



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-266

Appeal M-9300244

**Metropolitan Separate School Board
[Toronto]**



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ORDER

BACKGROUND:

The Metropolitan Separate School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the examinations used in the Grade 12 "Advanced Mathematics" and "Advanced Physics" programs at a named secondary school in June 1991 and June 1992.

The Board located four examinations that were responsive to the request and granted access to the introductory section and the majority of questions contained in each document. The Board decided, however, not to disclose the remaining questions found in the examinations pursuant to the discretionary exemption found in section 11(h) of the Act. The requester appealed this decision.

In his letter of appeal, the appellant also submitted that the public interest would be served if individuals were able to compare the examinations administered by one school or school board with those used by others in the same region. By implication, therefore, the appellant has raised the possible application of section 16 of the Act (the so-called public interest override) to the records at issue.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the Board and the appellant. Representations were received from both parties.

The sole issue to be addressed in this appeal is whether the discretionary exemption provided by section 11(h) of the Act applies to the examination questions. This provision reads as follows:

A head may refuse to disclose a record that contains,

questions that are to be used in an examination or test for an educational purpose;

In Orders P-351 and P-422, former Assistant Commissioner Tom Mitchinson considered the application of section 18(1)(h) of the Freedom of Information and Protection of Privacy Act (which is the provincial equivalent to section 11(h) of the Act). In these two cases, which involved community colleges, the examination questions being sought were contained in a "test bank", which is also the situation in the present appeal.

In both decisions, Assistant Commissioner Mitchinson found that the section 18(1)(h) exemption did not apply to the examination questions. He explained his reasoning in the following fashion:

In my view, the College has failed to establish the requirements for exemption under section 18(1)(h). The records all consist of questions used in examinations which have already been completed ... The fact that the College may, at some point in the future, choose to re-

use the same questions on a subsequent examination is not, in my view, sufficient to satisfy the requirements of section 18(1)(h).

With these orders in mind, I must now determine whether, for the purposes of section 11(h) of the Act, the four sets of examination questions "are to be used in an examination or test".

In its representations, the Board indicates that the examination questions administered in 1991 and 1992 were taken from an accumulated pool of questions. The Board then states that the 1991 and 1992 questions will be incorporated into examinations to be given on one of two occasions in the future. The Board has not, however, provided the Commissioner's office with specific supporting evidence to verify this assertion.

The Board also indicates that there are some strong public policy reasons for not releasing high school examination questions and discusses these points in some detail. It then points out that the Board has a policy in place which permits students and their parents to review examination questions, with the students' answers, after these tests have been administered. The Board states, however, that in the present case, the requester is not a student (or the parent of the student) who has previously taken an examination.

In his representations, the appellant submits that the questions to be used in a particular examination are ordinarily finalized no earlier than one to two months before a test is scheduled. On this basis, he takes issue with the Board's position that examination questions are known many months in advance of the date for administering the test.

I have carefully reviewed the records at issue in this appeal along with the representations provided by the parties. As indicated previously, the Board has stated in general terms that the 1991 and 1992 questions will be used for examinations to be administered on one of two occasions in the future. It must be noted, however, that these tests had not been finalized on the date that the access request was filed. On this basis, and in the absence of more definitive evidence on this point from the Board, I am not persuaded that the questions will actually be incorporated into these examinations. For these reasons, I find that the Board cannot rely on section 11(h) of the Act to withhold the examination questions from disclosure.

ORDER:

1. I order the Board to disclose the records at issue in their entirety to the appellant, within fifteen (15) days of the date of this order.
2. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by:
Irwin Glasberg
Assistant Commissioner

February 9, 1994