

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3626-F

Appeal MA15-288

Toronto Catholic District School Board

June 26, 2018

Summary: The appellant, a student at a school under the jurisdiction of the Toronto Catholic District School Board (board), made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an investigation into an incident in which he had been involved. The board provided partial access to the responsive records, withholding two records entirely on the basis of the discretionary personal privacy exemption at section 38(b) of the *Act*, and the discretionary exemption at section 38(a) in conjunction with the health and safety exemption at section 13. The appellant appealed. In Interim Order MO-3463-I, the adjudicator partially upheld the board's decision to withhold personal information under section 38(b) and partially upheld its decision to withhold information under section 38(a) in conjunction with section 13. She deferred her findings on the application of section 38(a) in conjunction with section 13 to the remaining information pending notification of affected parties.

In this final order, the adjudicator partially upholds the application of section 38(a) in conjunction with section 13 to the remaining information, and orders the board to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 13 and 38(a).

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

BACKGROUND:

[1] A student at a Toronto Catholic District School Board (board) school, together with his mother, made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an investigation into an incident in which the student had been involved. The request was for the following records:

- a. A complete copy of any and all records generated as a result of the principal's investigation under s. 310 of the *Education Act*, including but not limited to any emails, handwritten notes, draft reports, witness statements, memoranda, or other similar documents;
- b. A copy of any internal TCDSB policies, procedures, directions, instructions or other similar documents with respect to how a principal is expected to conduct an investigation under s. 310 of the *Education Act*;
- c. A complete copy of any and all records relevant to the threat assessment, including the final threat assessment document, any drafts of the threat assessment document, any notes taken during the threat assessment meeting on [specified date], notes from any participants or contributors to the threat assessment, and any emails relevant to the threat assessment;
- d. A complete copy of the social worker's notes and records with respect to her provision of services to the appellant during the 2014/15 school year; and
- e. A copy of any internal TCDSB policies, procedures, directions, instructions, memoranda or other similar documents with respect to "threat assessments".

[2] The board issued a total of three decisions in response to the request. The student and his mother appealed the board's initial decision to this office, following which the board made its second decision. The effect of the two decisions was to grant access to the records responsive to parts b), d) and e) of the request, but to deny access to the records responsive to items a) and c). In denying access to the latter information, the board maintained that its disclosure could reasonably be expected to seriously threaten the safety or health of an individual, such that the discretionary exemption at section 13 applied. The board also relied on the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] During mediation of the appeal, The board advised the mediator that it had located additional records responsive to part a) of the request, and issued a third decision letter in which it denied access to them pursuant to sections 13 and 38(b) of the *Act*.

[4] Following mediation, the appeal proceeded to the adjudication stage, with the only records remaining at issue being the threat assessment documents and the

principal's handwritten investigation notes. I invited and received representations from the board and the appellants' counsel. The parties' representations were shared with one another in accordance with this office's *Practice Direction 7* and section 7 of the *Code of Procedure*, with some portions of the representations withheld pursuant to the confidentiality criteria set out in *Practice Direction 7*.

[5] Also during adjudication, I identified a potential complication arising out the fact that both the student and his mother had appealed the board's decision. I notified the appellants' counsel of this potential complication,¹ and she consented on behalf of the appellants to having this appeal proceed with the student as the only appellant. My references to the "appellant" in the remainder of this order refer to the student appellant.

[6] In Interim Order MO-3463-I, I partially upheld the board's decision to withhold personal information of individuals other than the appellant under section 38(b) and partially upheld its decision to withhold information under section 38(a) in conjunction with section 13. I deferred my findings on the application of section 38(a) in conjunction with section 13 to the remaining information pending notification of affected parties.

[7] I notified and invited representations from a number of affected parties, three of whom provided representations in response, objecting to the release of the information. I did not find it necessary to share the affected parties' representations with the appellant. Some of their arguments were similar to those that had already been made by the board, while the remainder were not persuasive.

[8] In this final order, I uphold the application of section 38(a) in conjunction with section 13 to the some of the remaining information, and I order the board to disclose the information that does not qualify for an exemption to the appellant.

RECORDS:

[9] The records at issue are the principal's handwritten investigation notes and a threat assessment package. The information in those records that remains at issue is the information other than that found to be exempt in Interim Order MO-3463-I, as more fully described below.

¹ I did not elaborate on the nature of the complication and also cannot do so in this order, because to do so would reveal the content of the records.

ISSUES:

- A. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information remaining at issue?
- B. Did the institution exercise its discretion under section 38(a) in conjunction with section 13? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information remaining at issue?

[10] The records at issue contain the appellant's personal information.² Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, subject to the exemptions from this right found in section 38.

[11] Section 38(a) allows for the withholding of information if certain other exemptions would apply to that information. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[12] Section 38(a) of the *Act* 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.³ Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[13] In this case, the board relies on section 38(a) in conjunction with section 13, which states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[14] For this exemption to apply, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is

² This was one of the findings in Interim Order MO-3463-I.

³ Order M-352.

needed will depend on the type of issue and seriousness of the consequences.⁴

[15] The term “individual” is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.⁵

Representations of the board

[16] The board submits that the section 13 exemption applies to both the principal’s handwritten notes and the threat assessment documents. It submits that these records were used to assess the seriousness of a perceived threat to staff and students at the school, and to determine an appropriate course of action to neutralize the threat. As part of this assessment, the incidents that led to the perceived threat were frankly discussed, and the staff and students involved in the incident, as well as those involved in the assessment process, are named.

[17] The board further submits:

[The] records at issue were created in order to investigate a serious incident in which the subject is alleged to have made bullying, violent threats to other students related to his stated involvement in a gang. Once an incident of this nature is reported to the school principal, he or she is compelled to investigate as per the principal’s duties under the authority of Part XIII of the *Education Act*. During the investigation, the principal interviewed students involved in the incident and other staff members about the alleged threat. Guaranteed a high level of confidentiality, students and staff members provided frank responses to the principal’s questions. The responses, including the personal information of students and staff, were recorded in the principal’s notes and formed the basis for the threat assessment that was subsequently initiated, which also included personal information. In this [instance], considering the frank responses of the students and staff, and given the nature of the alleged threat originally made by the subject it is our opinion that the safety of those named in relation to the incident could reasonably be compromised by disclosure.

[18] The board goes on to elaborate on the confidentiality inherent in the notification process involved in investigations under the *Education Act*. The board refers to Policy/Program Memorandum No. 144 from the Ministry of Education to school boards, which states:

⁴ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁵ Order PO-1817-R.

Boards must ... put in place procedures to allow students to report bullying incidents safely and in a way that will minimize the possibility of reprisal.

[19] The board also refers to its duty as an employer under the *Occupational Health and Safety Act* to maintain the safety of its school workers. The board submits that the records at issue must remain confidential in their entirety in order to fulfill its obligations to maintain the safety of its staff.

Representations of the appellant

[20] The appellant refers to *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*⁶ and submits that in order to make out the section 13 exemption, the board must establish that:

1. There is a reasonable basis for concluding that disclosure could be expected to seriously threaten the safety or health of an individual;
2. The board's reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. In other words, the risk of harm is beyond the merely possible or speculative; and
3. There is detailed and convincing evidence about the potential for harm. The board must provide evidence "well beyond" or "considerably above" a mere possibility of harm.

[21] The appellant submits that the board has provided almost no detail to support its position. The appellant notes, in particular, that the board does not submit that he has made any threat to staff. The appellant submits that, at their highest, the board's submissions contain nothing more than vague statements and a subjective belief that there is a safety threat. The appellant submits that the board has not met its burden of establishing that section 13 of the *Act* applies to the records at issue.

[22] The appellant states that he is no longer a student at the school and does not have any contact with staff from his former school. He notes, further, that even the incident in question ultimately only resulted in a seven-day suspension, and the principal did not recommend his expulsion, nor did he attempt to exclude him from the school. The appellant submits that the school's actions do not support the characterization of him as a serious threat.

Reply representations of the board

[23] In reply, the board refers to specific information contained in the threat

⁶ Cited above.

assessment documents which, in the board's view, supports its submission that the records are exempt under section 13. I cannot elaborate on the nature of this information, because to do so would reveal the contents of the record.

Representations of the affected parties

[24] Following the release of Interim Order MO-3463-I, I notified a number of affected parties of the appeal and invited their representations. Three affected parties provided representations in response. All three affected parties objected to the disclosure of the information at issue. I will refer to the affected parties' arguments as necessary below.

Analysis and findings

[25] As mentioned above, in Interim Order MO-3463-I I found certain information to be exempt from disclosure. As a result of those findings, the information that remains at issue is the following:

- Information in the principal's investigation notes including the appellant's own statements (which includes the personal information of others appearing in his statements), his mother's personal information, and information the principal gathered from various professionals
- Information in the threat assessment documents including information about the appellant gathered from various professionals, as well as forms and other general information

[26] Section 13 requires that any threat to health and safety be a result of disclosure of the records at issue. In Interim Order MO-3463-I, I found that disclosure of the identifying information associated with the opinions of those involved in the threat assessment could reasonably be expected to seriously threaten the safety or health of an individual. I must now decide whether the same can be said for the remainder of the information at issue.

[27] The party with the burden of proof under section 13, that is, the party resisting disclosure, must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[28] I have carefully reviewed the records at issue and the parties' representations. For the reasons set out below, I find that disclosure of the information of some, but not all of the information remaining at issue could reasonably be expected to seriously threaten the safety or health of an individual.

[29] In its representations, the board submits that two groups of individuals' health or safety could reasonably be expected to be threatened as a result of disclosure of the records: the students mentioned in the records and the professionals involved in the

investigation and threat assessment.

[30] I have already found the personal information of the students other than the appellant to be exempt under section 38(b), with the exception of their personal information contained in the appellant's own statements. I do not need to consider whether the information exempt under section 38(b) is also exempt under section 38(a) in conjunction with section 13.

[31] With respect to the personal information of other students found in the appellant's own statements, I am not satisfied from the evidence before me that disclosing the appellant's own statements to him could result in a health or safety threat to the other students mentioned in those statements. The board's submissions focus on protecting the identity of those students who were interviewed in the course of the investigation. I find that the release of the appellant's own statements could not reasonably be expected to result in a serious threat to the health or safety of the other students or, for that matter, of any other individual.

[32] With respect to the information of various individuals who participated in the investigation and the threat assessment process in their professional capacities, I have reviewed the parties' representations and the information in the records referred to by the board. While I cannot be specific about the nature of the information in the records, I observe that the concern around the appellant's past behaviour revolves mainly around his alleged aggression toward his peers. However, the Principal's Report, which was one of the records disclosed to the appellant in full, indicates that the appellant has behaved aggressively toward staff. For example, on two occasions, he was suspended for pushing a teacher.

[33] There are also references in the records at issue to serious incidents which strongly suggest that the appellant has the potential to act violently, but which do not pertain specifically to aggression or threats directed toward any particular person or group. I cannot be more specific without revealing the contents of the records.

[34] One affected party submitted that board employees have been threatened by students in the past for either reporting a threat or participating in the threat assessment process. Another affected party raised a concern that ordering disclosure of the threat assessment documents would set a precedent for the disclosure of future threat assessments.

[35] However, the assessment of whether disclosure of information could reasonably be expected to result in harm is highly context-specific. The issue before me is whether there is a concern with these particular records and this particular student. Therefore, I have not placed any weight on the evidence that other students have threatened staff in relation to the threat assessment process. Moreover, because each case is unique, my finding in this appeal cannot be said to provide a precedent for future access requests involving similar types of records.

[36] Having carefully reviewed the information before me, including the parties' representations, the records at issue and the principal's report, I find that disclosure of some of the information remaining at issue could reasonably be expected to seriously threaten the safety or health of an individual. This information includes some portions of the principal's investigation notes including information provided by other staff who participated in the principal's investigation, and some portions of the threat assessment documents including the identities of the threat assessment team members. Generally speaking, the information that I find to be exempt consists of evaluative information originating from an identifiable individual or group of individuals, and factual information that can be connected to the individual or individuals who provided it either to the principal (during his investigation), or to the threat assessment team. In my view, this information has the potential to be inflammatory in the hands of the appellant.

[37] As noted above, for the section 13 exemption to apply, there must be a risk of harm that is well beyond the merely possible or speculative. How much and what kind of evidence is needed also depends on the type of issue and seriousness of the consequences.⁷ The evidence before me that leads me to conclude that the risk of harm from disclosure goes well beyond a mere possibly of harm includes the following:

- Evidence in the records at issue relating to previous school incidents involving the appellant
- Evidence in the Principal's Report that the appellant has assaulted staff in the past
- Evidence in the threat assessment records which strongly suggests that the appellant has the potential to inflict serious harm on an individual or individuals, including but not limited to information found at pages 4, 5, 6, 10, 11 of the Full Threat Assessment document
- Evidence that the release of this particular information has the potential to be inflammatory for the appellant, for example as found on pages 17 and 32 of the Full Threat Assessment document

[38] In coming to my conclusions, I have also taken into account the appellant's submissions, including his evidence that he is no longer a student of the school where the incident took place and has had no discipline issues since leaving the school. Moreover, the appellant notes that he has always denied the school's characterization of the specific incident that led to the threat assessment. While these are relevant considerations, weighing all of the evidence before me leads me to conclude that the risk of harm resulting from the disclosure of the above-described information is well

⁷ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

beyond the merely possible or speculative.

[39] The same cannot be said, however, for the rest of the information in the records. As noted above, for the section 13 exemption to be made out, there must be a link between the disclosure of the information at issue and the threat to health and safety. While I acknowledge the board's general concern that the appellant poses a risk, the issue is not whether the appellant poses a risk generally, but *whether disclosure of the information at issue* could reasonably be expected to seriously threaten the safety or health of an individual. In the circumstances of this appeal, I am not satisfied that disclosure of forms and other general information contained in the threat assessment package could reasonably be expected to seriously threaten the safety or health of an individual. I reach the same conclusion for a good deal of the factual information about the appellant that came to light during the threat assessment. Where it is possible to sever and disclose such information without revealing the identity of the individual who provided it, I will order that the board do so.

Issue B. Did the institution exercise its discretion under section 38(a) in conjunction with section 13? If so, should this office uphold the exercise of discretion?

[40] The exemption at section 38(a) in conjunction with section 13 is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[41] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹

Relevant considerations

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- the purposes of the *Act*, including the principles that

⁸ Order MO-1573.

⁹ Section 43(2).

¹⁰ Orders P-344 and MO-1573.

- information should be available to the public
- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[44] The board submits that it exercised its discretion based on relevant considerations, including the appellant's right of access to his own personal information, the principle that the privacy of individuals should be protected, the relationship between the appellant and any affected parties, and the nature of the information and the extent to which it is sensitive to any party.

[45] The board acknowledges its statutory duty to provide individuals access to their own personal information, but submits that the context in which the records were created is important.

[46] The appellant submits that the board's exercise of discretion was unreasonable as it relied on irrelevant factors. The appellant submits that, while the board has explained how the threat assessment documents are important to it, it has not explained why this justified withholding them.

[47] The appellant submits, further, that the board failed to take into account relevant

factors, such as the compelling need on the part of the appellant to access the information or the extent to which disclosure would increase public confidence in the board.

Analysis and conclusion

[48] Having reviewed the records and the parties' representations, and for reasons similar to those I articulated in the interim order, I find that the board appropriately exercised its discretion in withholding the information at issue. The board took into account the appellant's right of access to his own personal information, but also the safety interests of the other individuals.

[49] From my review of the board's representations in their entirety, I am satisfied that, although the board may not have enumerated all factors it considered in its exercise of discretion, it did not fail to consider relevant factors. I also do not share the appellant's concern that the board relied on irrelevant factors in withholding the threat assessment package under section 38(a) in conjunction with section 13, nor do I have any reason to conclude that it exercised its discretion in bad faith or for an improper purpose.

[50] I uphold the board's exercise of discretion.

ORDER:

1. I uphold the board's decision, in part, and find that some of the information remaining at issue is exempt from disclosure pursuant to section 38(a) in conjunction with section 13 of the *Act*. With the board's copy of this order, I am providing a copy of the records at issue with the information that I found in Interim Order MO-3463-I to be exempt pursuant to section 38(b) highlighted in yellow, and the information that I have found to be exempt pursuant to section 38(a) in conjunction with section 13 highlighted in orange.
2. I order the board to disclose the non-exempt information to the appellant. To be clear, the portions of the enclosed records that are not highlighted are to be disclosed to the appellant.
3. The disclosure referred to in paragraph 2 is to be made by **August 1, 2018** but not before **July 27, 2018**.
4. In order to ensure compliance with paragraphs 2 and 3 of this order, I reserve the right to require the board to provide me with copies of the records disclosed to the appellant.

Original Signed by: _____
Gillian Shaw

June 26, 2018 _____

Senior Adjudicator