



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-2054-I

Appeal MA-040046-2

Toronto District School Board



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This Interim Order disposes of some of the remaining issues in Appeal Number MA-040046-2. It follows my previous Interim Order MO-2046-I in this same appeal, issued on April 24, 2006.

BACKGROUND AND NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a number of records relating to the requesters' son and the Board, including an identified school's Local School Team Meeting notes or records concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school kept and used by the principal.

In response, the Board issued a decision providing access to a number of records, and denying access to other records, in whole or in part, on the basis of a number of exemptions including section 14(1) of the *Act* (invasion of privacy) with reference to the presumptions in sections 14(3)(a) and (d). The Board's response also stated that, where only partial access had been granted, the Board had severed (not released) the exempted portions.

The requesters (now the appellants) appealed the Board's decision. The appeal letter identified that the appellants were appealing the denial of access, and also took the position that additional responsive records exist. During mediation the appellants confirmed that they were not interested in the names of other children (or the children's parents) contained in the records, and that these identifiers could be severed from the records.

Mediation did not resolve this appeal, and it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Board, initially, inviting it to address a number of the issues in this appeal. In addition, I identified that some of the records at issue may contain the personal information of the requesters and/or their son, and I invited representations on the possible application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy) to the records.

The Board responded to the Notice of Inquiry by providing representations on the issues, and also identified:

- that it would be providing additional records to the appellants;
- that it had located additional records which still required review; and
- that a supplementary decision letter would be issued to the appellants respecting access to these additional records.

I then sent a Notice of Inquiry to the appellants, along with the non-confidential representations of the Board, and invited the appellants to address the issues.

One of the issues raised in this appeal relates to the reasonableness of the searches conducted by the Board for responsive records. As indicated above, in the course of providing representations in this appeal, the Board located additional responsive records, and subsequently issued a new decision regarding access to those records. For the reasons set out in MO-2046-I, a subsequent appeal was opened (MA-040046-4), and I decided to address the access issues relating to the records at issue in Interim Order MO-2046-I. I also decided to defer my review of issues relating to the reasonableness of the search for responsive records, in order to address that issue at the same time that the reasonable search issue is addressed in Appeal MA-040046-4.

Accordingly, MO-2046-I only dealt with issues relating to access to the responsive records in Appeal MA-040046-2. These records consisted of portions of seven pages of Local School Team Meeting minutes (Records 1 through 7), an email (Record 8) and an attached draft letter (Record 9).

In Interim Order MO-2046-I, I upheld the Board's decision to deny access to Records 8 and 9 on the basis of the exemptions claimed for those records.

With respect to the portions of seven pages of Local School Team Meeting minutes (Records 1 through 7), I found that all of these records contained the personal information of the appellants and/or their child. I also found that the severed portions of Records 1 through 7 contained the personal information of identifiable individuals other than the appellants or their child as defined in section 2(1) of the *Act*.

I then reviewed the application of section 38(b) to Records 1 through 7, and made the following finding:

... I find that the disclosure of the severed portions of Records 1-7 would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellants or their child. Since the records also contain the personal information of the appellants and/or their child, I find that they qualify for exemption under section 38(b) of the *Act*. I will review the Board's exercise of discretion below.

Upon reviewing the Board's exercise of discretion, I stated:

... with respect to Records 1 through 7, the Board indicated in its representations that it has not exercised its discretion in deciding to withhold these records from the appellant. The Board takes the position that, notwithstanding the fact that Records 1 through 7 contain the personal information of the appellants or their child, by disclosing all of the information relating to the appellants or their child, the Board is not required to exercise its discretion under section 38(b) of the *Act*. I do not accept the Board's position on this point.

I then identified the proper approach to take in dealing with records that contain the personal information of a requester, which is the record-by-record approach as set out by Senior Adjudicator Higgins in Order M-352. I reviewed the record-by-record approach, and then stated:

The Board has indicated in its representations that it has not taken the record-by-record approach to Records 1-7, and that it has not exercised its discretion in applying section 38(b). In the circumstances, I am not persuaded that the Board has exercised its discretion in denying access to those portions of Records 1 through 7 that I have determined qualify for exemption under section 38(b). Accordingly, I will include a provision in this interim order requiring the Board to do so.

Provision 2 of Interim Order MO-2046-I accordingly read:

I order the Board to exercise its discretion regarding the application of section 38(b) to the responsive parts of Records 1 through 7, and to provide me with an outline of the factors considered in exercising discretion in this context by May 15, 2006.

I am now in receipt of the representations of the Board in which the Board identifies the factors it considered in exercising its discretion to deny access to the severed portions of Records 1 through 7, and am in a position to review the appropriateness of that exercise.

DISCUSSION:

EXERCISE OF DISCRETION

Section 38(b) of the *Act* requires the Board to properly exercise discretion in deciding whether to provide the appellant with access to the records. In Interim Order MO-2046-I, I noted that section 38(b) is a discretionary exemption, and made the following statements regarding the exercise of discretion:

... When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In its representations on the manner in which it exercised its discretion, the Board states:

In exercising its discretion under section 38(b) to deny access to the severed parts of Records 1 through 7, the Board has taken into account the competing interests of access and privacy protection, and has balanced those interests in favour of privacy protection. The Board has taken the particular circumstances of this case into account in exercising discretion in this manner.

Specifically, in exercising its discretion regarding the application of section 38(b), the Board has considered the following factors:

- (a) the personal information of the requester was not intertwined with the personal information of the other individuals and the personal information of the requester was severed from records 1 through 7 and provided to the requester;
- (b) the remaining personal information of the other individuals as contained in Records 1 through 7 falls within the scope of the presumptions contained in section 14(3) (including sections 14(3)(a) and (g)). [The Board then refers to its earlier submissions on the application of section 14(3) to Records 1 through 7];
- (c) notwithstanding the presumptions contained in section 14(3), the Board considered the individual circumstances of this request including the factors set out in section 14(2) including 14(2)(a), (b), (f) and (h). [The Board then refers to its earlier submissions on the application of section 14(2) to Records 1 through 7];
- (d) section 38(b) provides that a head may refuse to disclose a record if the disclosure would constitute an unjustified invasion of another individual's personal privacy;
- (e) in the instant case, the balance between the right of access and the protection of another person's right to privacy must fall in favour of protecting the other individual's personal privacy. The Board is not satisfied that the reasons given by the requester (public scrutiny and public health and safety) outweigh the other purpose of the *Act* to protect the privacy of the other individuals in the circumstances of this case.

Based on the representations provided by the Board, I find nothing improper about the manner in which it has exercised discretion in deciding not to disclose the severed portions of Records 1 through 7 to the appellants. The Board makes it clear that it has taken into account the particular circumstances of the appellants' request and the contents of the records in reaching its decision. In particular, it points out that the information relating directly to the appellants and their son has been disclosed, and it then identifies the factors it considered in deciding not to disclose the remaining portions of Records 1 through 7 to the appellants.

Accordingly, I find that Records 1 through 7 qualify for exemption under section 38(b) of the *Act*.

ORDER:

1. I uphold the Board's decision to deny access to the severed portions of Records 1 through 7.
2. I remain seized of this matter in order to deal with the outstanding issues relating to the reasonableness of the Board's search for records.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ May 23, 2006