Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3050

Appeal MA13-466

Toronto District School Board

May 20, 2014

Summary: The appellant sought access to records describing corporal punishment administered to elementary school students by staff with the board's predecessors. The board identified a representative sampling of such records and denied access to them on the basis that to do so would result in an unjustified invasion of the personal privacy of the students under section 14(1). In this decision, the adjudicator finds that information relating to individuals who were born before 1924 did not qualify as the "personal information" of these individuals, owing to the operation of section 2(2). The information relating to children born after 1924 qualified as their personal information and was not subject to the exception in section 14(1)(e) as the evidence tendered by the appellant did not establish that disclosure was consistent with the conditions or expectations of disclosure under which it was collected. Finally, the exception in section 14(1)(f) did not apply as the factor weighing in favour of non-disclosure was more compelling than any favouring disclosure. Accordingly, that personal information was found to be exempt under section 14(1).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) [definition of "personal information"], 2(2), 14(1)(e) and (f). *Education Act*, R.S.O. 1990, c. E.2, as amended, sections 264 and 265.

Orders and Investigation Reports Considered: P-666, MO-2467.

OVERVIEW:

[1] The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …six (6) punishment books coming from former (K-8) elementary schools so that such data can be analyzed, and that permission be granted for the Scarborough archives to provide the same.
>
> Each book:
>
> 1. Must come from a known school, I'll need to know which school each book pertains to as I will need to request average enrollment figures for that school for the periods in question: the data needs to be placed in context to total student population.
>
> 2. Must have been a K-8 school, no Middle or High Schools.
>
> 3. Will preferably span a decade or longer, and ideally contain at least a few hundred entries within each.

[2] The board issued an interim decision containing a fee estimate. The requester, now the appellant, appealed the board's decision.

[3] During mediation, the appellant advised that he is pursuing access to the records for a research purpose in accordance with the exception to the prohibition against the disclosure of personal information in section 14(1)(e) of the *Act*. He argues that the records must include the names and other personal identifiers of both students and staff in order to analyze the data in the manner which he requires.

[4] The appellant indicated that he is agreeable to entering into a research agreement with the board and complying with the security and confidentiality conditions prescribed in section 10 of Regulation 823, R.R.O. 1990. The board advised the mediator that it would not agree to enter into a research agreement with the appellant as it is of the view that the request does not satisfy all three elements of section 14(1)(e) of the *Act*. The appellant advised the mediator that he would like to pursue the appeal at adjudication.

[5] As this matter could not be resolved at mediation, it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the board and the appellant, as well as additional reply representations from the board. In the Notice of Inquiry

provided to both the board and the appellant, I posed the following questions to assist me in better understanding the nature of the records sought by the appellant and the manner in which they are maintained by the board. Specifically, I asked each party to respond to the following questions:

1. Did the appellant specify in his request or in his discussions with board staff which schools or time period are to be covered by the six "punishment books" he was seeking? If known, why did he seek six such books, rather than a larger or smaller number?

2. How did the board choose the representative sampling from the "punishment books" which it provided to this office on November 7th? Please identify the school and the time period covered in each of the representative samples provided to this office as it is not clear on the face of each of the records.

3. Approximately how many of these "punishment books" does the board have for each of its schools?

4. Are there similar records for the Scarborough school(s)? How will the board identify which Scarborough school's records will be chosen as responsive to the request?

5. How did the board identify which six Toronto schools' records and what period of time would be chosen?

[6] I received representations from both the board and the appellant, as well as reply submissions from the Board. In response to my questions, the board indicates that it has approximately 10-20 "punishment books" from the former Toronto School Board in its record-holdings, as well as a further 30 books for Scarborough schools covering the period from the mid-1950s to the 1970s. The board indicates that for the purposes of this appeal, it only identified three such books and provided me with representative samples consisting of four pages each from them.

[7] In this order, I uphold the Board's decision to deny access to the names of students who were born after 1924 that are contained in the responsive records.

RECORDS:

[8] The records at issue in this appeal consist of corporal punishment record books, a representative sample of excerpts from three of these books were provided to me.

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?

DISCUSSION:

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

[9] 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) 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 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;

[10] 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].

[11] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) 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.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] 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.)].

[13] The representative sample of the records provided to me by the board consists of lengthy lists of individual student's names, the date and nature of the infraction and the disposition by the responsible staff person within the school. The twelve pages of excerpts from the "punishment books" provided by the board as a representative sampling of the records date from 1894 (two pages), 1896 (two pages), 1898 (two pages), approximately 1903 (two pages), 1948 (one page) and 1949 (one page). The records relate to students who were attending primary schools at that time. These children would have been between five and thirteen years of age at the time of their attendance at the schools. Accordingly, I find that, with the exception of the students

listed in the 1948 and 1949 pages, all of the students would have been born between 1881 and 1898.

[14] In 2009, this office issued Order MO-2467 which addressed a request for similar historical information contained in the "attendance registers" for classes at the Port Stanley Public School from 1899 to 1964. In that decision, Adjudicator Colin Bhattacharjee provided a detailed analysis relying on Statistics Canada data relating to life expectancies to find that individuals who were born before or in the year 1919 would, on average, have died before 1979, given an average life expectancy of 60 years. Accordingly, the 30 year period set forth in section 2(2) operates to render any personal information about them no longer personal information for the purposes of the *Act*, and therefore no longer subject to exemption under section 14(1).

[15] As a further five years have passed since that order, I find that the appropriate year to consider when determining whether the 30 year rule applies is now 1924, meaning that individuals born before 1924 would, on average, have died in or before 1984. Accordingly, section 2(2) operates in such a way that the personal information relating to these individuals is no longer defined as such under the *Act* and it cannot, therefore, qualify for exemption under section 14(1).

[16] In the present appeal, the information contained in the representative sampling of the records relating to the years 1894, 1896, 1898 and 1903 does not qualify as "personal information" owing to the operation of section 2(2). The individuals listed on these pages have all been dead for more than 30 years, using the formula relied upon in Order MO-2467. However, information relating to the individuals listed in the 1948 and 1949 pages and any of the Scarborough school records dating from the 1950s to the 1970s continue to qualify as the personal information of these individuals.

[17] I have found that the information in the punishment books relating to students who were born before 1924 does not constitute their "personal information," in accordance with section 2(2) of the *Act*. Accordingly, this information cannot be exempt under section 14(1), which only applies to "personal information". I will order the board to provide the appellant with a decision letter respecting access to this information.

[18] However, the information in the punishment books relating to individuals born after 1924 constitutes the "personal information" of the pupils who are identified in these records, as that term is defined in section 2(1) of the *Act*, because it cannot be reasonably assumed that such individuals have been dead for at least 30 years. I will now determine whether this personal information qualifies for exemption under section 14(1) and whether it is subject to the exceptions to the exemption in sections 14(1)(e) and (f).

[19] The punishment books from 1948 and 1949 also include the name of the identified students' teachers. I find that this information does not qualify as the teachers' personal information as it identifies them only in their professional capacity, as contemplated by section 2(2.1) and does not include any "personal" element which would qualify it otherwise, as "personal information" under the definition in section 2(1).

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

PERSONAL PRIVACY

General principles

[20] The board claims the application of the personal privacy exemption in section 14(1) of the *Act* to the personal information in the records, which I have found above in to include only information in the punishment books relating to students born after 1924.

[21] Where a requester seeks the 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.

[22] In my view, the only possible exceptions that could apply are paragraphs (e) and (f) of section 14(1). These provisions state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the

> information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(e)

[23] 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. In this case, the appellant argues that the exception in section 14(1)(e) applies. If the requirements set out in the exception in paragraph (e) of section 14(1) are met, the personal information in the punishment books about students born after 1924 is not exempt from disclosure under section 14(1).

[24] The wording of section 14(1)(e) makes it clear that this exception only applies if the disclosure of personal information is for a "research purpose." If that preliminary requirement is met, paragraphs (i), (ii) and (iii) must also be satisfied for the section 14(1)(e) exception to apply.

[25] I will first determine whether the disclosure requested by the appellant of the personal information from the punishment books is for a "research purpose" within the meaning of section 14(1)(e). In Order MO-2467, Adjudicator Bhattacharjee adopted the definition of the term "research" taken from the *Concise Oxford Dictionary* which was first articulated in Order P-666, which states:

> ... [T]he systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions [and] ... an endeavour to discover new or to collate old facts etc. by the scientific study or by a course of critical investigation ...

[26] He then went on to find that the genealogical research being conducted by the appellant in that appeal, who was not an academic researcher, met the definition of the term "research purpose" set forth in section 14(1)(e). He found that:

> I am satisfied that the appellant is conducting "research," as that term is defined in the *Concise Oxford Dictionary*. He is engaged in the systematic investigation of materials and sources in order to substantiate when individuals attended Port Stanley Public School. I also accept his submission that he is conducting genealogical research, which is the study of families and the tracing of their lineages and history. In my view, the meaning of "research" in section 14(1)(e) should not necessarily be restricted to professional researchers and academics but should be interpreted in a broad enough manner to encompass genealogical and other research conducted by ordinary citizens, as long as their work meets the definition set out in the *Concise Oxford Dictionary*.

[27] In the present appeal, the appellant describes in his representations the research work he is conducting into corporal punishment in Canadian schools. He also provided me with a copy of his self-published book entitled *The Canadian Regulation School Strap*. In this publication, the appellant describes in great detail the policies, practices and regulation of corporal punishment and the use of the strap as a discipline tool in Canadian schools. Clearly, this publication entailed a great deal of research into various issues surrounding the historical use of corporal punishment in our schools. Based on my review of the appellant's book and the representations he has provided in this regard, I am satisfied that he is conducting "research" into issues relating to corporal punishment in Canadian schools as contemplated by the wording of section 14(1)(e), based on the definition of that term set out in the orders above.

[28] I must now determine whether all three parts of the test under section 14(1)(e), set out above, have been satisfied.

(i) Consistent with conditions/reasonable expectations of disclosure

[29] The board argues that "the use of disciplinary records by third party researchers for their own benefit, and not on behalf of the board, has never been a component of the purpose of collecting records of student discipline." Rather, it submits that the purpose behind the collection of such information is to:

1. Comply with statutory and regulatory and ministry and board guidelines to ensure school discipline is maintained and all discipline recoding obligations are met.

2. Ensure there is a record demonstrating the board is meeting its obligations to ensure discipline is maintained in schools.

3. Permit school staff to employ the concept of progressive discipline in choosing the appropriate sanction or alternative response along a

> continuum by permitting staff involved in administering discipline to review the record of prior discipline (or lack thereof).

[30] In support of these arguments, the board has provided me with copies of excerpts from sections 264 and 265 of the *Education Act*, the Ministry of Education Policy/Program Memorandum No. 145 which identifies discipline reporting obligations of school boards and the board's own *Code of Conduct* relating to the use of progressive discipline. I note that none of these documents contemplates or allows for the potential use of the information gathered pertaining to student discipline by third party researchers.

[31] With respect to the first part of the test described in section 14(1)(e), the appellant argues that the historical information he is seeking was not collected under the auspices of these more recent policy documents, but rather was maintained by individual school administrators without any regulatory requirement for doing so. He also relies on a series of purposes behind the collection of this information which are described in his book. In addition to such purposes as allowing for the accurate reconstruction of events, eliminating the risk of malicious accusation, allowing school supervisors to check for overuse, misuse or unjust targeting of corporal punishment, and inhibiting the "heat of the moment" disciplining, the appellant suggests that the following are also reasons why school authorities maintained corporal punishment records:

- creating a database. If administrators took the time to review it in detail, this could help to indicate where corporal punishment was or was not effective and thereby allow for the removal, modification or increase of its application to maximize its effectiveness, and

- showing long-term trends in behavioural issues within the student body.

[32] However, I note that these purposes are unattributed and are not in keeping with the more formal language set forth in the documents and legislative provision in the *Education Act* relied upon by the board. In response to the board's argument that the information was not compiled to assist third party researchers, the appellant has offered to share the results of his research with the board.

[33] In its reply representations, the board argues that privacy protection is outlined as one of the purposes of the *Act* in section 1(b) and that neither personal privacy nor the right of access is to be given primacy. The board also points out that the research which the appellant seeks to undertaken is available to him, so long as the individuals to whom it relates have been dead for more than 30 years. I note that many of the records that are responsive to the request which were maintained by the board's

predecessor Toronto School Board will be made available to him with all of the personal identifiers intact. Only those records relating to individuals who have not been dead for more than 30 years will be subject to the privacy protection provisions in the *Act*.

[34] The board also points out that the appellant has the right to receive the records in anonymized form, with the personal identifiers, the names of the students, removed. However, the appellant insists that he needs to have this information in order to perform recidivism analysis and "for the purpose of aggregating data generically under various categories, and then anonymizing it completely for exhaustive statistical analysis."

Analysis and findings

[35] The board has identified the purposes for the creation of the records, based on the current requirements of the *Education Act* and the pertinent Ministry of Education policy documents. These sources do not refer to or suggest that the records were kept either to review the use of corporal punishment in behaviour modification or to answer questions of efficacy and recidivism with respect to corporal punishment. These are the primary purposes identified by the appellant as to why the records were created and maintained. Instead, I find that the primary purpose for the creation of the punishment books was to ensure that records were kept of the incidents and the punishments that resulted in order to ensure that board policies relative to discipline which were in force at the time were adhered to.

[36] Although the appellant identifies a number of reasons why he believes the records were maintained, I agree with the board that, other than citing a page from his own publication, he has not provided any further citations or references to substantiate his statements about the reasons behind the creation and maintenance of the records.

[37] The records at issue in this appeal contain personal information about children in schools operated by the board's predecessors. The personal information in those records was recorded by individual school administrators for the reasons described by the board in its representations. I note that none of the current policy documents and the provision of the *Education Act* governing the compilation of information relating to student discipline contemplate the use of such information by third party researchers.

[38] I find that I have not been provided with sufficiently convincing evidence to lead me to the conclusion that the disclosure of the personal information in the records is consistent with the circumstances surrounding its collection. I find that at the time the punishment books were created, the idea that they may someday be subject to examination and study by a researcher outside the board would not have reasonably been contemplated by those who compiled the information. In my view, the purpose for their creation was to ensure that a record was kept of the incidents and the

punishments that resulted in order to establish that existing board policies relative to discipline were adhered to. I agree with the board that at the time these "punishment books" were kept, records of this sort were intended to exist only within the school milieu and were not intended to be shared outside of it.

[39] Accordingly, I conclude that because the first part of the test under section 14(1)(e) has not been satisfied, this exception to the exemption in section 14(1) does not apply.

Section 14(1)(f)

[40] As noted above, 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. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[41] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Neither the board nor the appellant have referred to any of the presumptions in section 14(3) or the factors favouring access and privacy protection in section 14(2) in their representations. Based on my review of the personal information in the records, I find that none of the presumptions in section 14(3) apply to it. If no section 21(3) presumption applies, section 21(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].

[42] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies [Orders PO-2267 and PO-2733].

[43] The personal information in the responsive records relates to infractions and the punishments meted out to students at elementary schools in Toronto and Scarborough over many years. Some of the punishment books identified by the board describe events which occurred in schools administered by its predecessor Scarborough Board of Education in the 1970's. In my view, the personal information relating to "offences" and the punishment they attracted is "highly sensitive" as it relates to actions taken by school staff to punish children for their behavior. I find that personal information about the discipline of children is inherently sensitive in nature and falls within the ambit of the consideration favouring privacy protection in section 14(2)(f).

[44] Further, I find that none of the considerations, listed or unlisted, in section 14(2) favouring the disclosure of personal information apply in the circumstances. Balancing the privacy interests of the children whose personal information is contained in the records against the appellant's right of access, I find that the privacy considerations far outweigh any interest that may exist in disclosure. None of the circumstances listed in section 14(4) are present in this case, and the appellant has not raised the possible application of the public interest override provision in section 16. As a result, I find that the personal information in the responsive records relating to individuals born after 1924 is exempt from disclosure under the mandatory personal privacy exemption in section 14(1).

ORDER:

1. I order the board to provide the appellant with a decision letter respecting access to the records which contain only the personal information of students who were born before 1924.

2. I uphold the board's decision respecting access to the records containing the personal information of students born after 1924 and dismiss that part of the appeal.

Original Signed by: May 20, 2014
Donald Hale
Adjudicator