

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3706

Appeals MA17-597 and MA17-598

Toronto District School Board

December 17, 2018

Summary: The board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* from a father for information contained in his daughters' Ontario Student Records. The board claimed that disclosure would constitute an unjustified invasion of personal privacy under section 14(1), taking into account the presumption at section 14(3)(d) (educational history). The board also took the position that the appellant does not have the right to exercise access under section 54(c) for one of his children who is under 16 years old. This order upholds the board's decision to deny the father access to the records.

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", 14(1), 14(3)(d) and 54(c).

Orders and Investigation Reports Considered: Orders MO-2291 and MO-2853.

OVERVIEW:

[1] An appellant filed a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to obtain information about the location of his daughters' current school. The board located responsive information contained in the Ontario Student Record (OSR) for each child.

[2] The board issued a decision letter denying the appellant access to the requested information. The board claims that disclosure of the information would constitute an unjustified invasion of personal privacy under section 14(1).

[3] The appellant appealed the board's decision to this office and a mediator was assigned to the appeal. During mediation, the board confirmed that it was relying on the presumption at section 14(3)(d) along with factors favouring non-disclosure at section 14(2) to deny access to the information under section 14(1).

[4] Mediation did not settle the appeal and the file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry. I commenced my inquiry by inviting the board to submit representations. The non-confidential portions of the board's representations were provided to the appellant. However, the appellant did not provide representations in response.

[5] In this order, I find that disclosure of the information at issue to the appellant would constitute an unjustified invasion of personal privacy under section 14(1), taking into account the presumption of section 14(3)(d). I uphold the board's decision to deny access to the records.

RECORDS:

[6] The information at issue is contained in the Ontario Student Records for two students.

PRELIMINARY ISSUE:

Section 54(c) of the *Act*

[7] One of the individuals identified in the appellant's request is less than 16 years of age. Accordingly, one of the issues identified in the Notice of Inquiry sent to the appellant was whether he is entitled to exercise a right of access on behalf of this individual under section 54(c). Section 54(c) reads:

Any right or power conferred on an individual by this Act may be exercised,

If the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

[8] Under this section, a requester can exercise another individual's right of access under the *Act* if he or she can demonstrate that:

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

[9] If the appellant met the requirements of this section, he would be entitled to have the same access to the personal information of the student as the student would have. The request for access to the personal information of the student would be

treated as though the request came from the student herself.¹

[10] As previously mentioned, the appellant did not respond to the Notice of Inquiry sent to him. As a result, he did not provide evidence as to whether he has lawful custody of his child who is less than 16 years of age.

[11] In its representations, the board provided a link to a publicly reported family law matter between the appellant and his daughters' mother. The matter was heard before an Ontario Superior Court justice who denied the appellant's motion relating to custody. The board refers to a specific paragraph in the decision in which the court concluded that a final court order was already in place which awarded the mother sole custody of the children.

[12] The board states in its representations that its review of the court's decision "... leads to a reasonable conclusion that the requester currently has neither custody nor access rights to the children affected by the request."

[13] As stated above, the appellant was given an opportunity to provide submissions as to whether he is entitled to exercise access under section 54(c) but declined to do so. I have reviewed the submissions of the board, including the court decision referred to by the board, and am satisfied that there is insufficient evidence establishing that the appellant has lawful custody of his child who is less than 16 years of age. Accordingly, I find that the appellant cannot exercise a right of access on behalf of this individual under section 54(c) in the circumstances of this appeal.

[14] Given my decision above, I must determine whether the mandatory exemption at section 14(1) applies to the personal information of the child who is less than 16 years, along with the other personal information at issue about the appellant's child who is over the age of 16.

DISCUSSION:

Would disclosure of the OSR information to the appellant result in an unjustified invasion of personal privacy under section 14(1) of the Act?

[15] The sole issue remaining in this appeal is whether disclosure of the withheld information to the appellant would constitute an unjustified invasion of personal privacy under section 14(1).

[16] There does not appear to be a dispute that the records at issue contain personal information as defined in section 2(1). Having reviewed the records, I am satisfied that the records contain the personal information of the individuals identified in the records. Specifically, I find that the records contain the appellant's daughters' names, ages and information relating to their education, as defined in paragraphs (a), (b) and (h) of the

¹ Order MO-1535.

definition of “personal information”. The records also contain information about the location of their school(s). The records do not contain the personal information of the appellant.

[17] Where an individual seeks access to 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. The parties have not claimed that any of the exemptions in paragraphs (a) to (e) apply, and I am satisfied that none apply.² Accordingly, the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

[18] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. However, the parties have not claimed that any of the situations in section 14(4) apply and I am satisfied that none apply.

[19] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14(1). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies.³

[20] The board claims that the presumption at section 14(3)(d) applies in the circumstances of this appeal and refers to Order MO-2291 in support of its position. Though the board’s decision letter indicates that factors favouring privacy protection under section 14(2) apply in this appeal, its representations did not specify which factors might apply or provide arguments on any of them.

Analysis and findings

[21] Section 14(3)(d) reads:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or educational history

² A different requester in Order MO-2853 claimed that section 266(3) of the *Education Act* expressly authorized the disclosure of his child’s OSR to him, and he argued that the withheld information should be disclosed to him under section 14(1)(d). Section 14(1)(d) provides that an unjustified invasion of personal privacy under section 14(1) will not result if the disclosure is expressly authorized by an Act of Ontario or Canada. However, the adjudicator in Order MO-2853 rejected this argument and found that section 14(1)(d) did not apply to circumstances in which non-custodial parents make requests under the *Act* for information contained in their child’s OSR. In that decision, Adjudicator Frank DeVries stated that the “Ontario Legislature did not intend to give a non-access, non-custodial parent the right to examine his or her child’s OSR.” I agree with this conclusion and adopt it here.

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

[22] Previous decisions from this office, including Order MO-2291 relied upon by the board, have established that information relating to a student that is located in their OSR constitutes their educational history.⁴ In Order MO-2291, Senior Adjudicator John Higgins stated:

I have reviewed the records, and I accept the Board's evidence that all of them form part of the OSR, which is, in effect, the core of a student's educational history. I therefore find the presumption at section 14(3)(d) applies to all of the records. It forms the "core of a student's educational history."

[23] The information at issue in this appeal forms part of the appellant's daughters' OSR. Having regard to the nature of information contained in the records, I am satisfied that disclosure to the appellant would reveal information constituting his children's educational history.

[24] Applying the reasoning of previous decisions, I find that the presumption at section 14(3)(d) applies to the information at issue. In addition, I find that this presumption cannot be rebutted by any factors favouring disclosure under section 14(2). As mentioned above, once established, when considering whether information is exempt under section 14(1), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. In this case, I found that none of the circumstances listed in paragraphs (a) to (d) of section 14(4) apply to this appeal. In addition, the appellant did not raise the possible application of the public interest override in section 16, nor am I persuaded that it applies in the circumstances.

[25] With regard to the above, I find that disclosure of the withheld personal information to the appellant would result in an unjustified invasion of personal privacy under section 14(1), and I uphold the board's denial of access to it.

ORDER:

I uphold the board's decision to deny access to the requested information to the appellant, and I dismiss the appeal.

Original Signed by _____
Jennifer James
Adjudicator

December 17, 2018 _____

⁴ See also Orders MO-2413 and PO-2711.