Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2806

Appeal MA12-216

Hamilton-Wentworth District School Board

October 29, 2012

Summary: The appellant sought access to the record of a speech given by the affected party at a high school assembly, arguing that the compelling public interest override in section 16 was applicable to permit disclosure of the record. The institution denied access to the record on the basis that the mandatory personal privacy exemption in section 14 applied, and section 16 was not applicable. The decision of the school board to deny access to the record is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(1), 14(3)(d) and (h), and 16.

Orders and Investigation Reports Considered: P-984.

OVERVIEW:

[1] The Gay Straight Alliance (GSA) of a high school in the Hamilton-Wentworth District School Board (the board) hosted a school wide assembly. The GSA invited a number of speakers from the community to speak at the assembly. Following the assembly, concerns were raised by some parents of students who attended the assembly, and some members of the community, about the content of one of the speeches made by a particular speaker.

[2] The board subsequently received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a speech "given

publicly" by an identified individual during the student assembly. The requester asserted that a typed copy of the speech had been kept by the board as a general record and that all board trustees had been given a copy of the speech.

[3] The board located a responsive record and identified therein the personal information of an individual whose interests could be affected by disclosure of the record (the affected party). Prior to making a decision on the access request, the board notified the affected party and sought the affected party's views on disclosure.

[4] The affected party stated that the record contained her personal information as set out under paragraphs (a) (religion and marital/family status), (b) (employment history), (e) (personal opinions and views) and (h) (name where it appears with other personal information) of the definition of that term in section 2(1). The affected party asked that the record not be disclosed to the requester on the grounds that disclosure would be an unjustified invasion of her personal privacy.

[5] The board subsequently issued a decision denying access to the record based on the mandatory personal privacy exemption in section 14(1). The board's decision stated in part:

> We confirm that the responsive record in question is a portion of an issue note circulated to the Board Trustees, which contains the speaker's speaking notes. However, as a point of clarification, the record is not a transcript of the actual speech. The speech was not recorded by electronic or other means, nor was a transcript produced. We further confirm the speech was not open to the public, but was delivered at a school in private to students at a student assembly.

[6] The board's decision stated that the presumptions against disclosure of personal information relating to employment history in section 14(3)(d), and indicating an individual's ethnic origin, sexual orientation, or religious beliefs or associations in section 14(3)(h), were applicable. The board also referred to the factors at sections 14(2)(e) (unfair exposure to pecuniary or other harm), (f) (highly sensitive) and (i) (unfair damage to reputation), in support of its decision not to disclose the record.

[7] The requester (now the appellant) appealed the board's decision.

[8] During mediation, the appellant confirmed that he was not interested in the portions of the record that did not relate to the speech, which the board had indicated were not responsive to the request. Accordingly, these non-responsive portions of the record are not at issue in this appeal.

[9] Also during mediation, the appellant indicated that disclosure of the speech was a matter of public interest and he asserted that section 16 (compelling public interest) was applicable.

[10] Mediation did not resolve the appeal, and it was moved to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act.*

[11] I sought and received representations from the board, the affected party and the appellant, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.*

[12] In this order, I uphold the decision of the board.

RECORDS:

[13] The sole record at issue is the portion of an issue note that relates to the speech given by the affected party.

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 14 exemption?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[14] In order to determine which sections of the *Act* 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), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (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,
>
> …
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …
>
> (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;

[15] 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.[1]

Representations

[16] In their representations, the board and the affected party submit that the record contains the affected party's personal information as set out in paragraphs (a), (b), (e) and (h) of section 2(1). The board further states that the record relates to the personal views and experiences of the affected party, with a focus on the interaction of her religion, sexual orientation and employment.

[17] The appellant does not address this issue directly in his representations. However, he tacitly acknowledges that the record contains the affected party's personal information by questioning why the affected party delivered the speech to students and staff at a public school if it contained such personal matters.

Analysis and findings

[18] Based on my review of the record at issue, I accept the representations of the board and the affected party that the record contains the personal information of the affected party. I find that the record contains information relating to the affected party's religion, sexual orientation, marital and family status, employment history, personal opinions or views, and name where it appears with other personal information relating

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[1] Order 11.

to the affected party, all of which qualify as personal information for the purposes of section 2(1) of the *Act*.

[19] The record does not contain the personal information of the appellant or any other individual.

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

[20] 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. Section 14(1)(f) reads:

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

[21] Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

[22] 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.[2]

[23] The presumptions at sections 14(3)(d) and (h) read as follows:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> > (d) relates to employment or educational history;
> >
> > …
> >
> > (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Representations

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[2] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[24] In their representations, the board and the affected party submit that disclosure of the affected party's personal information would be presumed to constitute an unjustified invasion of personal privacy under both sections 14(3)(d) and (h). The board submits that none of the exceptions listed in section 14(4) applies to rebut the presumptions. The board further submits that in the alternative, the considerations in sections 14(2)(e), (f) and (i) weigh against disclosure of the record. The board also reiterates that the speech was not given "publicly" as suggested by the appellant, but rather, it was presented by the affected party to students at a closed assembly, which was not open to the public.

[25] In his representations, the appellant submits that disclosure would not constitute an unjustified invasion of personal privacy as the affected party communicated the personal information contained in the record to "an audience of as many as 400 persons in the auditorium at a public institution that is funded by tax dollars." He infers that the affected party would not have delivered her speech to staff and students at the high school if she was "authentically concerned" that the release of the information contained in the record would constitute an invasion of her personal privacy. The appellant's argument in this regard raises the possibility that these circumstances amount to an unlisted factor under section 14(2), which contains a non-exhaustive list of criteria for determining whether disclosure would be an invasion of privacy. The appellant's representations also allude to the consideration in section 14(2)(a), which reads as follows:

> (2) 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;

Analysis and findings

[26] Based on the representations provided by the board and the affected party, and on my review of the record, I am satisfied that the record falls within the ambit of both the presumptions at sections 14(3)(d), as it contains details of the affected party's work history, and (h), as the personal information indicates the affected party's sexual orientation and religious beliefs and associations. Accordingly, I find that disclosure of the record would constitute an unjustified invasion of the affected party's personal privacy under sections 14(3)(d) and (h).

[27] As noted above, once a presumed unjustified invasion of personal privacy under section 14(3) is established, it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. The factors in section 14(2), therefore,

including 14(2)(a), cannot rebut the presumption in section 14(3). I will, however, consider the appellant's representations in relation to the public interest override, below.

[28] I have considered section 14(4) and find that none of the personal information contained in the record falls within the ambit of this provision. Accordingly, I will now consider whether the public interest override in section 16 is applicable.

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 14 exemption?

[29] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[30] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

[31] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[3] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[4]

[32] A public interest does not exist where the interests being advanced are essentially private in nature.[5] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[6] A public interest is not automatically established where the requester is a member of the media.[7]

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[3] Orders P-984 and PO-2607.
[4] Orders P-984 and PO-2556.
[5] Orders P-12, P-347 and P-1439.
[6] Order MO-1564.
[7] Orders M-773 and M-1074.

[33] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[8]

[34] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[9]
- the integrity of the criminal justice system has been called into question[10]
- public safety issues relating to the operation of nuclear facilities have been raised[11]
- disclosure would shed light on the safe operation of petrochemical facilities[12] or the province's ability to prepare for a nuclear emergency[13]
- the records contain information about contributions to municipal election campaigns.[14]

[35] A compelling public interest has been found **not** to exist where, for example:

- another public process or forum has been established to address public interest considerations[15]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[16]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[17]

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[8] Order P-984.
[9] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[10] Order P-1779.
[11] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), and Order PO-1805.
[12] Order P-1175.
[13] Order P-901.
[14] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[15] Orders P-123/124, P-391 and M-539.
[16] Orders P-532, P-568, PO-2626, PO-2472 and PO-261.
[17] Orders M-249 and M-317.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[18]

- the records do not respond to the applicable public interest raised by appellant.[19]

Representations

[36] In their representations, the board and the affected party submit that section 16 is not applicable. The board states that the record does not address a public issue related to a government agency or institution; rather it contains personal information, experiences and opinions of the affected party. The board further submits that even if a compelling public interest existed in this appeal, the protection of the affected party's personal information would greatly outweigh any such public interest in the record.

[37] In his representations, the appellant submits that the record is "compelling" in accordance with the definition in Order P-984, as it "clearly rouses strong interest" in parents whose children attend the high school, ratepayers, and trustees. In support of his submission, the appellant, who is a member of the media, relies on two articles about the speech, which detailed subsequent concerns that were raised by parents, individuals and a representative of a religious organization. Adopting the words of the religious representative quoted in one of the articles, the appellant asserts that "a 'key element' of Premier Dalton McGuinty's anti-bullying legislation, Bill 13, involves…forcing all school boards to permit openly homosexual, student-run GSAs", and that "McGuinty's anti-bullying legislation is opening the schools' doors to speakers who…indoctrinat[e] kids to reject their parents' beliefs."

[38] The appellant submits that the information in the record concerns the public and should be disclosed because it would inform and enlighten the citizenry about the activities of government agencies (i.e. boards of education) that would influence the public in making political choices. In support of his submission, the appellant cites Order PO-2556. The appellant further submits that the record is indicative of the kind of solution that was proposed by the provincial government to combat problems of bullying in schools, and is therefore, of public interest. The appellant concludes by stating that the record raises issues of a more general application and he cites Order MO-1564.

Analysis and findings

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[18] Order P-613.
[19] Orders MO-1994 and PO-2607.

[39] In my view, the appellant's representations allude to two public interests, first, the public interest in provincial government initiatives aimed at eliminating bullying in schools, and second, the public interest in knowing what schools are teaching students.

[40] Order P-984 set out the following approach for assessing whether a public interest in disclosure of a record exists:

> [T]he public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[41] Applying the approach taken in Order P-984, I am not satisfied that there is a relationship between the record, which contains an account of certain personal, religious and employment experiences of the affected party, and the first public interest raised by the appellant. Any relationship between this particular record and the public interest in provincial government activities or decision making with respect to anti-bullying measures and legislation, is tangential at best.

[42] Further, to the extent that the appellant suggests that the compelling public interest in disclosure arises out of a need to know what publicly-funded school boards are teaching students, I am not convinced it exists here. While I accept that, generally, there is a public interest in disclosure of school board activities, I find that in the circumstances of this case, the interest in disclosure of this record is not "compelling." The articles relied on by the appellant establish that there has already been public discussion and debate about the issues raised by the affected party's speech, and that concerns have been brought forward to both the school and the board. Also, to the extent that the appellant refers to the concerns of parents, one of the articles relied on by the appellant establishes that any parents of students who had concerns about the content of the speech had the option of contacting the school principal directly to discuss their concerns.

[43] Given my finding that the first requirement of section 16 has not been met in this appeal, I need not consider the second requirement. The public interest override cannot apply.

ORDER:

I uphold the decision of the board to deny access to the record.

Original Signed by: October 29, 2012
Stella Ball
Adjudicator