Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-1098

Appeal M-9700192

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board), formerly the Toronto Board of Education, received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the requester's two children, "including but not limited to unofficial files relating to any actions considered or taken against [them]". The request also included information as to the number of suspension orders issued for a named school and all the elementary schools in the Board for the school year 1996-97 to the date of the request.

Section 54(c) of the Act provides that any right or power conferred on an individual by this Act may be exercised if the individual is less than 16 years of age, by a person who has lawful custody of the individual. In the circumstances of this appeal, there is no dispute that the requester and his spouse, who are the parents of the children, have lawful custody of the children and they may, accordingly, exercise the access rights available to their children under the Act on their behalf.

Prior to issuing its decision, the Board sought clarification from the appellant regarding the part of his request relating to his two children. As the result of discussions between the Board and the requester, the request was narrowed to include records which would relate to the Board "taking or considering taking disciplinary action" against either of the appellant's children. With respect to the younger child, these records would relate to the 1996-97 school year. For the elder child, the records would relate to the 1994-95, 1995-96 or 1996-97 school years.

The Board located 13 records responsive to the portion of the request for records relating to the appellant's children and granted access in full to five of them. It denied access in full to the remaining eight records pursuant to the following sections of the Act:

- right to a fair trial - section 8(1)(f)
- solicitor-client privilege - section 12
- discretion to refuse requester's own information - section 38(a)
- invasion of privacy - section 38(b)

The requester (now the appellant) appealed the Board's decision to deny access and also claimed that the Board had failed to respond to his request for information about the number of suspensions from the named school and all elementary schools in the Board. In addition, the appellant claimed that further responsive records should exist. Specifically, he was seeking "records held by the Principal of [the named school], the Superintendent of [the named school], and the Superintendent of School Operations, and a minimum of 12 letters from other parents".

During the mediation of the appeal, the Board issued a second decision to the appellant regarding his request for records relating to suspension orders generally. The Board advised the appellant that no record exists which contains the information as described in his request. The Board, however, advised the appellant that it did have records relating to specific student suspensions, but that these records would be exempt under section 14(1) of the Act (invasion of privacy).

The appellant informed the Appeals Officer that he did not want records relating to specific student suspensions, but did not accept that the Board does not maintain general suspension statistics. The appellant also advised the Appeals Officer that he did not require the personal information or personal identifiers of any other individuals identified in the records. However, the appellant indicated that he sought access to all information relating to individuals who were acting in their professional or employment capacity at the time the records were created.

The appellant provided the Appeals Officer with a list of an additional 58 records he believed should exist and consented to have this list forwarded to the Board. The Board reviewed the list and informed the Appeals Officer that it had no further records responsive to the appellant's request, as narrowed. The Board advised that the records listed by the appellant fell outside the scope of the narrowed request. The appellant disagreed, particularly with respect to 13 of the records he had listed, claiming that these documents fell within the ambit of his narrowed request. In the Board's view, however, the appellant was attempting to broaden his request.

This office sent a Notice of Inquiry to the Board, the appellant and seven individuals whose interests may be affected by the disclosure of the information contained in the records (the affected persons). Representations were received from the Board and four of the affected persons, who objected strongly to the disclosure of any information relating to them. The appellant indicated that he wished to rely on his letter of appeal and another piece of correspondence to this office as his representations.

RECORDS:

The records at issue in this appeal consist of several records entitled "Confidential Report Forms - Suspension Information" and a number of handwritten notes.

DISCUSSION:

REASONABLENESS OF SEARCH

The Board argues that there is no provision in the Act which grants the appellant a right to appeal regarding the reasonableness of an institution's search for documents. It claims that the plain wording of section 17 of the Act does not place any obligation on an institution to conduct a reasonable search for records. Further, it argues that pursuant to section 22(1)(a) of the Act, an appellant has the right to appeal the issue of whether a certain record exists, but not whether an institution's search for the requested records was reasonable.

The Board states that the reasonableness of the search for records is not a decision of the head for the purposes of section 39 of the Act. The section provides that "A person may appeal any decision of a head under this Act to the Commissioner...". Therefore, the Board argues that there is no right of appeal with respect to the issue of the reasonableness of an institution's search. I do not agree with the Board's analysis of these provisions of the Act.

The wording of section 39 grants the appellant a right to appeal the decision of the head that no record exists. Reasonableness of search does not relate to the decision of the head but rather to the standard which an institution must meet to support the head's decision that no record exists (Order M-315). The head's decision that no record exists is a decision which may be appealed to the Commissioner's office.

In the alternative, the Board argues that it has conducted a reasonable search for records responsive to the appellant's request, as narrowed.

Where an appellant provides sufficient details about the records which he or she is seeking and the Board indicates that further records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The Board has provided detailed representations on the steps it took to identify responsive records beginning with the clarification which I have described above. The Board confirmed its understanding of the clarification to the appellant by letter approximately two weeks after the request was made. The Board states that the inclusion of the phrase "any actions" in relation to the appellant's children in the description of the request which was contained in its clarification letter to the appellant limited the scope of the request.

The Freedom of Information Co-ordinator (the Co-ordinator) for the Board has described the search which she undertook to locate records responsive to the part of the appellant's request relating to his children. The Co-ordinator states that the issue of which records were related to the request was determined through discussions with those directly involved in the decision to take disciplinary action against the children. As a result of these discussions, the Co-ordinator determined that certain other records did not relate to the request as clarified with the appellant.

With respect to the second part of the appellant's request for general statistical information about suspensions, the Board states that information about individual suspensions is presented at meetings of the School Programs Committee, which is a standing committee of the Board of Trustees. General information is kept with respect to the number of suspensions which occur throughout the schools operated by the Board, both elementary and secondary. However, there are no records containing a breakdown by school or between elementary and secondary schools. Therefore, no record exists which is responsive to that part of the request.

In his correspondence submitted during the course of the appeal, the appellant provided a list of records and indicated his belief that additional records should exist which are responsive to both parts of his request. He has not provided any further representations on this issue.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

In my view, after clarifying and confirming the intent of his request with the appellant, the Board has made a reasonable effort to identify records that are reasonably related to the clarified request with respect to the appellant's children. I agree with the Board that by seeking access to the additional records listed in his correspondence with the Appeals Officer, the appellant is attempting to return to the scope of his original request after having agreed to a narrower interpretation of it.

With respect to the statistical information relating to suspensions, I find that the Board has conducted a reasonable search for information which relates only to the named school or to elementary schools alone. The appellant was informed by the Board that raw data exists listing each suspension initiated by the Board which would provide the answer to his question about general suspension information for the named school or only the elementary schools operated by the Board. However, the appellant has clearly indicated that he does not wish to receive information about individual students' suspensions.

Therefore, based on my review of the submissions of the parties and the responsive records, I find that the Board conducted a reasonable search to locate the records reasonably related to both parts of the appellant's request.

SCOPE OF THE REQUEST

As noted above, the Board confirmed in writing with the appellant that he had clarified his request to include only "records which relate to the Board taking or considering taking **disciplinary** action" against the appellant's two children. The original request had referred to "**any** action" (my emphasis). In my view, by using the modifier "disciplinary", the scope of the request was significantly narrowed. Records which related to the non-disciplinary actions taken by the Board were removed from the scope of the request.

The appellant did not submit representations in response to the Notice of Inquiry nor does his correspondence to this office address this issue, other than to indicate that he believes that additional records should exist. The Board has made extensive representations on the rationale for its interpretation of the request and the application of that interpretation to the records. The Board does not deny that there are additional records which relate to the appellant's children. However, it submits that these records are not responsive to the appellant's request as clarified, because they do not relate to disciplinary action taken by the Board with respect to the children.

For the reasons I have expressed in my discussion of the reasonable search issue, I find that the additional records listed in the correspondence provided by the appellant to the Appeals Officer (and then to the Board) do not fall within the scope of his narrowed request.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The Board submits that Records 4, 5, 7, 12 and 13 contain the personal information of various individuals other than the appellant's children. It states that some of these individuals are employees of the Board, the remainder are students.

In examining the records, I must determine whether the information which relates to Board employees qualifies as their personal information.

The parties were requested to identify whether the information qualifies as their personal information with reference to section 2(1) of the Act. The Board has provided detailed representations on each of the records, with the exception of Records 2, 9, and 11. The appellant did not make any submissions with respect to this issue.

In reviewing the records, I have kept in mind the appellant's statement that he does not require the personal information or personal identifiers of any students other than his children. Therefore, the personal information of any students other than the appellant's children is not at issue in this appeal.

Record 2

The Board did not make representations on this record. I have reviewed this document and find that it contains the personal information of one of the appellant's children only. It is a description of an incident involving the child, given by a Board employee. In my view, the information consists of facts about the incident which were recorded in the employee's professional or employment capacity and does not contain any information recording the employee's personal reaction to the incident described therein. This employee was not involved in the incident and was simply responding to it in accordance with her professional responsibilities. Therefore, I find that the information qualifies as the personal information of the appellant's child only and not of the employee.

Record 4

The Board states that Record 4 contains the personal information of a Board employee. It explains that Record 4 consists of the handwritten notes of the school Vice-Principal regarding her visit to an employee after an incident involving one of the appellant's children.

I have examined this record and, in my view, it contains the personal information of the Board employee and several other identifiable individuals, as well as one of the appellant's children. Because the information is about a sensitive personal issue, rather than a professional or employment matter, and describes in intimate detail the employee's feelings and reactions, I find that it falls outside the scope of the individual's employment capacity and into the category of personal information for the purposes of section 2(1).

Record 5

The Board argues that Record 5, which is very similar to Record 4, contains the personal information of the same Board employee referred to in Record 4. In my view, part of Record 5 contains the personal information of this employee and one of the appellant's children.

However, Record 5 is different in character from Record 4. Another part of Record 5 describes the actions taken in response to the incident by a person in authority within the school. In my view, this information relates to this individual in her professional capacity as a school administrator only and does not, accordingly, qualify as her personal information.

Record 7

The Board argues that Record 7 contains information about the personal experience of the same employee whose personal information is contained in Records 4 and 5. In particular, the Board indicates that the record describes the employee's reaction to an incident involving one of the appellant's children. The Board claims that an entire paragraph describing the incident is the personal description by the employee of the incident and that it qualifies as the personal information of this individual.

I agree with the submissions of the Board and find that the paragraph describing the incident contains the personal information of one of the appellant's children and the employee.

I find that the notations at the bottom of the first page of Record 7 refer to administrative matters only with respect to the incident. As such, they contain only the appellant's child's personal information

Record 9

The Board did not make representations on Record 9. I have examined the record and, in my view, the paragraphs numbered 1 and 2 in this document contain the personal information of the appellant's child and other identifiable students.

I find that the notations at the bottom of the page are the personal information of the appellant's family only.

Record 11

The Board did not make representations on Record 11. I have examined the record and, in my view, part of the first descriptive paragraph contains the personal information of one of the appellant's children and other identifiable individuals.

The remaining information in the paragraph is that of the appellant's child and spouse. The reference to an employee of the Board in this record is in her professional, rather than her personal, capacity as a school administrator and does not, therefore, qualify as this individual's personal information.

The paragraph at the bottom of the page contains the personal information of the appellant's child and spouse only.

Record 12

Part of this record contains the personal information of a student other than the appellant's children. As the appellant has indicated that he is not seeking access to the personal information of any other children, this information is outside the scope of the appeal.

The record also contains a description by a Board employee of an incident which includes the personal information of the appellant's child. In my view, in describing this incident, the Board employee relating her version of the incident is doing so in her professional, as opposed to her personal, capacity. The passage in question is descriptive in nature and does not include any information concerning the employee's personal reaction or feelings. Accordingly, I find that the remainder of this record contains only the personal information of one of the appellant's children.

Record 13

Record 13 consists of six pages of handwritten notes taken by the Vice-Principal of the school.

In my view, Record 13 contains the personal information of the appellant's child, other students and other identifiable individuals.

To summarize, I have found that Record 2 in its entirety and the responsive portions of Records 9, 11 and 12 contain the personal information of the appellant's family only. I have severed the non-responsive parts containing the personal information of other students from these records on the copy which I have provided to the Board's Freedom of Information and Protection of Privacy Co-ordinator as the appellant has indicated that he is not seeking access to such information. Because the remaining information relates only to members of the appellant's family, it should be disclosed.

I have found above that Records 4, 5, 7 and 13 contain the personal information of the appellant's children, as well as other identifiable individuals who are not students. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both a requester and other individuals and the Board determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Board has the discretion to deny the requester access to that information. In this situation, a requester is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since a requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information. The Board has not raised the application of any of the presumptions found in section 14(3), and I find that none apply.

If none of the presumptions contained in section 14(3) apply, the Board must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case. The Board submits that section 14(2)(f) (highly sensitive information) and section 14(2)(h) (information provided in confidence) are relevant considerations.

Similarly, the affected persons who made submissions argue that the information contained in these records is highly sensitive within the meaning of section 14(2)(f) and have also raised other personal reasons for not wanting the information disclosed to the appellant. I am unable to discuss in any detail the nature of these concerns but agree that they are important, albeit unlisted, considerations weighing in favour of privacy protection. In addition, one of the affected persons raises concerns about the accuracy of the information contained in the records, claiming that statements attributed to her are inaccurate (section 14(2)(g)).

The appellant has not made any submissions on the application of section 38(b) to the records. It would appear, however, that he is seeking access to the personal information contained in the records because he feels they are relevant to a fair determination of the rights of his children in the suspension appeal proceedings which are still pending before the Board (section 14(2)(d)).

Having weighed the factors favouring privacy protection against the appellant's right to access personal information about his family, I find that the factors favouring privacy protection are more compelling in the circumstances of this appeal. It is apparent from the records that the incidents which gave rise to the creation of these records affected the staff and students involved profoundly. I have found above that those portions of the records which describe their personal reactions and feelings to be of a highly sensitive and personal nature. The factor weighing in favour of the appellant's right of access is far less compelling, however.

I further find that the information relating to the affected persons which is contained in Records 4, 5, 7 and 13 is so intertwined with the personal information of the appellant's children that it cannot reasonably be severed to allow the appellant access to the child's personal information only. Accordingly, I find that the highlighted portions of Records 5 and 7, and Records 4 and 13 in their entirety, qualify for exemption under section 38(b) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/RIGHT TO A FAIR TRIAL

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8, would apply to the disclosure of that personal information.

The Board has claimed that section 8(1)(f) applies to all of the information contained in each of the records.

Section 8(1)(f) of the Act states that a head may refuse to disclose a record if the disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

The Interpretation Act, which applies to all provincial legislation including the Act, provides that the definition of "person" includes a corporation. Therefore, the Board is a person for the purposes of section 8(1)(f) of the Act.

The Board states that there are a number of outstanding suspension appeals with respect to the appellant's children. The Board submits that all of the records contain information which relates to the very matters which are the subject of the suspension appeals which will be heard by a committee of the Board of Trustees.

The Board argues that disclosure, if it is to occur, should only occur in the context of the hearings of the suspension appeals and in the context of mutual disclosure.

I have reviewed section 23(2) of the Education Act which addresses appeals against student suspensions. It states that:

> The parent ... of a pupil who has been suspended ... may, within seven days of the commencement of the suspension, appeal to the board against the suspension and the board, after hearing the appeal, may remove, confirm or modify the suspension and, where the board considers it appropriate, may order that any record of the suspension be expunged.

This section provides that an appeal of a student's suspension is heard by the Board. Accordingly, the Board is the impartial adjudicator in the matter and is not a party to the proceedings. The Board's rights to a fair adjudication are not at issue in such a hearing. Rather, the right of the parties to the appeal of

the suspension are at issue, including the rights of the child who was suspended. I find that section 8(1)(f) is not applicable to protect the rights of the **Board** to a fair hearing in the circumstances of an appeal of a student suspension.

SOLICITOR-CLIENT PRIVILEGE

Although the Board claimed the application of the solicitor-client privilege exemption in section 12 in its original decision, it has not made representations on this issue. Therefore, I must conclude that it has abandoned this claim. I have reviewed the records themselves and conclude that the section 12 exemption has no application to them.

ORDER:

1. I uphold the Board's decision to deny access to Records 4 and 13 in their entirety, as well as the information which is highlighted in yellow on the copy of Records 5, 7, 9, 11 and 12 which I have sent to the Board's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

2. I order the Board to disclose Record 2 in its entirety and the information contained in Records 5, 7, 9, 11 and 12 which is **not** highlighted on the copy which I have sent to the Board's Freedom of Information and Protection of Privacy Co-ordinator with this order by providing him with a copy by **June 9, 1998** but not before **June 4, 1998**.

3. I find that the Board's search for records responsive to the appellant's request, as narrowed, was reasonable.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: May 5, 1998
Donald Hale
Inquiry Officer