

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3996

Appeal MA18-00738

Toronto District School Board

January 14, 2021

Summary: The Toronto District School Board (the board) received a request from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act* for access to internal board communications pertaining to an assault incident concerning a specific student.

The board granted access in part to the records identified as responsive, withholding portions of them under the discretionary exemption in section 7(1) (advice or recommendations) and the mandatory exemption in section 14(1) (personal information), as well as on the basis that it is not responsive to the request. The requester appealed the board's access decision. In this order, the adjudicator upholds the board's decision.

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"), 7(1), 14(1) and 17(1).

OVERVIEW:

[1] The records at issue in this appeal are internal Toronto District School Board (TDSB or the board) records related to a police report made by a student about an alleged assault and a subsequent press conference held in response to the police report, as well as the media coverage of the incident.

[2] Specifically, the board received a request from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act) for access to the following information pertaining to an alleged assault. The requester narrowed his request to the following information:

...Any communications between TDSB, Queens Park and Ottawa (external communication between Federal, Provincial and Municipal Governments) and internal communications between the board's decision makers related to the incident, Communications Department and school staff who were involved in this incident. Exclude complaint letters from members of the public and media communication that is any correspondence to and from media organizations...

[3] The board issued a decision to the requester disclosing records to him, denying partial access to them pursuant to the mandatory personal privacy exemption in section 14(1).

[4] The requester, now the appellant, appealed the board's decision.

[5] During the course of mediation, the board issued a revised decision denying access to further information in the records under the discretionary advice or recommendations section 7(1) exemption.

[6] The appellant advised the mediator that he was pursuing access to the withheld information pertaining to communications regarding the board's media response to the incident. The appellant provided the mediator with a further clarification of his request for information, as follows:

Requesting all internal communications that includes all internal communications regarding media and the press conference held – from within TDSB, as well as between TDSB and Federal, Provincial and Municipal Governments, regarding the incident involving [named student] [for a specific 5-day] time period.

[7] The mediator conveyed this information to the board. Subsequently, the board issued a final decision granting access to additional information, while maintaining its claim that sections 7(1) and 14(1) of the *Act* applied to the withheld portions of the records. The board later confirmed to the mediator that it had also withheld some information on the basis that it was non-responsive to the request.

[8] Following receipt of the records disclosed in the board's final decision, the appellant advised the mediator that he would like to pursue the appeal at adjudication, where an adjudicator may conduct an inquiry.

[9] I decided to conduct an inquiry and sent a Notice of Inquiry to seek the representations of the board initially, which it provided. I then provided the board's representations to the appellant with a Notice of Inquiry and sought his representations. The appellant did not provide representations in response.

[10] In this order, I uphold the board's decision that the information that it has claimed is exempt under sections 7(1) and 14(1), is exempt under those sections. I also find that

the information claimed to be not responsive to the request is outside the scope of the request and is therefore non-responsive.

RECORDS:

[11] The records are emails regarding proposed board statements, news article commentaries, media inquiries, and other internal board communications.

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- D. Does the discretionary advice or recommendations exemption at section 7(1) apply to the records?
- E. Did the board exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[12] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[14] To be considered responsive to the request, records must "reasonably relate" to the request.²

Representations

[15] The board described the history of the request, as set out above, which culminated in the following request as narrowed at mediation:

Requesting all internal communications that includes all internal communications regarding media and the press conference held – from within TDSB, as well as between TDSB and Federal, Provincial and Municipal Governments, regarding the incident involving [named student] [for a specific 5-day] time period.

[16] The board states that it released 184 pages of the records to the appellant, which included:

- 25 pages that were duplicate records,
- 18 pages that were deemed non-responsive in full, and
- 30 pages that were deemed non-responsive in part, with other parts of these pages withheld under the 7(1) and 14(1) exemptions.

[17] The board states that all internal communications with board staff for three days of the 5-day time period in the request related to the media and a press conference, in the form of email correspondence, and was considered by the board to be responsive to this request.

[18] The board further states that external communications from media outlets and individuals were deemed non-responsive to the request, as were records not related to the media or the press conference.

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

Analysis/Findings

[19] I find that the appellant's request, as narrowed during the mediation stage of the appeal, provided sufficient detail to identify the records responsive to the request. I agree with the board that the information that it deemed as non-responsive to the request, as set out above, is not responsive to the request.

[20] The request seeks internal board communications related to media coverage and a press conference concerning a specific incident related to an identified student.

[21] Having reviewed the records, I accept the board's submission and find that the portions withheld as non-responsive consist of external communications from media outlets and individuals, as well as records not related to the media and press conference set out in the request. Therefore, as this information in the records is outside the scope of the request, I uphold the board's decision to withhold it as non-responsive.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[22] 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). 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.³

[23] The board states that the records contain personal information about the student in a personal capacity and relies on the following paragraphs of the definition of personal information:

"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,
- (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,

³ Order 11.

(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.

[24] The board states that the records are board communications regarding an alleged incident that took place, relating to a named student. The student was acting in their personal capacity. The board states that the records also contain information regarding the student's opinions and views, in addition to those of their family.

[25] The board submits that the records also contain personal information regarding the named student, as well as, the board staff's opinions and views about the student. It states that the incident in the records received news coverage from multiple news outlets and that the appellant named the student in his access request; therefore, the appellant could be expected to identify the student if disclosure is granted to the personal information at issue in the records.

Analysis/Findings

[26] 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.⁴

[27] 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.⁵

[28] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[29] The records are board communications regarding an alleged incident that took place on a specific date, regarding a named student in a personal capacity. The records reveal that the incident in the records received news coverage from multiple news outlets and I accept that disclosure of the personal information in the records would reveal the identity of the student, their family and other individuals who communicated with the board about the incident in their personal capacities.

[30] I agree with the board that the records contain the personal information of the

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

student and their family including information about their sex and family status, as well as their personal opinions or views or the views of others about them.

[31] I also agree with the board that the records include correspondence sent to it by individuals 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.

[32] As well, I agree that disclosure of certain individuals' names in the records would reveal other personal information about them.

[33] Therefore, I find that the records contain personal information of identifiable individuals other than the appellant in their personal capacity in accordance with paragraphs (a), (e), (f), (g) and (h) of the definition of personal information in section 2(1).

[34] I will now consider whether the mandatory personal privacy exemption in section 14(1) applies to exempt the personal information in the records from disclosure.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[35] Where a requester seeks 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.

[36] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[37] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), it is not exempt from disclosure. The information does not fit within these paragraphs.

[38] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[39] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. In addition, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[40] 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. 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.⁷

Representations

[41] The board relies on the presumptions against disclosure in sections 14(3)(b), (d), and (h), which read:

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

(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;

(d) relates to employment or educational history;

(h) indicates the individual’s racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[42] Regarding section 14(3)(b), the board states that as a result of the alleged incident in the records, an investigation into a possible violation of law was initiated by law enforcement officials. It submits that the identifiable personal information in the records was compiled as part of an investigation into a possible violation of law under the *Criminal Code*.

[43] The board states that the records reveal the student’s grade at the time of the incident, which fits within the presumption in section 14(3)(d).

[44] The board states that the information in the records relates to the racial, ethnic origin and religious beliefs of the individuals named in the records for the purpose of section 14(3)(h).

[45] The board also provided submissions on the factors against disclosure in sections 14(2)(e), (f), and (i), which read:

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;

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[46] Regarding section 14(2)(e), the boards submits that disclosure of the records would result in the student being unfairly exposed to pecuniary harm by affecting their ability to live their everyday life without reputational damage. It submits that, as there was investigation involving law enforcement regarding the incident in the records, disclosure would be harmful to the student's reputation.

[47] The board submits that the records are considered to contain highly sensitive personal information, as disclosure of the personal information in them could reasonably be expected to cause personal distress to the student under section 14(2)(f). It states that information about an individual's involvement with the criminal justice system, or even the fact of such involvement in and of itself will usually be highly sensitive because disclosure can be expected to cause significant personal distress to such individuals.⁸ The board states that as the student had interviews with law enforcement and the board, it is even more likely that disclosure of this information would cause further significant personal distress.

[48] As well, it submits that disclosure would further compromise the student's safety by disclosing their location, in addition to damaging their reputation under section 14(2)(i).

[49] The board also states that disclosure may unfairly damage the reputation of the student for the purpose of section 14(2)(i) because they have no idea how the appellant, a reporter, will use and disclose this information.

Analysis/Findings

[50] 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.⁹ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰

[51] Based on my review of the records, I agree with the board's submission that the personal information in the records is identifiable as part of an investigation into a possible violation of law involving the alleged incident set out in the records. Therefore, I find that the presumption in section 14(3)(b) applies.

[52] I agree with the board that the personal information in the records reveals the

⁸ The board relies on Order PO-2518.

⁹ Orders P-242 and MO-2235.

¹⁰ Orders MO-2213, PO-1849 and PO-2608.

educational history of the student, as the records reveal the school attended by the student and the student's grade level. Therefore, I find that the presumption in section 14(3)(d) applies to it.

[53] Similarly, I agree with the board that the personal information in the records that would reveal the student and their family's racial or ethnic origin, as well as their religious beliefs. Therefore, I find that the presumption in section 14(3)(h) applies.

[54] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).¹¹ Therefore, I do not need to consider whether section 14(2) applies.

[55] As the presumptions in sections 14(3)(b), (d) and (h) apply, I find that the personal privacy exception in section 14(1)(f) is not established and the mandatory section 14(1) personal privacy exemption applies.¹² I find that the personal information withheld by the board is, therefore, exempt under section 14(1).

Issue D: Does the discretionary advice or recommendations exemption at section 7(1) apply to the records?

[56] The information at issue for which section 7(1) has been claimed are internal board emails that include information about how to respond to questions from school staff, parents of students and the media regarding the alleged assault incident. Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Representations

[57] The board states that disclosure of the information at issue in the records would reveal actual advice or recommendations.

[58] The board explains that the types of advice or recommendations provided in the records at issue are:

- An employee of the board was asking for (draft) recommendations from the communications team on how to respond to questions from school staff and media regarding the incident.

¹¹ *John Doe*, cited above.

¹² Orders PO-2267 and PO-2733.

- An employee of the board instructing staff on how to address family members' concerns regarding communicating to media.
- An employee of the board instructing staff on how to address the student's concerns regarding communicating to media.
- Recommendations from an employee on safety and well-being of students and staff.

Analysis/Findings

[59] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹³

[60] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[61] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁴

[62] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[63] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁵

[64] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the

¹³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹⁴ See above at paras. 26 and 47.

¹⁵ Order P-1054

institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁶

[65] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).¹⁷

[66] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information¹⁸
- a supervisor's direction to staff on how to conduct an investigation¹⁹
- information prepared for public dissemination.²⁰

[67] Based on my review of the records, I find that the information in the records that the board has identified as containing advice or recommendations does consist of advice or recommendations for the purpose of section 7(1) of the *Act*.

[68] In support, I find that the records are internal board communication where board staff provided advice or recommendations to other board staff as to:

- advice as to how to respond to questions from school staff and media regarding the incident in the records;
- advice as to how to address the student and their family members' concerns regarding communicating to media; and,
- recommendations regarding how to respond to queries about the safety and well-being of students and board staff in light of the incident set out in the records.

[69] I am satisfied that the information for which section 7(1) is claimed is not factual or background information, but is the actual advice or recommendations of board staff

¹⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁷ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

¹⁸ Order PO-3315.

¹⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²⁰ Order PO-2677

as set out above.

[70] I also considered, and I find, that the exceptions to section 7(1) in sections 7(2) and (3) do not apply. Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1).²¹

[71] In particular, the records do not consist of reports or studies within the meaning of section 7(2). Nor does the information in the records for which section 7(1) has been claimed contain factual information that can be severed from the actual advice or recommendations.

[72] Therefore, I find that the information for which section 7(1) has been claimed is, subject to my review of the board's exercise of discretion, exempt under that section.

Issue E: Did the board exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[73] The section 7(1) exemption is discretionary, and permits an institution to disclose

²¹ Sections 7(2) and (3) state:

- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
 - (a) factual material;
 - (b) a statistical survey;
 - (c) a report by a valuator;
 - (d) an environmental impact statement or similar record;
 - (e) a report or study on the performance or efficiency of an institution;
 - (f) a feasibility study or other technical study, including a cost estimate, policy or project of an institution;
 - (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
 - (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
 - (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
 - (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
 - (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.
- (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old.

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.

[74] 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.

[75] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²² This office may not, however, substitute its own discretion for that of the institution.²³

[76] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁴

- 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

²² Order MO-1573.

²³ Section 43(2).

²⁴ Orders P-344 and MO-1573.

- 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

[77] The board states that in exercising its discretion, it considered all relevant factors affecting the records at issue, including:

- The general purposes of the *Act*, including the principles that information should be available to the public, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected.
- The information that the appellant is seeking consists of recommendations from board employees regarding a sensitive incident and the identified student. Therefore, the recommendations provided in the records at issue would reveal the sensitive information of the student.
- The appellant is not seeking their own personal information.
- The appellant has not provided any sympathetic or compelling need to receive the requested records at issue.
- The appellant requested access to these records as an individual, but the appellant has identified that they are a reporter and will be writing a news story regarding the requested records at issue.

Analysis/Findings

[78] Based on my review of the records and the board's representations, I find that in denying access to the record, the board exercised its discretion under section 7(1) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[79] In exercising its discretion, I find that the board considered the nature of the advice and recommendations in the records. Disclosure of the advice or recommendations would reveal sensitive information about the student.

[80] As well, I find that the board took into account the purpose of section 7, which is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations

within the deliberative process of government decision-making and policy-making.²⁵

[81] Accordingly, I am upholding the board's exercise of discretion under section 7(1) and find that the information for which this exemption has been claimed is exempt on that basis.

Conclusion

[82] I find that all of the information that the board has claimed exempt under sections 7(1) and 14(1) is exempt under these sections. As no other discretionary exemptions have been claimed and no other mandatory exemptions apply, I uphold the board's decision. I also find that the information the board has determined as non-responsive to the request is not responsive to the appellant's request.

ORDER:

I uphold the board's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 14, 2021

²⁵ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.