

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3950

Appeal MA19-00095

Rainbow District School Board

August 28, 2020

**Summary:** This order deals with the issues raised as a result of an access decision made by the Rainbow District School Board (the board). The access request was for a copy of an anonymous complaint letter, including the envelope the letter arrived in. The board denied access to both the letter and the envelope, claiming the application of the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8 (law enforcement), as well as section 38(b) (personal privacy). In this order, the adjudicator finds that the envelope does not contain personal information and is not exempt under either sections 8, 38(a) or 38(b). However, she finds that it is reasonable to expect that the identity of the letter writer could be ascertained upon disclosure of the contents of the letter. She also finds that the letter contains the personal information of the appellant, the letter writer and another individual and that, on balancing the factors and presumptions in sections 14(2) and 14(3), the letter is exempt from disclosure under section 38(b).

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(a), 8(1)(b), 8(1)(d), 8(2)(c), 14(3)(a), 14(2)(f), 14(2)(h) and 38(b).

### OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Rainbow District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for a copy of an anonymous complaint letter, including the envelope the letter arrived in. The request included the date the letter was received and the name of the person who received it.

[2] The school board denied access to the records, in full, claiming the application of the discretionary exemptions in sections 8(1)(a) and (d), 8(2)(a) and (c) (law enforcement), as well as the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

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

[4] During the mediation of the appeal, the mediator noted that the records appear to contain the personal information of the appellant, raising the possible application of the discretionary exemptions in sections 38(a) (discretion to refuse one's own personal information) and 38(b) (personal privacy) of the *Act*. In response, the board agreed that sections 38(a) and 38(b) of the *Act* should be added as issues in this appeal. In addition, the board advised the mediator that it was no longer relying on section 8(2)(a) (law enforcement report).

[5] The appeal then proceeded to the adjudication stage of the process where an adjudicator may conduct a written inquiry under the *Act*. The adjudicator assigned to the file began this inquiry by seeking the representations of the board. The board provided representations. In its representations, the board added section 8(1)(b) as an exemption. The file was then transferred to me to continue the inquiry. I sought, and received, representations from the appellant. The board's representations were shared with the appellant, with the exception of portions that met this office's confidentiality criteria, as set out in *Practice Direction 7*.

[6] While I will not be referring to the confidential portions of the board's representations, I did take them into consideration in making my decision.

[7] For the reasons that follow, I find that the letter is exempt from disclosure under section 38(b) of the *Act*. However, I also find that the envelope does not contain personal information, is, therefore, not exempt from disclosure under either 38(a) or 38(b). I also find that the envelope is not exempt from disclosure under section 8, and I order the board to disclose it to the appellant.

## **RECORDS**

[8] The records at issue consist of a one-page letter and an envelope.

## **ISSUES**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the letter? Should this office uphold the board's exercise of discretion?

C. Does the discretionary exemption at section 8 apply to the envelope?

## **DISCUSSION**

### **Issue A: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?**

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. 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;

[10] 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.<sup>1</sup>

[11] Section (2.1) also relates to the definition of personal information, which states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>2</sup>

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>3</sup>

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

### ***Representations***

[15] The board submits that the records contain the personal information of both the appellant and the individual who authored the letter. Although the information relates to the appellant in a professional capacity, the board argues, it qualifies as the appellant's personal information because it reveals something of a personal nature about him.

[16] The appellant's position is that the records contain his personal information.

### ***Analysis and findings***

[17] I have reviewed the letter and I find that it contains the personal information of the appellant, the author of the letter and another individual. In particular, I find that the letter contains the appellant's name, appearing with other personal information relating to him, falling within paragraph (h) of the definition of personal information in section 2(1) of the *Act*. I further find that, with respect to the appellant, the letter contains the views or opinions of an individual about the appellant, which qualifies as the personal information of the appellant under paragraph (g) of the definition.

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] Concerning the author of the letter, and the other individual, their names are not identified in the letter. However, on my review of the letter, I find that it is reasonable to expect that the individuals' identities could be ascertained based on the information contained in the letter.

[19] As a result, I further find that the letter contains the personal information of two identifiable individuals, including information about their family status, falling within paragraph (a) of the definition. The letter also contains information about the psychological history of the second individual, which qualifies as their personal information under paragraph (b) of the definition of personal information.

[20] In addition, I find that the letter qualifies as correspondence sent to the board by the author that is implicitly or explicitly of a private or confidential nature, falling within paragraph (f) of the definition of personal information in section 2(1) of the *Act*.

[21] Conversely, I find that the envelope does not contain any personal information. It simply contains the name and address of the recipient of the letter. It is clear from my review of the envelope that the author sent the letter to recipient in the recipient's professional capacity. I find that the disclosure of this information would not reveal any personal information about any individual. Given that the envelope contains no personal information, I find that the exemptions in sections 38(a) and 38(b) do not apply. However, I will consider (under Issue C) whether the law enforcement exemption in section 8 applies to exempt the envelope from disclosure.

[22] I will now determine whether the letter is exempt from disclosure under section 38(b).

**Issue B: Does the discretionary exemption at section 38(b) apply to the letter? Should this office uphold the board's exercise of discretion?**

[23] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[24] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester. In this case, the board's position is that the disclosure of the record would constitute an unjustified invasion of another individual's personal privacy.

[25] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[26] If the information fits within any of paragraphs (a) to (e) of section 14(1),

disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[27] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[28] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>5</sup>

[29] 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 38(b).

[30] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>6</sup>

[31] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>7</sup>

### ***Representations***

[32] The board submits that the presumptions in sections 14(3)(a) and (b) apply in these circumstances, as well as the factors in sections 14(2)(e), (f), (h) and (i). The board submits that the content of the letter is very sensitive in nature. The board also argues that the personal information in the letter was supplied in confidence to it. The board also submits that it undertook a line by line examination of the letter, to determine if it could be severed and came to the conclusion that it could not.

[33] The appellant submits that the police were notified about the contents of the letter, who subsequently advised the appellant that because there was not an identified complainant, there was "nothing to investigate," that the complaint was most likely unfounded, and constituted potential harassment against the appellant. The appellant further submits that an investigation was conducted at the relevant school by the board, and that another investigation was conducted by the Children's Aid Society,

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<sup>5</sup> Order MO-2954.

<sup>6</sup> Order P-239.

<sup>7</sup> Order P-99.

although that investigation relates to a record that was sent to an organization not covered by the *Act*, and which is not the subject matter of this appeal.

[34] The appellant also argues that his privacy has been invaded substantially and he has a right to know all of the information that warranted the actions described, above, and that, as a result of the letter at issue, his reputation has been damaged. Further, the appellant does not accept the board's position that the letter was provided in confidence, as he argues that the author of the letter went to great lengths to share the letter with two sources, (the board and another organization).

[35] Lastly, the appellant takes issue with the board's actions upon receiving the letter, and in its aftermath.<sup>8</sup>

### ***Analysis and findings***

[36] As previously stated, the board is relying on the presumptions in sections 14(3)(a) and (b), as well as the factors in sections 14(2)(e), (f), (h) and (i).

[37] The relevant portions of section 14(3) state:

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

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[38] The relevant portions of section 14(2) state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

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<sup>8</sup> My jurisdiction is limited to whether the record is exempt from disclosure under the *Act*, and whether the board properly exercised its discretion in not disclosing the letter to the appellant. I have no jurisdiction to review other aspects of the board's actions.

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

*The presumptions in section 14(3)*

[39] On my review of the parties' representations and the letter itself, I find that only the presumption in section 14(3)(a) applies, as there is health information about an individual in the letter.

[40] Turning to the presumption in section 14(3)(b), even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>9</sup> The presumption can apply to a variety of investigations, including those relating to by-law enforcement<sup>10</sup> and violations of environmental laws or occupational health and safety laws.<sup>11</sup>

[41] I find that the presumption in section 14(3)(b) does not apply. The evidence before me provided by the appellant suggests that the police declined to conduct an investigation. In addition, the board has not provided evidence that there was a police investigation. The appellant refers to an investigation conducted by the Children's Aid Society; however according to the appellant, this investigation was conducted as a result of a letter (not the subject matter of this appeal) sent to an organization that does not fall under the ambit of the *Act*. Lastly, I find that I have not been provided with sufficient evidence the internal investigation conducted by the board was carried out in order to investigate a possible violation of the law, including which law or legislation would be possibly violated. I am, therefore, unable to conclude that the presumption in section 14(3)(b) applies.

*The factors in section 14(2)*

14(2)(e): pecuniary or other harm

[42] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. The board has not

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<sup>9</sup> Orders P-242 and MO-2235.

<sup>10</sup> Order MO-2147.

<sup>11</sup> Orders PO-1706 and PO-2716.

provided evidence of this harm, other than simply citing section 14(2)(e). I find that this factor does not apply in these circumstances and, consequently, I give it no weight as a factor weighing against the disclosure of the letter.

14(2)(f): highly sensitive

[43] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>12</sup> I accept the board's argument that the letter contains highly sensitive personal information regarding, in particular, the author of the letter and another individual. I also find that there is a reasonable expectation of significant personal distress, should the letter be disclosed. As a result, I find that the factor in section 14(2)(f) applies and weighs heavily against disclosure of the letter.

14(2)(h): supplied in confidence

[44] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>13</sup> I find that, based on the board's representations and on my review of the content of the letter itself, that both the author of the letter and the board had a reasonable expectation, in the circumstances, that the highly sensitive personal information contained in the letter would be treated confidentially. Therefore, I find that the factor in section 14(2)(h) applies and weighs heavily against disclosure of the letter.

14(2)(i): unfair damage to reputation

[45] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.<sup>14</sup> I have not been provided with sufficient evidence from the board that the disclosure of the letter would cause damage to any individuals' reputation that would be classified as "unfair" to them. Therefore, in the absence of sufficient evidence before me, I find that the factor in section 14(2)(i) does not apply in these circumstances.

[46] While the appellant did not specify any of the factors favouring disclosure in section 14(2), I have given weight to the unlisted factor that the appellant identified in his representations. Particularly, I have given some weight to the appellant's position that he should be permitted to review the record that he argues damaged his

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<sup>12</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>13</sup> Order PO-1670.

<sup>14</sup> Order P-256.

reputation.

[47] Having considered the relevant presumption in section 14(3)(a) and the relevant factors in sections 14(2)(f) and (h), and balancing them with the appellant's right of access under the *Act* and the unlisted factor favouring disclosure that I have given some weight to, I find that the balance favours the non-disclosure of the personal information at issue. As a result, I find that the letter is exempt from disclosure under section 38(b).

[48] I further find that the board has demonstrated in its representations, including its confidential representations, that it properly exercised its discretion in not disclosing the letter to the appellant. I am satisfied that it took into consideration relevant factors, such as the appellant's right of access to his own personal information, with the privacy considerations of other individuals. I am also satisfied that the board took into account whether the letter could be severed but found that it could not be severed without possibly disclosing the identity of the individuals in the letter. Consequently, I uphold the board's exercise of discretion.

[49] Lastly, having found that the letter is exempt from disclosure in its entirety under section 38(b), it is not necessary for me to consider the possible application of section 38(a) to it.

**Issue C: Does the discretionary exemption at section 8 apply to the envelope?**

[50] Having found that the letter is exempt from disclosure under section 38(b), the sole record remaining at issue is the envelope. The board is claiming the application of sections 8(1)(a), (b), (d), as well as section 8(2)(c). Those sections state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

...

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(2) A head may refuse to disclose a record,

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

[51] “law enforcement” is used in several parts of section 8, and is defined in section 2(1) as follows:

“law enforcement” means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[52] The term “law enforcement” has covered the Children’s Aid Society investigation under the *Child and Family Services Act*.<sup>15</sup>

[53] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>16</sup>

[54] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>17</sup> The institution must provide detailed evidence about the potential for harm. It 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.<sup>18</sup>

### ***Representations***

[55] The board’s representations regarding the possible application of the exemption in section 8 relate to the letter itself, rather than the envelope.

[56] As previously stated, the appellant submits that the police were notified about

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<sup>15</sup> Order MO-1416.

<sup>16</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>17</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>18</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

the contents of the letter, who subsequently advised the appellant that because there was not an identified complainant, there was “nothing to investigate,” that the complaint was most likely unfounded, and constituted potential harassment against the appellant. The appellant further submits that another investigation was conducted by the Children’s Aid Society, although in response to a subsequent letter that is not the subject matter of this appeal and that the matter was concluded.

### ***Analysis and findings***

#### *Section 8(1)(a): law enforcement matter*

[57] The matter in question must be ongoing or in existence.<sup>19</sup> The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.<sup>20</sup>

[58] “Matter” may extend beyond a specific investigation or proceeding.<sup>21</sup> The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.<sup>22</sup>

#### *Section 8(1)(b): law enforcement investigation*

[59] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations.<sup>23</sup> The investigation in question must be ongoing or in existence.<sup>24</sup>

[60] The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply.<sup>25</sup>

#### *Section 8(1)(d): confidential source*

[61] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.<sup>26</sup>

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<sup>19</sup> Order PO-2657.

<sup>20</sup> Orders PO-2085 and MO-1578.

<sup>21</sup> *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

<sup>22</sup> Order PO-2085.

<sup>23</sup> Order PO-2085.

<sup>24</sup> Order PO-2657.

<sup>25</sup> Order PO-2085.

<sup>26</sup> Order MO-1416.

*Section 8(2)(c)*

[62] The purpose of section 8(2)(c) is to protect individuals who have provided information or created a record during a law enforcement investigation, which may expose them to civil liability. The exemption is not intended to protect a police officer's routine recordings of observations and actions.<sup>27</sup>

[63] Based on the evidence before me provided by the board, including its confidential representations, as well as the appellant, I find that the exemptions in section 8 do not apply to the envelope. First, I am unable to conclude, based on the evidence, that there is an ongoing law enforcement matter or investigation currently underway. Second, I also find that the board has not established the requisite harm required in order to satisfy me that the envelope is exempt under section 8. In particular, I find that the board has not demonstrated that, in disclosing the envelope, there would be a risk of harm that is well beyond the merely possible or speculative, particularly given that the envelope does not identify the source of the author of the letter. For these reasons, I find that the envelope is not exempt from disclosure under the law enforcement exemption in section 8.

**ORDER:**

1. I uphold the board's decision to not disclose the letter to the appellant.
2. I order the board to disclose the envelope to the appellant by **October 5, 2020** but not before **September 29, 2020**.
3. I reserve the right to require the board to provide this office with a copy of the envelope it discloses to the appellant.
4. The timelines noted in order provision 2 may be extended if the board is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_  
August 28, 2020

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<sup>27</sup> Order MO-1192.