Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3657

Appeal MA16-651

Toronto District School Board

September 12, 2018

Summary: The appellant made a request to the board for access to school zone boundary maps in "shapefile" format, which permits users to manipulate mapping data electronically. The board denied access to the records, initially on the basis of section 11(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), and later on the basis of sections 11(c) and (d). The section 11 discretionary exemptions all relate to the protection of certain economic interests of institutions. The appellant appealed the board's denial of access and its late raising of new discretionary exemption claims. In this order, the adjudicator allows the board to raise its section 11(c) and (d) exemption claims, but finds they do not apply in the circumstances. She orders the board to disclose the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 11(c) and (d).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

OVERVIEW:

[1] The appellant represents a real estate brokerage company. She made a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for school boundary maps, such as those appearing on the board's website, in formats necessary for digital mapping and online display. The appellant later clarified her request to read as follows:

> All Toronto District School Board (TDSB) school boundary maps (also referred to by the TDSB as "Attendance areas") currently in effect for all

> schools, grades and programs, in the format required (for example but not limited to Geographical Information Systems (GIS) digital format such as Environmental Systems Research Institute (ESRI) shapefiles), for digital mapping and online display (for example but not limited to on TDSB website pages such as this one: http://www.tdsb.on.ca/Findyour/School/ByMap.aspx?focusOnScool=3432).

[2] The board initially denied access to responsive records on the basis of section 11(a) of the *Act*, which permits an institution to refuse to disclose a record that contains trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value. The board also noted that, as identified by the appellant in her access request, school boundary maps are available online on the board's website.

[3] The appellant appealed the board's decision to this office.

[4] During the mediation stage of the appeal process, the appellant clarified her request, as set out above. She also explained that her preference is to receive the school boundary maps in "shapefile" format, which is not a format in which school boundary maps are available online.

[5] The board maintained its refusal to disclose the requested information. At this stage, it also amended its basis for refusing disclosure, citing sections 11(c) and (d) of the *Act* in place of its original claim of section 11(a). Like its previous claim, sections 11(c) and (d) relate to the protection of an institution's economic or other interests. The appellant objected to the board's late raising of new discretionary exemptions. As such, the board's entitlement to rely on the new claims is an issue in this appeal.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*. The parties' representations on the issues were exchanged in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I allow the board to raise its section 11(c) and (d) claims, but find they do not apply in the circumstances. I order the board to disclose the records to the appellant.

RECORDS:

[8] At issue in this appeal are school boundary maps in "shapefile" format, which permits users to overlay data onto maps electronically.

ISSUES:

A. Should the board be permitted to rely on exemptions raised after the lapse of the 35-day period?

B. If the board is permitted to raise them, do the discretionary exemptions at sections 11(c) and/or (d) apply to the records? If so, did the board exercise its discretion under these sections?

DISCUSSION:

A. Should the board be permitted to rely on exemptions raised after the lapse of the 35-day period?

[9] The appellant objects to the board's reliance on discretionary exemptions that it raised for the first time during the mediation stage of the appeal process.

[10] This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[11] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[1]

[12] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[2] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions

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[1] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[2] Order PO-1832.

can be raised after the 35-day period.[3]

[13] The parties were asked to provide representations on any prejudice to them, or to the integrity of the appeals process, in permitting or not permitting the late raising of discretionary exemptions in this case.

[14] The appellant submits that the board's late raising of new claims deprived her of information that could have assisted her at the mediation stage. By way of example, she says that her decision not to engage legal counsel at the mediation stage was made, in part, because she believed that the original exemption claim made by the board was clearly inapplicable and that she did not need legal assistance to make her case. She states that the board's reliance on new exemption claims later in the appeal process created additional work for her, as she was required to do additional research late in the mediation stage. In the appellant's submission, these factors undermined the mediation process by affecting her ability to participate effectively in the process.

[15] The board observes that it provided notice of its revised claims several months before the conclusion of the mediation process, giving the appellant an opportunity to take this development into account in deciding next steps. The board states that if it is not permitted to rely on these claims, it will have no alternative basis on which to deny access. The board also notes that since making its new claims, it has filed its submissions in a timely manner and has not requested any extensions of time.

[16] I conclude that any prejudice to the appellant or to the integrity of the appeals process in allowing the board's late claims is minimal. The new exemptions apply to the same records that the board originally withheld under another exemption claim (on which the board no longer relies), meaning that no additional information has been withheld from the appellant as a result of the new claims. The appellant was notified of the board's new claims during mediation, at which stage it was still open to the parties to attempt settlement of the new issues raised by the board's revised decision. If the appellant believed that seeking legal assistance or conducting additional research would assist in settling these issues, she could have done so.

[17] Instead, the appellant elected to proceed to the adjudication stage (as she was entitled to do), where the parties had the opportunity to address the new exemption claims, as well as the issue of late raising, in submissions to the adjudicator. The appellant made representations on both topics, and I have considered them in arriving at my findings in this order. In addition, the board's late raising of new claims has not resulted in any appreciable delay in the processing of the appeal.

[18] By contrast, not permitting the board's late claims would be severely prejudicial to the board. Because the board withdrew its previous (and only other) exemption claim when making its new claims, disallowing the board's new claims could result in the disclosure of records that are properly exempt under the *Act*.

[3] Orders PO-2113 and PO-2331.

[19] In view of the serious prejudice to the board and the minimal prejudice, if any, to the appellant in allowing the board's late claims, I will exercise my discretion to consider their application to the records at issue.

B. Do the discretionary exemptions at sections 11(c) and/or (d) apply to the records? If so, did the board exercise its discretion under these sections?

[20] The board withholds the records, in full, on the basis of sections 11(c) and (d) of the *Act*. These sections state:

> A head may refuse to disclose a record that contains,
>
> > (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution[.]

[21] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[4]

[22] For section 11(c) or (d) 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 needed will depend on the type of issue and seriousness of the consequences.[5]

Parties' representations

[23] The board uses the shapefile maps at issue in this appeal to identify the boundaries for school zones within the board. As noted, the shapefile format permits users to overlay data electronically onto maps and to manipulate the maps.

[24] The board explains that it has historically published "snapshots"—fixed versions—of the shapefile maps on its website. The board has become aware that members of the public rely on these maps in order to make decisions about where to live. It has also become aware that reliance on these maps has led to confusion about whether certain residential addresses fall within particular school zones. Specifically, the board reports that members of its Planning Department have received angry communications from members of the public over misunderstandings about school zone boundaries.

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[4] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[5] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[25] To address this matter, the board has attempted to caution the public against relying on the maps by including an express disclaimer on its website instructing interested individuals to review the clearer, written descriptions of the boundaries on its website. If, however, the board were made to disclose the shapefile maps at issue, it would lose the ability to include these types of measures to limit its exposure to potential litigation. The board observes that the appellant would not be limited in terms of the representations she could make to her customers or other members of the public when sharing the information contained in the records, and would not be obliged to provide safeguards to better protect the board against litigation. While the board acknowledges that it has not yet been subject to litigation on this issue, it submits that the risk of such litigation is ongoing, and is not time-limited. It states that regardless of the merits of any potential litigation, simply being named as a co-defendant would subject the board to the costs of having to defend itself in an action.

[26] The board supports its submissions with an affidavit of its system planning officer responsible for preparing and amending electronic mapping data used by the board to construct school zone boundaries. He confirms that his department has been contacted on a number of occasions in the past by angry parents who claim to have been misled by information contained in board map data, and that for this reason the department added to the board's website the disclaimers described by the board. He also states that, based on the historical complaints and the significance of the data to individuals making home purchases based on school zones, he reasonably believes that the board's map data may, in certain cases, give rise to civil claims.

[27] The board additionally submits there is no public policy reason to overturn its decision. The board asserts that any commercial use to which the appellant wishes to put the records is not in the public interest, and that the appellant is free to create her own maps if she wishes. The board states that by seeking access to the board's shapefile maps under the *Act*, the appellant simply eliminates the cost of having to generate her own commercial product.

[28] In response, the appellant observes that the board has not provided evidence that it has ever been the subject of litigation over its publication of school boundary maps. She also observes that the risk of harm claimed by the board relates to public confusion over the publication of map data on its own website. She questions why information displayed on a third-party website would subject the board to any substantive threat of litigation, given that the board makes clear on its own website what sources of information ought to be treated as being official.

[29] The appellant responds to the board's concerns about its inability to control the appellant's use and further disclosure of its shapefile data by noting that other institutions routinely release information to the public under open data arrangements that may stipulate terms of use, or require recipients of information to enter into contractual agreements.

[30] The appellant explains that her primary interest in seeking access to the board's shapefile data is to obtain accurate information about the board's school zone

boundaries, in order to help her customers and other members of the public to make better real estate decisions. In this regard, she and the board have a shared interest in ensuring the disclosure of timely and accurate information to the public. She notes that the main rationale given by the board for denying access (namely, the fear that the public may become confused, misled or angry about inaccurate information) is at odds with the board's suggestion that the appellant create her own shapefile maps. The appellant explains that the risk of introducing inaccuracies in creating her own maps from the static images appearing on the board's website is considerable, including because the delay in producing her own maps based on information on the board's website means they could be based on out-of-date information. She submits that the best way to ensure that members of the public have timely and accurate information on school zone boundaries is for the board to provide the shapefiles it uses in enacting its school admission policies.

[31] The appellant also addresses the board's comments regarding the commercial motivations behind her request. She notes that her intention to use the requested records for commercial purposes is not a relevant consideration in determining her right of access under the *Act*.

[32] The board provided representations in reply. I will refer to relevant portions of the board's reply in my discussion below.

Analysis and findings

[33] For the reasons that follow, I do not uphold the board's denial of access under section 11(c) or (d).

[34] In order for these sections to apply, there must be a reasonable expectation that disclosure of the records could cause specified harms to the board's economic or financial interests. I understand the board's argument to be that disclosure of the records to the appellant could reasonably be expected to result in litigation against the board, which would harm the board's economic and financial interests within the meaning of sections 11(c) and (d). I do not accept this argument, for several reasons.

[35] First, even if I accept that litigation against the board would cause the harms described in sections 11(c) and (d), I do not agree with the board about the likelihood of litigation arising from publication of school boundary maps.

[36] The board's evidence is that publication of map data on its own website has resulted in contacts from angry parents based on confusion about school zone boundaries, and that it added disclaimers on its website in order to limit its exposure to litigation. The board proposes that the fact it added disclaimers demonstrates that it recognized a real risk of litigation going beyond mere speculation of possible harm. I agree with the board that it is not necessary for there to have been past litigation in order to establish a risk of future litigation. However, there still must be a reasonable basis upon which to conclude that the risk is well beyond the merely possible or speculative. The board's own perception of risk does not, in itself, establish an

objectively reasonable expectation of harm, as required by sections 11(c) and (d).[6]

[37] In this case, the board's anecdotal evidence does not persuade me of an objectively reasonable expectation that public confusion over school zone boundaries could materialize into actual legal claims against the board. Among other things, I have considered the apparent lack of detail in the complaints received by the board about actual damage suffered by individuals as a result of their reliance on school boundary maps. I also recognize that potential litigants generally take into account multiple factors, including whether there is a basis for a claim and the likelihood of success, in deciding whether to commence litigation.[7]

[38] More importantly, I am not satisfied there is the necessary connection between disclosure of the particular records sought by the appellant and the risk of litigation. The board's argument appears to be that disclosure of the records to the appellant, for uses and further disclosures that cannot be controlled by the board, would subject the board to similar risks of litigation as has publishing map data on its own website—and, in fact, to a higher degree of risk because of the board's inability to include disclaimers with any maps created and published by the appellant or other third parties. I do not agree.

[39] As I described above, I am not persuaded of a reasonable likelihood of litigation against the board as a result of the board's publication of school boundary maps on its own website. In my view, the risk of litigation against the board is further diminished in relation to maps published on third-party sources not affiliated with the board. Here I find relevant and persuasive the appellant's observation that members of the public would not generally be expected to treat third parties as official sources of board information in deciding whether to pursue litigation against the board on matters of board policy.

[40] In making this finding, I recognize that disclosure under the *Act* is effectively disclosure to the world, so that the consequences of disclosure into the public domain, and not merely to a particular requester, are relevant considerations in deciding whether claimed exemptions apply.[8] I also acknowledge that, except in specific circumstances that are not applicable here,[9] the *Act* does not contemplate conditions on

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[6] See, for example, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII). At paragraph 204, the Supreme Court of Canada, quoting from a decision of an Australian tribunal, confirmed that the words "could reasonably be expected to" in the federal *Access to Information Act* "'refer to an expectation for which real and substantial grounds exist when looked at objectively.'" The Supreme Court later confirmed that the standard of proof identified in *Merck Frosst* is applicable to the identical phrase in the *Freedom of Information and Protection of Privacy Act*, the *Act*'s provincial equivalent: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

[7] This is distinct from deciding whether litigation that has been commenced could reasonably be expected to cause the harms in section 11(c) or (d). I accept the board's suggestion that, in some cases, even meritless litigation commenced against an institution could harm an institution's economic or financial interests within the meaning of those sections.

[8] See, for example, Orders PO-1537, PO-2461 and MO-2304.

[9] Disclosures of personal information for research purposes [see section 14(1)(e)].

disclosures made under the *Act*.[10] As a result, while I find credible the appellant's assertions about her intended use of the records and her willingness to enter into an agreement with the board concerning this use, I have not relied on these factors in considering the likelihood of harm from disclosure.

[41] Instead, I have considered whether disclosure of the records into the public domain, for uses and further disclosures that cannot be controlled by the board, could reasonably be expected to subject the board to the claimed harms. For example, I have specifically considered the board's arguments about the risk of litigation to the board should the appellant and other third parties publish their own versions of school boundary maps without any obligation to include disclaimers or otherwise ensure the accuracy of the information they provide. However, this possibility exists irrespective of any disclosure: the board itself observes that the appellant could produce her own maps using the fixed map data already available on the board's website, without need for the shapefile data that is at issue in this appeal. This undermines the claimed connection between disclosure of the records and the harms under sections 11(c) and (d), without which these exemptions cannot apply.

[42] Furthermore, and while not necessary to my finding, I note the appellant's argument that access to the board's shapefile data would enable her to produce more accurate maps (compared to those she could produce using the publicly available fixed map data), so that disclosure of the records would, in fact, reduce the likelihood of disseminating inaccurate information, and the associated risks of litigation claimed by the board. In any event, and without needing to decide the merits of this argument, the board's failure to establish a reasonable connection between disclosure of the records and the claimed harms means that the section 11(c) and (d) exemptions cannot apply. As I do not uphold the board's denial of access to the records on these grounds, I will order their disclosure to the appellant.

[43] While both parties made submissions on whether there are public policy reasons for disclosure of the records, and on the particular motivations behind the appellant's request, these were not relevant to my findings in this order. I also confirm for the board's benefit that in arriving at my decision, I have not been privy to nor relied upon any privileged communications that might have passed between the parties during the mediation stage of the appeal process.

ORDER:

I do not uphold the board's denial of access under sections 11(c) and (d). I order the board to disclose the records to the appellant by **October 15, 2018**.

Original Signed by: September 12, 2018
Jenny Ryu
Adjudicator

[10] See, for example, Orders PO-2018, PO-3140 and PO-3268-F.