



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

FINAL ORDER MO-2544-F

Appeal MA08-425

Toronto Catholic District School Board



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NATURE OF THE APPEAL:

On February 25, 2010, I issued Interim Order MO-2499-I, addressing a number of issues in this appeal. Order MO-2499-I required the Toronto Catholic District School Board (the Board or TCDSB) to re-exercise its discretion to deny access to information that had been requested by a member of the news media under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The request that led to this appeal was for the following information:

[All] documentation regarding any payments or agreements made between the TCDSB and [identified Trustee] or her legal counsel, within the last year. Please include any correspondence between the TCDSB and [identified Trustee]'s legal counsel. Also any motions approved by the Board related to [identified Trustee]'s departure.

In responding to the request, the Board granted access to portions of some records and denied access in full to the remainder pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). The requester (now the appellant) appealed the Board's decision.

Following mediation, I conducted an inquiry under the *Act*. During the inquiry, both parties submitted representations in relation to the issues in the appeal. In its representations, the appellant revised the scope of the request by stating that it was only seeking access to information relating to the dollar amount of any payout that may have been made to an identified Trustee.

Following the exchange of representations process, I issued Order MO-2499-I. As set out in the interim order, although I upheld the application of section 6(1)(b), I included a provision requiring the Board to re-exercise its discretion with regard to the information that I had found to be exempt, and to advise the appellant and myself, in writing, of the results of its re-exercise of discretion.

The Board decided to affirm its original decision to deny access. It provided further representations to me concerning its re-exercise of discretion. Parts of these representations were not shared with the appellant for confidentiality reasons and I am not able to disclose those portions of the representations in this order. However, I shared the following passage from the Board's representations with the appellant and I invited it to submit representations in response:

The Board takes seriously its responsibilities under [the *Act*] to provide access to institutional records when required and when, all matters considered, disclosure would be desirable for the institution as well as the community it serves. To that end, the Board has reviewed your interim order and revisited our decision.

I then received representations from the appellant.

This is my final order, in which I address the Board's re-exercise of discretion.

DISCUSSION:

PRELIMINARY MATTER

The appellant was only invited to submit representations on the re-exercise of discretion issue. However, some of its representations touch on the merits of the original decision regarding the application of section 6(1)(b). Before I turn to consider the Board's re-exercise of discretion, I will address those aspects of the appellant's representations which, in my view, relate to the merits of the original decision.

Section 6(1)(b) of the *Act* states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

The appellant also raises section 6(2)(b). It states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

The appellant disputes that the responsive information is exempt under section 6(1)(b) and, referring to a record disclosed at the request stage, argues that the exception to the exemption in section 6(2)(b) applies because the Board revealed the substance of deliberations at a meeting open to the public. The appellant states:

According to the minutes of the closed door meeting, made public by the Board in its initial response to the request, the motion was sent to the Board's committee and publicly voted on by that committee. The Board's subsequent press release also released as part of the initial access request confirms the committee approved the motion, hence the trustee's removal from the Board. It is our position, the Board has considered the subject matter of the deliberations, at least in part, in a meeting open to the public.

The appellant then states:

The precedent in the cases presented by the adjudicator during this appeal reveal that even during in camera meetings, the public can still be told who attended those meetings, where they were held, etc. The Board, in its initial response only disclosed one meeting, yet from the adjudicator's interim order it is clear there have been four in camera meetings.

Although portions of the minutes of one closed meeting were disclosed by the Board to the appellant in response to the initial access request, the evidence before me in this appeal does not support a finding that "the subject matter of the deliberations has been considered in a meeting open to the public" under section 6(2)(b). The meeting of the Committee of Human Resources, Program and Religious Affairs of February 11, 2008, to which the partially disclosed minutes relate, and the Board meeting of January 23, 2008, were closed to the public. As I found in Order MO-2499-I, the meetings of January 23, February 11, March 5 and March 26, 2008 were all authorized to be held as closed meetings under section 207(2)(b) of the *Education Act*. Contrary to what is suggested by the appellant, the evidence does not support a finding that any relevant motion was considered or voted on by either the Board or one of its committees in a meeting open to the public.

The fact that the Board exercised its discretion to disclose some information from the minutes of the February 11 meeting in response to an access to information request and also to the media, in the form of a press release, is not sufficient to support a finding that the exception in section 6(2)(b) applies.

With respect to the appellant's arguments regarding information about who attended and where and how many in camera meetings were held, in Interim Order MO-2499-I, I found that the records that would reveal information of this nature were not responsive to the request as a result of the appellant's narrowing of the request during the adjudication stage of the appeal process. The request was narrowed by the appellant as follows:

As we understood it, [the identified Trustee], an elected public official was removed from office by the TCDSB for cause under the Education Act and received a payout from the Board.

Simply stated, we are requesting the dollar amount of that payout.

I considered the scope of the revised request in my interim order and stated:

Although the appellant uses the words "payout" and "removal for cause" in his revised request, it is clear, on a liberal interpretation of the request, that the appellant seeks access to information regarding the financial particulars of any arrangements that may have been made with the Trustee at the time that her position with the Board came to an end.

I adopt this interpretation of the request and I find that information responsive to the request is contained in Records 32 and 33. Although these records include some information which is not responsive, they also include information that on a fair, reasonable and liberal construction of the request would be considered responsive to the revised request. In particular, I find that pages 98 to 104, and part of page 106, are responsive. However, my conclusion that responsive information exists in the records must not be taken as confirmation that a financial settlement was reached between the Board and the Trustee. Rather, on a large and liberal reading, there is information in these pages of the records that is reasonably related to the request.

As all of the other records provided to this office at the initial stages of the appeal are non-responsive to the appellant's request, that is sufficient to dispose of the access issues relating to those records and I will not consider them further.

As I previously stated, the merits of my findings in Order MO-2499-I are not before me at this stage of the appeal. Even if they were, I would make the same findings regarding the application of section 6(1)(b) and the scope of the request as I have already done in Order MO-2499-I.

EXERCISE OF DISCRETION

As noted in Order MO-2499-I, the exemption in sections 6(1)(b) is discretionary, and it permits an institution to disclose information, despite the fact that it could withhold it. On appeal, this office may determine whether the institution erred in exercising its discretion by acting in bad faith, or by taking into account irrelevant considerations, or by failing to take into account relevant considerations.

In such a case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). I did so in Order MO-2499-I.

As I indicated previously, following the issuance of Order MO-2499-I, the Board decided to reaffirm its original decision to deny access under section 6(1)(b), and it submitted confidential representations in support of that decision. I am not able to refer to portions of these representations in this order for confidentiality reasons, with the exception of the passage quoted above. For ease of reference, I will set it out again here:

The Board takes seriously its responsibilities under [the *Act*] to provide access to institutional records when required and when, all matters considered, disclosure would be desirable for the institution as well as the community it serves. To that end, the Board has reviewed your interim order and revisited our decision.

Regarding the re-exercise of discretion, the appellant's submissions refer to previous disclosures by the Board of information about trustees.

I have carefully considered the representations provided to me regarding the Board's re-exercise of discretion, including the confidential portions of the Board's representations. I am satisfied that the Board has undertaken a review of the records at issue and the application of section 6(1)(b) to them and has, in good faith, considered the relevant factors in revisiting the exercise of its discretion. As noted in Order MO-2499-I, this type of request involves issues that attract public scrutiny and therefore relates to the transparency purposes of the *Act*. However, the evidence provided to me in confidential representations supports a finding that the transparency provisions of the *Act* have been considered by the Board in its re-exercise of discretion.

Accordingly, I uphold the Board's re-exercise of discretion.

ORDER:

I uphold the Board's decision.

Original Signed by: _____
John Higgins
Senior Adjudicator

July 29, 2010