

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3320

Appeal MA15-277

Durham District School Board

May 31, 2016

Summary: The appellant is a newspaper reporter who is seeking a chart that shows the number of students who were suspended or expelled at each high school in the Durham District School Board over a three-year period. The board denied access to this record under the discretionary exemptions in sections 11(f) (economic and other interests) and 15 (information soon to be published) and the mandatory exemption in section 14(1) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that this record is not exempt under any of those provisions, and he orders the board to disclose it in full to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 11(f), 14(1), 15(a) and 15(b).

Orders Considered: Order PO-2811.

OVERVIEW:

[1] The appellant is a newspaper reporter who submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Durham District School Board (the board) for the following information:

Suspension and expulsion rates for each DDSB high school, including the rate and number of students it applies to for 2012, 2013 and 2014.

[2] In response, the board located records that are responsive to the access request and then issued a decision letter to the newspaper. It fully disclosed two charts in its possession published by the Ministry of Education: (1) Durham DSB and Province of Ontario – Percentage of Students Suspended and (2) Durham DSB and Province of Ontario – Percentage of Students Expelled.

[3] However, the board refused to disclose a chart prepared by its own accountability and assessment office, which includes the number of suspensions and expulsions for each high school in the board for the years 2011-2012, 2012-2013 and 2013-2014. It withheld this chart under the discretionary exemptions in sections 11(f) (economic and other interests) and 15 (information soon to be published) and the mandatory exemption in section 14(1) (personal privacy), read in conjunction with the factor in section 14(2)(f) and the presumption in section 14(3)(d). In addition, the board's decision letter cited section 32(c), which is found in Part II (Protection of Individual Privacy) of the *Act*.

[4] The appellant appealed the board's decision to this office, which assigned a mediator to assist the parties in resolving the issues in dispute. During mediation, the board stated that it was no longer relying on section 32(c) of the *Act* to deny access to the chart but was continuing to rely on the exemptions cited in its decision letter. The appellant argued that none of the exemptions claimed by the board apply to the chart and further submitted that there is a compelling public interest in disclosing this record that outweighs the purpose of the exemptions. Consequently, the public interest override in section 16 of the *Act* is at issue.

[5] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought and received representations from the board, the appellant and the Ministry of Education (the ministry). In this order, I find that the record at issue does not qualify for exemption under sections 11(f), 14(1) or 15, and I order the board to disclose it in full to the appellant.

RECORD:

The record at issue in this appeal is a chart entitled, "Suspension and Expulsion Data" for the years 2011-2012, 2012-2013 and 2013-2014.

ISSUES:

- A. Does the discretionary exemption at section 11(f) apply to the record?
- B. Do the discretionary exemptions at sections 15(a) and (b) apply to the record?
- C. Did the board exercise its discretion under sections 11(f), 15(a) and 15(b)? If so, should the IPC uphold the board's exercise of discretion?

- D. Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- E. Does the mandatory exemption at section 14(1) apply to the information at issue?
- F. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the sections 11(f) and 14(1) exemptions?

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

A. Does the discretionary exemption at section 11(f) apply to the record?

[6] The board claims that the chart showing the number of suspensions and expulsions for each high school is exempt under section 11(f) of the *Act*. This exemption states:

A head may refuse to disclose a record that contains,

plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

[7] In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
 - i. the management of personnel, or
 - ii. the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public¹

[8] The board claims that the ministry is responsible for compiling and publishing statistical data about suspensions and expulsions and that it would be inappropriate for school boards to “unilaterally circumvent” the ministry’s practices by disclosing such data. In essence, the board appears to be suggesting that the chart showing the number of suspensions and expulsions for each high school constitutes plans relating to

¹ Orders PO-2071 and PO-2536.

the management of personnel or the administration of an institution that have not yet been put into operation or made public.

[9] In my view, the board has failed to establish that the chart falls within the discretionary exemption in section 11(f). As noted above, the first part of the three-part test for this exemption is that the record must contain a plan or plans. The IPC has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".² The chart showing the number of suspensions and expulsions for each high school clearly does not contain a plan or plans. Consequently, I find that this record is not exempt under section 11(f).

INFORMATION AVAILABLE TO THE PUBLIC

B. Do the discretionary exemptions at sections 15(a) and (b) apply to the record?

[10] The board claims that the chart showing the number of suspensions and expulsions for each high school qualifies for exemption under sections 15(a) and (b) of the *Act*. These exemptions state:

A head may refuse to disclose a record if,

- a) the record or the information contained in the record has been published or is currently available to the public; or
- b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

[11] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.³

[12] Section 15(b) is intended to be claimed for records that will be made publicly available within a relatively short period of time after the request has been made under the *Act*, not where the record or the information may be made available at some unascertained date.⁴

² Orders P-348 and PO-2536.

³ Orders P-327, P-1114 and MO-2280.

⁴ Orders M-467 and PO-2109.

[13] The board refers to its representations on section 11(f) and claims that the information that the appellant is seeking is compiled and published by the ministry. It submits that the appellant should direct her access request directly to the ministry or await the published reports on the ministry's website, which will be available in "due time."

[14] However, the ministry's evidence contradicts the claims made by the board. The ministry states that it only publishes suspension and expulsion data at the board level, not at the high school level. In addition, it takes the position that the chart showing the number of suspensions and expulsions for each high school is in the custody and control of the board, and the ministry has "no issue" with the board disclosing this record to the appellant.

[15] The appellant's representations mirror the evidence provided by the ministry. She points out that the ministry's website contains general information about suspensions and expulsions but this data is not broken down by individual high schools, which is the information that she is seeking.

[16] As noted above, section 15(a) provides the board with the discretion to refuse to disclose a record if the record or the information contained in the record has been published or is currently available to the public. Although the board claims that the requested record will be published by the ministry on its website, the ministry itself has made it clear that it does not publish suspension and expulsion data for individual high schools at Ontario boards. Consequently, the chart showing the number of suspensions and expulsions for each high school has not been published by the ministry and is not currently available to the public. I find, therefore that this record is not exempt under section 15(a) of the *Act*.

[17] Section 15(b) provides the board with the discretion to refuse to disclose a record if its head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. Given that the ministry does not publish suspension and expulsion data for individual high schools at Ontario boards, it is evident that the chart or the information contained in the chart was not published by the ministry within ninety days after the appellant's access request or within any further period of time necessary for printing or translation. I find, therefore that this record is not exempt under section 15(b) of the *Act*.

[18] Given that I have found that the chart showing the number of suspensions and expulsions for each high school is not exempt under sections 11(f) or 15(a) or (b), it is not necessary to assess whether the board exercised its discretion properly in refusing to disclose this record to the appellant under those exemptions (Issue C).

PERSONAL INFORMATION

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

[19] The board claims that disclosing the information in the chart would be an unjustified invasion of the suspended and expelled students’ personal privacy under section 14(1). However, the mandatory personal privacy exemption in section 14(1) only applies to “personal information.” Consequently, it is necessary to first decide whether the chart contains these individuals’ “personal information.” 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;

[20] 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.⁵

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶ Consequently, in considering whether the chart contains the personal information of any suspended or expelled students, it must be determined whether it would be reasonable to expect that any of these students may be identified if this record is disclosed.

[22] The appellant submits that the chart does not contain the personal information of any students. She asserts that even if the number of suspended or expelled students is low for a particular high school, this data does not help her or her newspaper's readers to identify a particular suspended or expelled student.

[23] In addition, she points out that she made the same access request to the Durham Catholic District School Board, which fully disclosed the requested information to her. A magazine that she works for then published a chart showing the number of suspended and expelled students for each high school in that board from 2011 to 2014. She submits that publishing this data did not identify any suspended or expelled students and there were no complaints about these students' personal privacy being invaded.

[24] The board acknowledges that the chart does not directly identify specific students. However, it submits that the "minimal number" of students reflected in this record, coupled with the inclusion of further identifying information (i.e., school name), risks making the identity of a suspended or expelled student more determinable.

[25] I am not convinced by the board's submissions on this issue. I have thoroughly examined the chart, including the suspension and expulsion numbers at named high schools. With respect to the number of students who were suspended over the course of three years, some high schools suspended dozens of students each year, while others suspended between 100 and 200 students per year. A few high schools suspended more than 200 students. At the low end, one high school suspended between 5 and 20 students each year.

[26] Each number refers to a group of students suspended yearly. In my view, given the aggregate nature of the numbers in the chart, it is not reasonable to expect that any of the suspended students may be identified if these numbers and other information in the chart is disclosed. I find, therefore, that the chart does not contain the personal information of the suspended students.

⁵ Order 11.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[27] The number of students who were expelled at each high school on a yearly basis is much smaller. At several high schools, no students were expelled, while at the remaining schools, less than five students were expelled on a yearly basis. At some high schools, only one or two students were expelled yearly. However, the board has provided me with little evidence to explain how disclosing the fact that less than five students at a particular high school were expelled could reasonably be expected to identify such individuals.

[28] The ministry's representations provide an additional argument that should be addressed with respect to whether low expulsion numbers, coupled with other information in the chart, could reasonably be expected to lead to the identification of the expelled students. Although the ministry does not object to the board disclosing the chart to the appellant, it submits that it may be necessary to consider applying "small cell count suppression" to some of the numbers to ensure that individual students are not identified.

[29] The "small cell" count concept has been canvassed in previous IPC orders that addressed whether numerical data could reasonably be expected to render individuals identifiable. For example, in Order PO-2811, Senior Adjudicator John Higgins considered whether a record containing the first three characters of each of Ontario's postal codes (also referred to as FSAs⁷), coupled with the number of registered sex offenders in each FSA, contained personal information. The Ministry of Community Safety and Correctional Services had argued that in some cases, the number of sex offenders residing in an FSA qualifies as those individuals' personal information, based on "small cell" count. Senior Adjudicator Higgins addressed this argument in the following way:

. . . [T]he Ministry submits that there are five or fewer registered sex offenders residing in 45% of Ontario's FSAs. The Ministry submits that this comprises a "small cell" count. The term "small cell" count refers to a situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a "small cell" count varies depending on the situation. The Ministry has misapplied the concept of "small cell" count here. If, as the Ministry argues, 5 individuals is a "small cell" count, this would mean a person was looking for one individual in a pool of 5. By contrast, the evidence in this case indicates that one would be looking for 5 individuals in a pool of anywhere from 396 to 113,918. This is not a "small cell" count.

[30] In the record before me, I am not convinced that a "small cell" count exists. The fact that a named high school may have expelled less than five students does not, on its own, constitute a "small cell" count. For example, if a high school only had 10

⁷ Forward Sortation Areas.

students enrolled in total and expelled one student in a particular year, this would arguably constitute a "small cell" count, because one would be attempting to identify a single expelled student amongst a pool of only 10 enrolled students. In such circumstances, it might be reasonable to expect, based on this "small cell" count, that the expelled student may be identified.

[31] However, the reality is that the board's high schools do not have only 10 enrolled students. The board did not include any enrollment statistics in its representations but such figures are publically available on its website.⁸ A majority of the board's high schools has over 1,000 students each, one high school has more than 2,000 students, and several high schools have hundreds of students. The lowest enrolment at a high school is 299 students.

[32] In these circumstances, if a particular high school with a total enrolment of 1,500 students expelled two students in a particular year, one would be attempting to identify two individuals in a pool of 1,500 students. This does not constitute a "small cell" count. Even if the high school with the lowest enrollment (299 students) expelled one student, trying to identify that one individual in a pool of 299 students would not constitute a "small cell" count.

[33] In my view, given that a "small cell" count does not exist at any of the high schools listed in the chart, it is not reasonable to expect that disclosing the number of expelled students for each high school in a particular year may identify any of these students. I find, therefore, that the chart does not contain the personal information of the expelled students.

[34] Given that I have found that the chart does not contain the personal information of any suspended or expelled students, the mandatory personal privacy exemption in section 14(1) cannot apply to any of the information in this record, and it must be disclosed to the appellant in full. In such circumstances, it is not necessary to consider Issues E (personal privacy) and F (public interest override).

ORDER:

I order the board to fully disclose the chart entitled, "Suspension and Expulsion Data" for the years 2011-2012, 2012-2013 and 2013-2014, to the appellant, by **June 30, 2016.**

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

_____ May 31, 2016

⁸ Elementary and Secondary – October 2015 – Official Enrollment Projections, at page 15. Online: <http://ddsb.ca/AboutUs/FacilitiesAccommodations/StudentEnrolement/Pages/Default.aspx>

