

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3920-F

Appeal MA17-599

Waterloo Region District School Board

April 21, 2020

Summary: At issue in this appeal is a request for access to a specified code of conduct report. In Interim Order MO-3861-I, the adjudicator upheld the decision of the Waterloo Region District School Board (the board) that the code of conduct report is subject to section 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) and thereby qualified for exemption. However, as the board provided no representations on its exercise of discretion, he ordered the board to exercise its discretion under section 6(1)(b) regarding the granting of access to the code of conduct report on the considerations set out in the interim order. In this final order, the adjudicator upholds the board's exercise of discretion and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 6(1)(b).

Order Considered: Interim Order MO-3861-I.

OVERVIEW:

[1] The Waterloo Region District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified code of conduct report as well as a summary of the board's costs related to the investigation of the subject trustee, including legal billings.

[2] The board identified responsive records and relying on sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) denied access to them, in full.

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

[4] In the course of mediation, the board issued a supplementary decision letter disclosing additional information to the appellant. At the close of mediation, only access to the specified code of conduct report (the report) remained at issue in the appeal.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. I sought and received representations from the parties. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] In Interim Order MO-3861-I, I upheld the board's application of the exemption at section 6(1)(b) of the *Act*. However, as the board provided no representations on the exercise of its discretion, I ordered it to exercise its discretion under section 6(1)(b) of the *Act* and to provide both the appellant and me with an outline of the factors it considered in exercising its discretion.

[7] Ultimately, the board provided an outline of the factors it considered in exercising its discretion. Representations on the board's exercise of discretion were then exchanged between the board and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In this final order, I uphold the board's exercise of discretion and dismiss the appeal.

DISCUSSION:

[9] The remaining issue in this appeal is the board's exercise of discretion under section 6(1)(b) regarding the granting of access to the report.

[10] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[11] The section 6(1)(b) exemption 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.

[12] 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
- it fails to take into account relevant considerations.

[13] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ This office may not, however, substitute its own discretion for that of the institution.²

Relevant considerations

[14] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³

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

¹ Order MO-1573.

² Section 43(2).

³ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

The board's initial outline of the factors it considered

[15] In response to Interim Order MO-3861-I, the board submitted that it did not exercise its discretion in bad faith, or for an improper purpose, and that it took all relevant considerations into account.

[16] The board submitted that the information in the report is not the personal information of the appellant, who is a member of the local media. The board submits that it found no sympathetic or compelling need for the appellant to receive the information at issue.

[17] It added that the report contains the sensitive personal information of several individuals and that as an institution under the *Act*, the board had an obligation to protect the privacy of those individuals.

[18] Finally, the board submitted that it considered the public interest when it released the findings of the in-camera deliberations at a public board meeting.

The appellant's representations

[19] The appellant submits that one of the purposes of the *Act* is to provide a right of access in accordance with the principle that "information should be made public".

[20] He submits that disclosure of the report "will increase public confidence in the operation of the institution" which is a relevant consideration unaddressed by the board.

[21] He submits that the trustee who is the subject of the report was an elected official, judged by their peers against a standard of professional conduct established by the board to guide its operations.

[22] He submits that:

Transparency around how [they] met or failed those standards, and how effectively and fairly [they were] judged, helps inform the public about the usefulness and effectiveness of the board it elected.

People may find the board's judgment persuasive. They may find the board's judgment flawed. Either response is helpful to the board. Openness increases public confidence, which is why information should be available to the public.

I see transparency as a compelling need. The board sees otherwise.

The board's reply representations

[23] In reply, the board adds that based on its understanding of its rights and obligations under the *Act*, and under section 207(2)(b) of the *Education Act*⁴, all relevant considerations were taken into account.

[24] The board submits:

To ensure transparency and maintain privacy the trustees released a motion addressing the report at a public board meeting as required under the *Education Act*.

Information should be made public when it does not affect an individual's right to privacy.

The passage of time has resolved the earlier conflicts within the Board of Trustees and releasing the report would not increase the public confidence and may in fact cause further harm.

Analysis and finding

[25] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.⁵ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.⁶

[26] Section 1 of *MFIPPA* sets out the purposes of the *Act*. That section reads as follows:

The purposes of this *Act* are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

⁴ RSO 1990, c E.2. Section 207(2)(b) of that legislation provides that a meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian.

⁵ Order MO-1287-I.

⁶ Order P-58.

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[27] Thus, while the appellant is correct that one of the purposes of the *Act* is to provide a right of access in accordance with the principle that "information should be made public" another is "to protect the privacy of individuals with respect to personal information about themselves held by institutions".

[28] I am satisfied that in exercising its discretion not to disclose the report the board properly considered and weighed both of these purposes.

[29] I start by finding that there is insufficient evidence before me to establish that the board exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations. The board was well aware of the wording and purpose of section 6(1)(b) and that it was withholding the report under that section.

[30] I am satisfied that the board was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the board also considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information, the nature of the information and the extent to which it is significant and/or sensitive to the institution or an affected person. In addition, the board considered the age of the information. Finally, I am satisfied that the board considered whether disclosure of the report would increase public confidence in the operation of the institution. I note that the board did release the findings of the in-camera deliberations at a public board meeting.

[31] In all the circumstances and for the reasons set out above, I uphold the board's exercise of discretion.

ORDER:

I uphold the board's exercise of discretion and dismiss the appeal.

Original signed by _____
Steven Faughnan
Adjudicator

_____ April 21, 2020

