found that the factor at section 14(2)(f) applies to this information.

With respect to the remaining information which relates to the appellant, I find that there is no reasonable expectation that this information should be treated confidentially. In any event, there is no evidence that both the individual supplying the information remaining at issue and the recipient had an expectation that the information would be treated confidentially. Accordingly, I find that the factor at section 14(2)(h) does not apply to the remaining records.

14(2)(i): unfair damage to reputation

The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256].

The Board and the teacher submit that disclosure of the records could lead to her reputation with other parents being unfairly damaged. In my view, the factor at section 14(2)(i) has no application to the records remaining at issue, particularly since these records do not contain information which constitutes the teacher's personal information. Instead, the records remaining at issue consist of communications between the appellant and the teacher and/or principal, before and after she filed her complaint. Having regard to the nature of the information remaining at issue, I find that the factor at section 14(2)(i) has no application to the remaining records.

Summary of Findings and Balancing of the Section 14(2) Factors

I find that the factor favouring disclosure at sections 14(2)(a) and (d) raised by the appellant do not apply to the circumstances to this appeal. I also find that the factors favouring privacy protection at sections 14(2)(g) and (i) raised by the Board and/or teacher do not apply.

However, I found that the factor favouring privacy protection at section 14(2)(f) is applicable to the portions of the records which contain the teacher's personal opinions.

As I attributed high weight to this information and none of the factors weighing in favour of disclosure apply to it, I find that disclosure of this information would constitute an unjustified invasion of personal privacy within the meaning of section 14(1)(f). Accordingly, I find that this information is exempt under section 14(1), and I uphold the Board's decision to withhold the portions of the teacher's notes which contain her personal opinions from the appellant.

However, as none of the factors weighing in favour of privacy protection apply to the remaining records, I find that disclosure of this information would not constitute an unjustified invasion of personal privacy under section 14(1)(f) and thus is not exempt under section 38(b). As a result of my finding I will order the Board to disclose these records to the appellant.

ORDER:

1. I uphold the Board's decision to withhold portions of the teacher's notes (attachment #22) which I found exempt under the *Act*. For the sake of clarity, I have highlighted the

portion of this record that **should not** be disclosed in the copy of this record enclosed with this Order to the Board.

2. I order the Board to disclose the remaining records at issue (complaint form, attachments 1-21, 23 and a severed copy of attachment 22) to the appellant by sending a copy of these records to the appellant by **October 2, 2009** but not before **September 25, 2009**.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Board pursuant to provision 1 to be provided to me.

Original signed by: _____
Jennifer James
Adjudicator

_____ August 27, 2009