



**Information and Privacy
Commissioner/Ontario**

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

Reconsideration Order MO-1595-R

Order MO-1574-F

Appeal MA-010272-2

Toronto District School Board



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NATURE OF THE APPEAL:

Introduction

On September 26, 2002, I issued Order MO-1574-F, in which I ordered the Toronto District School Board (the Board) to disclose to the appellant a number of records, in whole or in part, by October 31, 2002. In that decision, I also found that some of the records or parts of records at issue were exempt from disclosure under the discretionary exemptions in sections 38(a) and (b) of the *Act*. Section 38 exempts records that contain a requester's personal information where certain exemptions in Part 1 of the *Act* (including section 13) would otherwise apply.

On October 31, 2002, the Board served this office with a Notice of Application for Judicial Review of the order. The Notice raises a number of grounds for review, including the following at paragraph 2(e):

Despite the Board's assertion that s. 13 applied to exempt the Board from release of all the records, in error, Mr. Hale [considered] the application of s. 13 of the Act only with respect to one of the records, Record C40 . . .

IPC's Reconsideration Procedures

The IPC's reconsideration procedures are set out in section 18 of the *Code of Procedure* (the *Code*). In particular, sections 18.01 and 18.03 of the *Code* state:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

Alleged Error in the Order

In the order, I considered the application of section 38(a), as it might apply in connection with section 13 of the *Act*, to Record C40 only. I found that Record C40 did not meet the requirements of section 13, but did qualify under section 8(1)(d) and was, on that basis, exempt under section 38(a). The Mediator's Report indicates that the Board was relying on section 13 for *all* of the records at issue as listed in the index attached to that report, and not just for Record C40. In addition, in my Notice of Inquiry sent to the parties, I sought representations on the application of section 13 to "the records", and referred elsewhere to the index attached to the Mediator's Report. Although the Board's representations on section 13 were focused on Record

C40, the Board did not expressly indicate that it no longer relied on section 13 to withhold the remainder of the records at issue.

My preliminary view was that I failed to decide an issue before me, *i.e.*, the application of section 13 of the *Act* to the records I ordered disclosed, and that this error constitutes a jurisdictional defect in the decision under section 18.01(b) of the *Code*. I also decided on a preliminary basis that I should reconsider the application of section 13 to the records I ordered disclosed, based on the material already before me.

In the circumstances, I granted a stay of provision 1 of the order, pending my final determination of whether to reconsider the order with respect to the records ordered disclosed and, if so, pending my determination on the reconsideration itself. Provision 1 requires the Board to disclose all of the records at issue (with the exception of Records C40, 74, 75, 76, 77, 79 and 80 and portions of Records 5, 9, 12, 15, 22, 23, 24, 25, 26, 31, 36, 53, 54, 55, 58, 60, 69, 70 and 73),

Before reaching my final determinations, I invited the appellant to make representations on the following:

1. Does paragraph 2(e) of the Board's notice raise sufficient grounds for me to reconsider the order under section 18.01 of the *Code*?
2. If so, is the appropriate remedy for me to reconsider the application of section 13 to the records I ordered disclosed, based on the material already before me?

The appellant provided me with his submissions on these issues. It was not necessary for me to seek the representations of the Board as it has already provided me with its views on the application of section 13 to the records which were ordered disclosed in Order MO-1574-F.

Should I Reconsider My Decision in Order MO-1574-F?

In his submissions with respect to whether I should reconsider the decision, the appellant submits that "I have no problem with you [the writer] reviewing the order providing the facts that TDSB are presenting to you are the truth." The majority of the appellant's submissions address the potential application of section 13 to the records.

I am satisfied that my failure to consider the discretionary exemption in section 38(a), taken together with section 13 of the *Act*, for all the records I ordered disclosed, was a jurisdictional defect in the decision within the meaning of section 18.01(b) of the *Code*.

Accordingly, I find that there exists a basis for the reconsideration of Order MO-1574-F and I will now proceed to determine whether all of the records at issue, with the exception of those found to be exempt under sections 8(1)(d) and 38(a) and (b) in that decision, are exempt under sections 13 and 38(a).

In Order MO-1574-F, I found that Records 74, 75, 76, 77, 79 and 80 in their entirety and those portions of Records 5, 9, 12, 15, 22, 23, 24, 25, 26, 31, 36, 53, 54, 55, 58, 60, 69, 70 and 73

which contain the personal information of other students are exempt under section 38(b). As noted previously, I considered whether Record C40 was exempt under section 38(a), in connection with section 13, and although I found that it did not qualify for exemption under section 13, it did qualify under section 8(1)(d) and was exempt under section 38(a) on that basis. In this reconsideration, I will confine my analysis to the remainder of the records, and parts of records that I have not found to be exempt in Order MO-1574-F.

These records consist of notes recording the observations and comments of a number of education professionals as a result of their contacts with the appellant, his wife and their son while he was enrolled at a school operated by the Board.

DISCUSSION:

DANGER TO SAFETY OR HEALTH/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) of the *Act* provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. Section 38 provides a number of exceptions to this general right of access. Under section 38(a), a head may refuse to disclose to the individual to whom the information relates personal information where (among others) the exemption in section 13 would apply to the disclosure of that personal information.

The Board relies on the discretionary exemption in section 38(a), taken in conjunction with section 13 of the *Act*, as the basis for its refusal to disclose all of the records at issue in this appeal.

The Board provided me with confidential submissions outlining the basis for its arguments that the disclosure of the contents of Record C40 could reasonably be expected to seriously threaten the safety of the individual who prepared them under section 13. In Order MO-1574-F, I found that section 13 did not apply to this record. The Board did not make any specific representations with respect to the application of section 13 to the information contained in the remaining records to which it had applied this discretionary exemption. Rather, the Board filed a number of confidential affidavits in support of its contention that all of the records in this appeal fall within the ambit of the discretionary exemption in section 13. Because of the nature of the information contained in these affidavits and in the representations submitted by the Board, I am unable to refer to them in this order in any detail.

Are the Records Exempt under Sections 13 and 38(a) of the *Act*?

Section 13 of the *Act* reads:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The evidentiary basis for applying section 20 of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 13 of the *Act*, was reviewed by the Ontario Court of

Appeal in *Ontario (Ministry of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (Ont. C. A.), at page 6:

. . . section 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

The evidence must therefore demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

Findings

In Order MO-1574-F, I addressed the application of section 13 to Record C40, which was ultimately found to be exempt under section 8(1)(d) of the *Act*. In determining that section 13 had no application to this document, I stated that:

I have reviewed the affidavit material and the confidential arguments submitted by the Board in support of its claim that this exemption applies. On the basis of the information provided to me, I am not satisfied that the disclosure of the records *to the appellant* could reasonably be expected to seriously threaten the safety or health of any individual. The only evidence of threatening behaviour before me relates to the appellant's son who, as demonstrated by the contents of the records, has made various threats against his teachers and other students. While the threats and abusive behaviour of the son are a serious matter, the fact is that there is no evidence of such behaviour by the appellant. By contrast, in the *Ministry of Labour* case, the requester had a history of using threatening and profane language with staff at the institution, and there were psychiatric reports expressing "concern that the Requester would act out past threats of violence against WCB staff."

I also note that some time has elapsed since the creation of the records. The appellant's son is now enrolled in another school from that at which the author of Record C40 was employed. Moreover, Record C40 acts only as a summary of events described in greater detail in the other records at issue in this appeal. The individual who prepared Record C40 used professional and carefully-chosen language to describe the events related in this record. There is nothing inflammatory or pejorative about the contents of the records; they simply set out a chronology of events involving the appellant, his wife and his son's interactions with the Board.

For these reasons, I find that Record C40 is not exempt from disclosure under section 13, taken in conjunction with section 38(a).

I note that the records, and parts of records, which refer to other students and their interactions with the appellant's son have been found to be exempt from disclosure under section 38(b). As a result, the only remaining records and parts of records still under consideration are concerned with the observations and comments of the Board's professional staff in their interaction with the appellant's son. Again, as was the case with Record C40, the records were prepared using professional and carefully-chosen language and cannot be considered to be pejorative or inflammatory.

In my view, the reasons expressed above in support of my findings with respect to Record C40 are equally applicable to the application of section 13 to the other records, and parts of records. Specifically, the Board has not provided me with evidence to demonstrate that there is a reasonable basis for believing that the disclosure of the information under consideration to the appellant could be expected to seriously threaten the safety or health of an individual.

In its application for judicial review, the Board criticizes my failure to apply section 13 to Record C40 on the basis that I did not consider ". . . the consequences of the father providing the records to his son." As noted previously, I found that Record C40 is exempt under sections 8(1)(d) and 38(a), and I am not dealing with that record in this reconsideration. The fact remains that the appellant might decide to share any information that is disclosed with his son. Even assuming that the remaining records, or parts of records, at issue will be shared with the appellant's son, in view of their contents and the manner in which they are written, I have concluded that there is no reasonable basis for finding that disclosure could reasonably be expected to seriously threaten the safety or health of any individual.

For these reasons, I find that the records are not exempt from disclosure under section 13 and do not, accordingly, qualify for exemption under section 38(a).

ORDER:

I uphold my decision in Order MO-1574-F and order the disclosure of all of the records at issue in this appeal with the exception of Records C40, 74, 75, 76, 77, 79 and 80 in their entirety and those portions of Records 5, 9, 12, 15, 22, 23, 24, 25, 26, 31, 36, 53, 54, 55, 58, 60, 69, 70 and 73 which were highlighted on the copy of the records which I provided to its Freedom of Information and Privacy Protection Co-ordinator with a copy of Order MO-1574-F, by **January 6, 2003** but not before **December 31, 2002**.

Original signed by: _____
Donald Hale
Adjudicator

_____ November 29, 2002