ORDER MO-1472-F

Appeal MA-000274-1

Halton District School Board

BACKGROUND:

The Ministry of Education (the Ministry) recently introduced changes in the way in which boards of education are funded. These funding changes were also made with respect to special education, effective in the 1998/1999 school year.

As a result of these funding changes, the Halton District School Board (the Board) found itself having to deal with a decrease in the total money available to it for the provision of special education programs. According to the Board, this resulted in a decrease in the number of "self-contained classes" that are provided by the Board.

The appellant is the parent of a student enrolled in a special education program operated by the Board. Her child was placed in a class of "mixed exceptionalities" through the Identification Placement Review Committee (IPRC) process, which is governed by the *Education Act* and regulations. The appellant disagreed with this placement and appealed the IPRC decision to the Special Education Appeal Board (the SEAB). In essence, the appellant believed that her child should have been placed in a "self-contained class" for children with specific learning disabilities. In addition, the appellant believed that the class in which her child was placed did not conform to the *Education* Act and regulations as the number of students exceeded the maximum limit established by the legislation. The SEAB denied the appellant's appeal and affirmed the placement of her child in the class of mixed special education exceptionalities.

According to the appellant, the Chair of the IPRC suggested to her that she investigate other placement options. The appellant was of the view that in order to make an informed decision that would be in her child's best interests, it was necessary for her to know what the placement options were.

NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Board for a list of self-contained special needs classes for elementary schools operated by the Board. In particular, the appellant requested that the list include the number of students enrolled in each class for the academic year 1999/2000 and the projected numbers for the academic year 2000/2001. The appellant indicated that the list should also contain the division of exceptionalities. She noted that she was not seeking a division of exceptionalities by gender, but rather, only the total number for each exceptionality.

In responding to the request, the Board provided the appellant with pages from the Special Education Guide (2000 edition), which it indicated was information responsive to the portion of her request for a list of self-contained classes and a division of exceptionalities. The Board also provided the appellant with a chart of the numbers of students across the Board as the only information responsive to the portion of her request for the number of students enrolled in each class. The Board indicated that no record exists which lists the number of students in each class and that it is not prepared to create such a record.

In appealing the Board's decision, the appellant stated that the Ministry requires that each board submit a report containing the requested statistics for each special education class.

During mediation, the appellant provided a number of documents to this office which she believed supported her contention that responsive information exists. In particular, she submitted examples of a document entitled "Regional List of Self-Contained Classes & Cluster Groups" for the 1997/98 school year. She noted that this document is commonly referred to as the "September Report" and stated that each October, school boards are required to submit this report to the Ministry. She also attached a letter written by an Education Officer with the Ministry's District Office which, she noted, refers to the September Report as a public document.

The appellant explained that she is seeking access to a list of classes offered by the Board, with their exceptionalities. She does not require information with respect to male/female breakdowns. She clarified that she is not seeking access to the teachers' or students' names. Rather, she indicated that she is seeking access to a list containing the name of the school, the class designation and the exceptionalities in each class, for the school years 1999/2000 and 2000/2001. She stated that she is prepared to accept raw data, if that is all that is available.

The Board advised that it no longer uses the form that the appellant attached to her correspondence with this office. The Board noted, however, that although it no longer collects information in the form requested, it can obtain raw data that would be responsive to the request. The Board indicates that to do so would require considerable resources.

The Board subsequently issued a revised decision in which access was denied to information relating to exceptionalities by school, class and number of students with specific exceptionalities per class based on the exemptions found at section 14(1)(f) (invasion of privacy) with specific reference to the presumptions in sections 14(3)(a) and 14(3)(d) of the *Act*, as disclosure of this information would reveal the identities of the students in these classes.

At the request of the Mediator, the Board provided this office with representative samples of the information at issue. This information will be described in greater detail below.

Further mediation was not possible and this appeal was moved into inquiry. I decided to seek representations from the Board, initially. The Board submitted representations in response to the Notice of Inquiry that I sent to it. I subsequently sought representations from the appellant and attached the non-confidential portions of the Board's representations to the Notice that I sent to her.

In responding to the issues raised by the appellant as set out in the above discussion, the Board takes the position that the "September Report" does not contain the information that the appellant is seeking as worded in her request. Therefore, the Board submits that the "September Report" is not responsive to the appellant's request. It was not clear that the appellant is seeking this particular record. However, in the event that she is, I included the responsiveness of this record to her request as worded as an issue in this appeal.

In addition to the issues raised in the Notice, the Board submits that, because the appellant wishes to argue that students with certain special education identification profiles should be segregated from those with different profiles, her request for information is made in bad faith and

is, therefore, frivolous or vexatious pursuant to section 4(1)(b) of the *Act*. I decided not to seek the appellant's submissions with respect to this claim and did not include the particulars of the Board's arguments in this regard in the portions of their submissions that I attached to the Notice that I sent to her. It was, therefore, not necessary for the appellant to address this issue in her submissions.

I received the appellant's representations, which in my view, raised issues to which the Board should be provided an opportunity to reply. I provided the Board with the portions of the appellant's representations to which it was invited to reply. I also included portions of a lengthy document that the appellant attached to her representations. The first document (118 pages) is entitled "Halton DSB's Public Funded Elementary Schools Enrolment in Special Education by Exceptionality in 1998-99 and 1999-2000". The second document (33 pages) contains the same type of information regarding Secondary Schools. I provided only the first few pages from each document as all of the other pages contain similar types of information.

The Board submitted representations in reply.

RECORDS:

The Board provided a representative sample of the records it ultimately identified as being at issue, consisting of three synopses of its special education programs. In its representations, the Board refers to this as the "alternative record". Each sample contains the same type of information consisting of:

- the name of the school;
- the composition of the class, including total number in the class with a breakdown by gender;
- a table containing six columns with the following headings: IDENT; GRADE; M/F; AGE; EXCEPTIONALITY, broken down into PRIMARY and SECONDARY.

All of the information in each record is identified as being responsive to the request. However, the appellant has indicated that she is not seeking gender information or the names of any individual. Therefore, any information relating to gender is not at issue. The records do not contain any names. Given that the appellant does not appear to be seeking particulars of personal information, I asked the Board to address disclosure of each record as a whole, and where certain identifying type of information is removed. The Board was asked to explain how each form of the record impacts on disclosure and/or the application of the exemptions claimed by it.

The second possible record at issue is the "September Report". In addition, in its representations, the Board has identified a third possible record that could be viewed as being responsive to the appellant's request. This record is a Board generated report entitled "Exceptional Student School Reconciliation".

PRELIMINARY MATTERS:

RESPONSIVE RECORDS

As I indicated above, the Board considers the "alternative record" to be responsive to the appellant's request as worded and clarified by the appellant, that request being for a list(s) containing the name of the school, the class designation and the exceptionalities in each class, for the school years 1999/2000 and 2000/2001.

The Board submits that the "September Report" is not responsive to the appellant's request as it does not contain a breakdown of self-contained classes and the number of students in each class. The Board acknowledges that one column of the table which identifies the educational resources for exceptional students identifies the number of students who are serviced by self-contained classes in each school within the Board. However, the Board states that this column contains the total of all the students in the particular school's special education self-contained classes as opposed to a subdivision by class as requested by the appellant.

The appellant takes the position that this record includes information that is reasonably related to her original request. She accepts that the information submitted by each school is a compilation of classes where one or more self-contained classes may exist. She notes, however, that there are a number of schools within the Board where there is only one self-contained class. On this basis, she submits that the record is reasonably related to her request.

In response, the Board states:

> The appellant initially requested that the Board provide a document containing "*a list of self-contained classes with the number of students in each for the Academic years 1999/2000, and the projected numbers for the AY 2000/2001 as well as the division of exceptionalities".*
>
> The Board provided the appellant with a list of all of the self-contained classes operated by the Board, but refused to provide a list of the identifications of each student in each class, as this would constitute an unjustifiable invasion of personal privacy. The appellant argues that the September Report provides the information she is seeking or some of the information.
>
> The September Report is not responsive to the appellant's request as it does not contain a list of classes and the special education identifications of the students who are in the class, but rather a list of the identifications of students in a particular school and whether they are in a self-contained or integrated setting. If the purpose of the appellant's request, as indicated in her Submissions, is to investigate special education placement options for her child by comparing the numbers of students in particular self-contained classes, as well as their special education identifications, the September Report is unresponsive as it does not

> provide a breakdown of self-contained classes in a school. [emphasis in the original]

As I indicated above, the Board has also identified a third record that contains a similar type of breakdown as the September Report. The Board does not address the responsiveness of this record but notes that it would be prepared to disclose a severed version of this record to the appellant. The Board indicates further in its representations that it would be prepared to provide a severed version of the September Report to the appellant. Finally, the Board has submitted representations on the application of the exemptions to the information contained in the September Report and implicitly, the third record.

It is arguable that these last two records do not, technically, contain the information requested by the appellant, particularly as clarified by her during mediation. However, the records do contain related information with respect to numbers of students and exceptionalities within the special education classes in each school. Moreover, as the appellant points out, where a school only contains one self-contained class, both of these records, in effect, identify the very information that the appellant has requested.

In Order P-880, former Adjudicator Anita Fineberg considered the issue of relevancy of records and responsiveness:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

This appeal was initiated as a result of the Board determining that it did not have records responsive to the appellant's request as originally worded. Through discussions between the parties and this office, it was determined that records that are directly responsive to the appellant's request as worded and as clarified do, in fact, exist. As part of these discussions,

other records were identified and discussed and would appear to be, from the appellant's perspective at least, partially responsive to her request.

In the circumstances of this appeal, the location of responsive records has occurred through a process of discovery. While not directly providing the information that the appellant is seeking, in my view, these other records contain information that is relevant to the issue of the number of students receiving special education services by the Board and their particular exceptionalities.

Moreover, while the appellant's motive for requesting the records is not determinative of whether records are responsive to her request, it does provide some assistance in determining, on a broader level, whether these records are reasonably related to her request.

In my view, based on the circumstances of this appeal as they have unfolded, it is reasonable to interpret her request as being broad enough to capture all three records identified in this appeal. I have come to this conclusion in part on the basis of the discussions that were held among the parties during the processing of this appeal, which are not mediation privileged. In part, my decision is based on the fact that the Board has fully addressed the issues arising with respect to these records as if they were responsive to the request and the Board would suffer no prejudice by including them in this inquiry.

On a related note, the appellant may, if I find to the contrary, simply file a new request for these records. Requiring the appellant to take such action in these circumstances is in no-one's best interest.

As a result, I find that all three records are responsive to the appellant's request and I will address the issues arising with respect to them below.

FRIVOLOUS OR VEXATIOUS

The Board claims that the appellant's request was made in bad faith and is, therefore, frivolous or vexatious. Several provisions of the *Act* and Regulations are relevant to the issue of whether a request is frivolous or vexatious. These provisions read as follows:

Section 4(1)(b) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, ...
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 20.1(1) of the *Act*:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
>
> (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
>
> (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

Section 5.1 of Regulation 823:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

An institution invoking section 4(1)(b) of the *Act* has the burden of establishing that the request is either frivolous and/or vexatious: see Order M-850.

In Order M-850, Assistant Commissioner Tom Mitchinson observed that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*", and that this power should not be exercised lightly.

As I noted above, the Board only raised this issue at the representations stage of this appeal contrary to section 20.1(1) of the *Act*. It is also noteworthy that the appellant's reasons for requesting the records at issue were known to the Board from the beginning. However, despite the fact that this appeal underwent extensive mediation, this issue was not identified. On this basis, I might have declined to consider the Board's claim at this late stage in the process, for to do so would be contrary to both the spirit and intent of the *Act*.

Even so, I believe it would be instructive to re-establish the requirements for a finding that a request has been made in bad faith as determined by previous orders of this office, in the context of this appeal, and for this reason I will address the issue.

Section 5.1(b) of Regulation 823

This section is comprised of two components and where either applies, a finding that a request is frivolous or vexatious may follow. The first mandates a finding that the request was made in "bad faith" while the second requires that the request be made "for a purpose other than to obtain access". The Board relies only on the first component.

Bad faith

In Order M-850, Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". He indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

The Board states:

> The Board submits that the information requested has been requested in bad faith, namely for the purpose of seeking to discriminate against other students in the Board.
>
> The Board submits that the information requested will be used by the appellant to attempt to move her child to a program with a different special education identification profile, one with students who are only or mostly identified as learning disabled and not identified as either, blind, deaf, physically disabled, behaviour, speech impaired, language impaired, gifted, mild intellectual disability, or developmental disability. Please refer to Tab J, which contains a request by the appellant to appeal the placement of her child who was placed through the Identification Placement Review Committee process, governed by the *Education Act* and Regulations, in a class of mixed exceptionalities. Please also find attached the decision of the special Education Appeal Board denying her request and affirming the placement of her child in a class of mixed special education exceptionalities. The Board submits this information as evidence that the appellant requests this information for an improper purpose.
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> The Board submits that the appellant wishes to argue that students with particular profiles of special education exceptionalities should be segregated from those with different profiles. The Board submits that this is analogous to a parent choosing to move their child to a class based on the religious or cultural background of students in that class. The Board submits that this constitutes bad faith on the part of the appellant. Moreover, the Board submits that the

> information requested will be provided to other parents with students in the Board who wish to move their children to classes based on the special education identification profiles of those classes.
>
> …
>
> The Board has provided the appellant with a list of all of the special education classes operated by the Board and where those classes are operated. The appellant is aware of the types of classes which are offered by the Board, the only issue left for the appellant to determine is who will be in the class with her [child] – the type of disabilities the other students will have … The Board submits that the appellant's purpose is discriminatory and made in bad faith and should therefore be considered frivolous and vexatious.

In interim Order MO-1168-I, I considered various arguments related to whether a request had been made in "bad faith" and concluded:

> In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the *Act*, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. *The question to ask is whether the appellant had some illegitimate objective in seeking access under the Act*. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board, that its reasons for requesting access to the records are not genuine.
>
> In a similar vein, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it (see: Order M-1154). In fact, there are a number of exemptions (such as section 10(1), for example) which recognize that disclosure to the public could reasonably be expected to result in some kind of harm. In orders dealing with section 14(1) of the *Act*, this office has acknowledged that disclosure of personal information to individuals other than the individual to whom the information relates under the *Act* is, effectively, disclosure to the world, and this is a consideration to be taken into account in determining whether the exemption applies. In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the Board does not mean that its reasons in using the access scheme were not legitimate. [emphasis added]

Put another way, the use to which a requester wishes to put records once access is granted does not, nor should it, factor into the question of whether the use of the *Act* is frivolous or vexatious. This factor is more appropriately dealt with under the "harms" provisions of various exemptions set out in the *Act*. In my view, it is the activities or conduct on the part of a requester in using the "process" of the *Act* that engages the application of these provisions. Looking at the issue from

this perspective, I do not accept the Board's contention that the appellant's request was made in bad faith.

Essentially, the appellant is seeking information about the number of students in each self-contained class and the breakdown of exceptionalities within each class in order to determine for herself whether the profile of a particular class would likely meet the needs of her own child's profile. Whether she is able, ultimately, to influence which class her child attends is no doubt subject to a number of considerations that are outside the scope of this discussion. However, as I indicated above, the use to which the appellant intends to put any information she receives is a factor that might be of relevance in determining whether the information is exempt under the *Act*, but it is not a factor to consider in determining whether the request was made in bad faith.

In my view, the Board has not established that the appellant had some illegitimate objective in using the process of the *Act* in order to obtain this information. Moreover, in my view, the evidence does not support a finding that the appellant was consciously "doing a wrong", nor that she had any dishonest purpose, moral underhandedness or secret design in using the access procedures of the *Act*. Accordingly, I conclude that the appellant's request was not made in bad faith or for an improper purpose.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined as "recorded information about an identifiable individual" and includes:

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

In this case, none of the records contain the names of individuals or other information that would readily be recognized as "identifying". However, it must be determined whether any of the students whose information is reflected in these records may nonetheless be identifiable given the information contained in the record.

The Board notes that the information in the alternative record and in the September Report includes information about students under the following headings: "IDNT"; "Exceptionality" and "Categories of Exceptionalities for Identified Students", and submits that these references:

> [R]efer to the "special education identification" of a student, which is determined through psychological testing for the purpose of providing educational services.

> The Board submits that the information being requested relates to the education or psychological history of the student.
>
> The Board submits that, while neither the Alternative Record nor the September Report contain the name of each student, the documents nevertheless, contain information about an identifiable individual. Students may be identified from these records as a result of the information contained in the record together with the personal knowledge of the appellant or information that may be easily gathered by the appellant.
>
> **The Board submits that the appellant's personal knowledge of special education classes at certain schools throughout the Board and the students who attend those classes, particularly her own child's class, will enable her to deduce the identity of students from the information provided in the Record.** [emphasis in the original]

The Board indicates further that the special education identifications of students are indicators of who those students are. In essence, the Board submits that the "special education identification" of a student is "in effect a psychological label given to a student, which is analogous to an identifying number, symbol or other particular assigned to an individual". The Board submits that in some cases a student may be readily identified by their special education identification, for example, where the student is identified as physically handicapped. The Board submits further that in some cases, students have multiple identifications, the combinations of which are unique to each individual.

The Board refers to several orders of this office in support of its position that disclosure of the records would reveal the identities of specific students (Orders P-230, MO-1388 and P-1153).

In the Notice of Inquiry, I asked the Board to address this issue with respect to each record as a whole and where it has been severed to remove certain categories of information.

The Board takes the position that even if the name of the school, the name of the class, the grade and gender are removed from the alternative record, the appellant would still be able to deduce to which class and school the record refers. The Board submits that this would also be the case once the name of the school and gender of the student is removed from the September Report.

Similar to its position with respect to the complete record, once the appellant is able to identify the school and class, the Board believes that she would then be in a position, because of her personal knowledge, to identify the individual students and their particular classifications.

The Board points out that the appellant already has in her possession certain information about self-contained classes in elementary schools throughout the Board and describes in considerable detail how the appellant could, through a process of elimination, determine the name of a particular school and class.

In response, the appellant states:

> I submit that both the September Report and the Alternative Record do not contain names of individual students and with the gender removed do not constitute personal information. In its submissions, the board has gone into great detail explaining how one may be able to deduce a certain child with a particular disability may be able to be identified by his/her disability when combined with my personal knowledge as a parent. This is not the case as it would be impossible to identify a particular child with a particular non-visible disability using the method suggested by the Board's lawyer. Once the name and gender were removed, it would not contain personal information, and I refer to Order M-264.

The Board replies that:

> The information requested by the appellant includes recorded information about student's special education identification. Special education identifications are determined through a process of psychological diagnosis. These special education identifications are categories which are used for the purpose of describing a student's educational handicap for which special educational services will be provided. Both the student's special education identification and the resulting necessary special education services provided form part of the psychological and educational history of a particular student. This information is contained in the student's Ontario Student Record and is used by Board personnel to create and administer the special education program of the particular student. Furthermore, a student's special education identification is a label or description, which is analogous to an "*identifying number, symbol or other particular assigned to the individual*".
>
> …
>
> Although the names of the students do not accompany their special education identifications, in many cases these identifications are self evident. Furthermore, in many cases, a student may possess more than one identification. While one of the student's special education identifications may be recognizable or self evident, other special education identifications attributed to the student [may] not be recognizable or self evident. The information, if disclosed, would enable the appellant to discern the non-recognizable special education identifications of students with one or more self evident or recognizable special education identifications.

Commenting on the documents that she attached to her representations, the appellant noted:

> This information is the September Report for 1998-1999, 1999-2000 for self-contained classes. You will notice that it has been reported under m/f and by exceptionality. In the [Board's] representations, the lawyer maintained that this

> was not public information and was not responsive to my request. As I have now received the above years, I must assume it is public information as I have noted previously.
>
> While the report lists schools and total numbers in schools, you will notice that there are some schools where only 1 class is reported. This information is known from the lists in the Student Guide that the Board provided to you. When crossreferenced with the lists, the information that I requested can be obtained for certain schools. The information for these schools is exactly the same as it would be for each school in the Alternate Report that the Board refers to in its submissions.

The Board responds that:

> In the past the September Report was made available to members of the public; however, the recent changes to special education funding have meant that the number of special education classes throughout the Board have been drastically decreased. As a result, there are fewer self contained special education classes per school, and in some cases only one class per school, as was noted by the appellant in her submissions. Therefore, although at one time particular students could not readily be identified, now through a process of deduction, students may be identified. For these reasons, any requests for the September Report would be denied.
>
> With respect to the Alternative Record, this is generated internally by the administration of the Board. It is used for internal purposes only. This Record is not and has never been released to any member of the public. Any request for the Alternative Record, whether under the *Act* or informally, would be denied by the Board.
>
> The Alternative Record may be distinguished from the September Record because the Alternative Record indicates the identifications of students in a particular self contained special education class at a particular school …
>
> …
>
> The Board would also like to comment on the disclosure of the September Report to the appellant by the [Ministry]. The Board maintains that the information is not public information. Please find attached a letter to the [Ministry], at Appendix 2, requesting that the September Report not be disclosed to the appellant.
>
> The Board notes, however, that the September Reports disclosed by the Ministry to the appellant were for the years 1999-2000, **not** 2000-2001. The Board submits that the release of historical September Reports by the [Ministry] does not

> in itself indicate that the documents generated in the current year are considered by the Ministry to be public information. It is conceded by the Board that historical September Reports may not contain the personal information of students in cases where students have since transferred, advanced or graduated. However, it should be noted that in many instances the same students may remain in a particular self-contained class for several years.

Previous IPC Orders on the definition of Personal Information

In Order P-590, former Adjudicator Anita Fineberg found that the version codes associated with the health numbers of three patients of the requester physicians did not qualify as personal information:

> There is nothing inherent in the version code itself that would allow one to identify any particular individual. In fact, the version codes responsive to the request in Appeal P-9300388 are the same for both individuals. Accordingly, I find that the requested information does not fall within the definition of "personal information" in section 2(1) of the *Act*.

On judicial review (*Ontario (Minister of Health) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 846/93 (Ont. Div. Ct.)) of this order, the Divisional Court quashed her decision stating, in part:

> It is ... entirely unreasonable to conclude the version code is not, when viewed in context, an "identifying number, symbol or other particular assigned to [any] individual" and that it is not "recorded information about an identifiable individual" within the meaning of ss. 2(1)(c) ... The determination [that the version code does not constitute "personal information"] is therefore quashed.

The matter was remitted back to the former Adjudicator for a rehearing, which resulted in Order P-867. In that order, former Adjudicator Fineberg described the nature and purpose of the version codes:

> A version code is a one or two upper case alpha character located in the lower right hand corner of a health card. The code is assigned to a health number whenever a replacement card is issued. Replacement cards are issued when a registered person turns 65, requests a new card to reflect a name change or correction, or reports that his or her original card has been lost, stolen or damaged. There is no connection between the assignment of a particular version code and the reason for its assignment - version codes are assigned on a completely random computer-generated basis. Essentially, the concept of the version code is simply a method to make any replacement card different from the original.

Based on the court's comments, she found that they constitute the personal information of the patients.

Special education identifications reflect specific groupings to which certain students have, in effect, been assigned through a determination of the IPRC. For example, a student may be given an IDENT, such as C4 which would correspond to a particular exceptionality, such as "Communication: autism". These groupings or categories and the definitions of exceptionalities have been developed by the Ministry and are applied by boards of education across the province. (see: *Working Together: Special Education Procedures: A Guide for Parents Guardians and Students* – a handbook prepared by the Board and distributed to the public).

A special education identification is not originally created to specifically relate to one unique individual. Rather, each individual student who exhibits the characteristics of one or more of the pre-established categories is identified within the category. While it may be that the combination of categories of exceptionality to which one student has been identified is, in fact, unique to that individual, it appears that a relatively large number of students may all be placed into the same category, and are thus given the same special education identification symbol. In my view, similar to the Divisional Court's view of version codes, when the special education identifications are viewed in context, they too constitute an identifying number, symbol or other particular that are assigned to particular individuals. However, there must be a link between the individual student and the identification. Absent other identifying information, mere reference to the category or exceptionality in the abstract is not sufficient to render this information as personal.

In this case, the information requested is in the nature of statistical information. The particular individuals are not otherwise identifiable on the records through conventional means, such as name, nor does the appellant seek access to other identifying information such as grade and gender. The question remains, are these students identifiable through the statistical compilation of their special education identifications alone?

In Order P-230, former Commissioner Tom Wright commented on the approach to be taken in determining whether information qualifies as personal information within the meaning of section 2(1) of the *Act*:

> I believe that provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

Applying this approach in Order MO-1388, I found that even where the appellant perhaps did not know the identity of another individual, the information in the record still qualified as "personal information":

> In the current appeal, it is not clear why the appellant is no longer seeking the identity of the other individual. That is, it is not clear whether the appellant

> simply no longer wants to know this information, or whether it is because she already knows the information. Apart from this uncertainty, however, given the nature of the incidents and the location at which they occurred, I am not prepared to find that simply removing the name of the other individual would render the remaining information no longer personal in nature. The records themselves indicate that the two parties have been involved in more than one incident. Even though the appellant may not know the name of this person, as an individual, she is identifiable to her. In my view, knowledge of an individual's name is only one of many indicators that the information constitutes personal information. Indeed, section 2(1)(h) states that an individual's name is only personal information where 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.

I also applied this approach in Order MO-1254, in determining whether disclosure of a list of agencies participating in the Ontario government's "workfare" program would reveal the personal information of the individuals who were placed in the agencies under this program. In doing so, I reviewed a number of previous orders of this office and concluded:

> Previous orders of this office have considered the impact of disclosing information which does not, itself, identify any individual, but which could, because of the small number of individuals involved, result in the identification of an individual. In Order P-644, Adjudicator Anita Fineberg considered a policy of the Ministry of Health which dealt with "small cell counts". In this regard, the Ministry of Health made the following submissions:
>
> > Physicians refer their patients to specialists and the fact that certain specialist [sic] also performed electrolysis was widely known. In addition, this information would be known to patients the specialist has treated. Therefore, these specialists can be identified in the public domain. The fact that there are so few in each speciality performing electrolysis would reveal or infer financial information about the individual specialists and must be severed under section 21 of the *Act*.
>
> Adjudicator Fineberg considered the comments made by former Commissioner Wright in Order P-230 and applied that approach in Order P-644. She concluded that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals.
>
> In another Ministry of Health case, however, which again dealt with this Ministry's "small cell count" policy, she took a different approach to the issue. She stated:

In Order P-230, Commissioner Tom Wright stated:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

Based on the submissions of the Ministry and adopting the test set out above, I concluded in Order P-644 that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. Accordingly, I concluded that the information at issue was personal information.

In this appeal, the Ministry argues that the numbers constitute personal information solely on the basis that they are in groups of less than five. Unlike the information provided in Order P-644, the Ministry has not indicated how disclosure of the fact that there was one hemophiliac in a particular province who contracted HIV and who made a claim could possibly result in the identification of that individual. For example, for one of the provinces, the number of hemophiliac HIV infected individuals is the same as the number of such individuals who have filed a claim against the province. This number has been disclosed because it is greater than five.

In my view, disclosure of the information in Record 135 could not lead to a reasonable expectation that the individuals could be identified. Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 has no application. Record 135 should be disclosed to the appellant in its entirety.

With respect to the record at issue in the current appeal, I note that in most cases, the number of placements is below two. In all of these cases, I am satisfied that the participating agency is very small and identification of the agencies, including their addresses and anyone who works for them, could allow anyone familiar with them to make reasonable inferences as to the identities of the workfare participants. To the extent that their identities can be ascertained, this would reveal that they are on workfare and thus disclosure would reveal information "about" them. Therefore, based on the approaches taken in Orders P-230 and P-644, I find that, with two exceptions, the names of the participating agencies, their addresses and contact person constitutes personal information.

> Two of the participating organizations are larger than the others and the numbers of participants in each is also greater. On first blush it would not appear that the principles enunciated in Orders P-230 and P-644 would apply. However, after considering the totality of the evidence, I find the City's arguments that the identities of individual recipients could still be revealed by disclosure of this information to be persuasive. In this regard, I find that, given the nature of the two remaining organizations and the nature of the types of work which would "typically" be done by individuals on workfare, there is a reasonable expectation that at least some of these individuals could be identified through disclosure of the record and would similarly reveal that they are on workfare. **The possible identification of only one individual from each organization is all that is required to bring the names, addresses and contact person of the two remaining organizations within the definition of "personal information".** [emphasis added]

With the above discussion in mind, I must now determine whether disclosure of the records at issue, in their entirety or as narrowed by the appellant would permit the identification of the individual students as having a particular exceptionality. In doing so, I will preface the ensuing discussion with a few, perhaps obvious, observations.

First, any parent with a child involved in special education, particularly where that child has been placed in a self-contained class, is going to know the identities of the other students in the class, and will very likely be able to identify the particular exceptionality of at least some of these students, as will anyone volunteering to work in one of these classes.

Similarly, it is possible that some parents of other children attending schools which offer self-contained classes may also be able to determine this information simply through observation and involvement in the school itself.

The fact that someone "knows" something about an individual is not determinative of whether the information in a record is "personal information". That is, information is "personal" or it is not, as prescribed by the definition in section 2(1) and orders of this office. In the circumstances of this appeal, however, the level of "knowledge" the appellant and/or others may have with respect to the nature of the requested information may be relevant in the overall analysis of whether disclosure of the records would "reveal" personal information as defined above.

Moreover, it is important to note that disclosure under the *Act* is effectively disclosure to the world (see: Order M-96), and as I noted above, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted under the *Act* (see: Order M-1154).

Both parties have provided me with a number of documents, which, they submit, support their respective positions. I have described below the various documents that have been identified in this inquiry and the types of information they contain.

Background Documents – not records at issue

Document one

The first document was attached to the appellant's representations. The appellant indicates that she received this document from the Ministry. This document, entitled "Halton DSB's Public Funded Elementary Schools Enrolment in Special Education by Exceptionality in 1998-99 and 1999-2000", indicates that the source of the information contained therein is the "School September Report for selected years". The information in it is contained in table format with the following categories: Year; Board Name; School No.; School Name; Line No.; Exceptionality; Special Ed. Classes Full Contained; and Special Ed. Classes part integrated. Under the last three categories, the following information is recorded (for example): Exceptionality - BEHAVIOURAL – Socially maladjusted; Gender notation; Special Ed. Classes Full contained – 7; Special Ed. Classes Part Integrated – 0. In other words, this document permits an observer to see that the particular school identified in the table has seven students who have been identified with this particular exceptionality in fully contained special education classes. This record does not contain any further breakdown of the information about the students who have been identified with this exceptionality.

Document two

The Board produces a document entitled "A Guide to Student Services: Special Education Information". The Board provided a copy of this document to the appellant initially. One section of the document contains a list of the locations of self-contained classes and special education programs for the particular school year. The list identifies how many self-contained classes each school has and the type of instructional focus, for example, "behaviour", "learning disability", "life skills" or "learning disability/life skills". Although not particularly detailed, when read with the information in the September Report, this public document provides additional information about the number of classes in a particular school and its focus. For example, if the September Report shows that there are eight students in self-contained classes in a particular school, and turning to Document two, the observer notes that this school has only one class with the instructional focus of "behaviour", the observer would be able to determine that these eight students are all in one class and that they have been identified under this exceptionality.

Document three

The Board also notes that section 31 of Regulation 298 (of the *Education Act*) specifies the maximum number of students that may be contained in classes for each exceptionality, including mixed exceptionalities and that this is a further indication of which class the record refers to.

Document four

Finally, the appellant provided this office with a copy of another record entitled "Regional List of Self-Contained Classes & Cluster Groups" which, she indicates, the Board had previously

provided to members of its Special Education Advisory Committee (SEAC). It appears that the appellant is a member of SEAC. I note that this document contains very similar information as that contained in the alternative record, except that it is expressed in a slightly different form with the result that individual students would be somewhat less identifiable. The Board indicates that it no longer uses this form to record the relevant information.

Records at issue

Document five

The "alternative record", as described above, contains the name of the school, the composition of the class, including total number in the class, and a table containing six columns with the following headings: IDENT; GRADE; M/F; AGE; EXCEPTIONALITY, broken down into PRIMARY and SECONDARY. This record permits the observer, at a minimum, to identify how many students in each class within a school are identified with a particular exceptionality or combination of exceptionalities.

Document six

The "September Report" records statistical student enrolment information by school. The portion of the "September Report" prepared by each school that addresses education for exceptional students consists of a table containing the following information: Categories of Exceptionalities for identified students (which corresponds to the "Exceptionality" category in the first document referred to above); Line No. (which corresponds to the Line No. in the first document referred to above); Gender; IEP in the year; Special Education Classes divided into two columns identifying Fully self-contained and Partially Integrated; Regular Classes divided into three columns identifying Withdrawal assistance, Resource assistance and Indirect service; and Total (which is the sum of the previous five categories). This record would permit the observer to know how many students in each school have been identified by exceptionality and the type of class/assistance the student is receiving. It is not possible from this table to know which particular class the student is attending.

Document seven

The Board indicates that it has created an internal report that contains information similar to the September Report. This document, entitled "Exceptional Student School Reconciliation" broken down by region, contains the name of each school in the region and the number of students (by gender) identified under each primary exceptionality code. This record does not specify what type of class the student has been placed in.

The Board submits that, if the name of the school, the sex of the student and the columns of the September Report that identify the type of class/service that each student is placed in were severed, the remaining portions could be shared with the appellant since to do so would not reveal the school thus preventing individual students from being identified. Similarly, the Board

indicates that it would be prepared to release its own internally generated report to the appellant with the names of schools deleted.

The appellant has requested records from the two previous school years. The Board indicates that many children would spend a number of years within the same school and very possibly the same class, suggesting that it is most likely that children identifiable in 1999 or 2000 would continue to be identifiable today or vice versa. While I initially anticipated that this may be the case, I was struck, after reviewing the statistics contained in the various documents described above for one particular school, by how variable these numbers are.

As far as the September Report and Reconciliation document are concerned, in my view, the likelihood of discovering the identities of individual students based on the exercise described by the Board is entirely speculative and/or remote insofar as past years are concerned. I am supported in so concluding by the fact that these very statistics have been provided by the Ministry in other formats.

With respect to current year September Reports, although I accept that it may be possible for an individual with intimate knowledge of a particular class to identify particular students through an analysis of the statistical information, this would most probably be more a result of their knowledge of the class, which is information already available and/or obtainable through direct observation/interaction with the class. That being said, it is possible that current information which specifically identifies the nature of the exceptionalities in a particular school, combined with this other knowledge base, might reveal the identities of the students so identified. This is especially the case where a school operates only one self-contained class and the number of students is small. While observers may know that a student is in a self-contained class, his or her special education identification would not necessarily be known. Although there would remain some uncertainty as to the particular special education identification that has been made with respect to a specifically identifiable individual, the fact that he or she has been identified with one of the enumerated exceptionalities in a class may reveal something about that individual. I should point out, however, that the appellant has not asked for the 2001/2002 school year and these observations are included, primarily for continuity purposes.

I do not find that similar considerations are applicable to a current Reconciliation Record prepared by the Board, however. In this regard, it is noteworthy that not all students identified with an exceptionality are placed in self-contained classes. In my view, the statistics captured in this record do not provide the observer with sufficient information to be able to reasonably link an exceptionality to a particular individual. Similar to the above, however, the appellant has not requested the current year Reconciliation Record and this discussion is included in order to place all of the documents and analysis in context.

The alternative record, as described above, identifies each student within a particular class as having one or more identifications. The class numbers are small, and some students would be readily identifiable through their exceptionality. In my view, even someone with limited knowledge of a specific class would be in a position to point to a particular student and say: "I may not know your name, but I do know how you have been identified". Further, I find that an

observer would be in the same position to identify particular students whether or not the gender of the student is known. The ability to do that, even if for only a small number of students, brings this information within the definition of personal information, consistent with the orders referred to above.

As with the other records, I would expect that the ability to identify students from this record over time would diminish to the point that its disclosure could no longer reveal personal information. However, even with variances from year to year, I accept the Board's argument that the identification and placement of students within a school do remain somewhat static over a number of years. Because of the specificity of the identifications in this record, I find that the alternative record for the years requested still constitute personal information.

In conclusion, I find that the September Reports and Reconciliation Reports for the 1999/2000 and 2000/2001 school years do not contain personal information nor would their disclosure reveal personal information. On the other hand, disclosure of the alternative record for these school years could reasonably be expected to reveal information about identifiable individuals and thus qualifies as personal information within the meaning of the definition.

Since the September Reports and Reconciliation Reports for 1999/2000 and 2000/2001 do not contain personal information, the exemption at section 14(1) cannot apply to them. As no other exemptions have been claimed for these records, they should be disclosed to the appellant.

INVASION OF PRIVACY

Where the record only contains the personal information of other individuals, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

Sections 14(1)(c) and (f) state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(c) – record available to the general public

The appellant suggests that the information she requested is "public" information. Both she and the Board addressed this issue in their representations. The focus of both the appellant's and Board's representations on this issue pertains to the September Report. As I have found that its

disclosure would not reveal personal information, it is not necessary to discuss these arguments further with respect to this record.

In my view, the information contained in the alternative record, while arguably the same as in the September Report, has been manipulated in such a way as to, in a sense, add to its value as a descriptor of the students receiving special education programming within a specific class at a particular school. The Board submits that this is not a record created for the public, but is, rather, a report it generates for internal administrative purposes, and I accept its position in this regard.

Accordingly, I find that the personal information in the alternative record was not collected and maintained specifically for the purpose of creating a record available to the general public, and section 14(1)(c) does not apply.

Section 14(1)(f)

In the circumstances, the only exception which could apply is section 14(1)(f). In determining whether section 14(1) applies, sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption.

The Board submits that the presumptions in section 14(3)(a) and (d) apply to the personal information in the records. These sections provide:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;

Section 14(3)(a)

The Board submits that the alternative record contains psychological information in that it contains "special education identifications". In this regard, the Board states:

> Special education identifications are determined through psychological diagnosis. After consultation and testing with a Board or community psychologist, special education students are identified. Many students have more than one identification. This process of identification facilitates programming for the particular special education student.

On a related note, the Board states:

> The Board submits that the release of this information would be considered by the parents of those children whose identifications, schools and placements are recorded in the documents to be an unjustified invasion of their and their son or daughter's personal privacy. There are students who are not aware of their own highly sensitive special education identifications. Their parents and doctors have decided that they should not be informed that they are special education students. For example, [a student may know that he/she has a physical disability, but may not know that he or she is developmentally delayed]. It is possible for the appellant or others, to whom the information has been disseminated to attend [a class] as parents or volunteers. They would then have access to information about a student, which has not even been made available to that student, is grossly inappropriate. Furthermore, a student's friends or extended family may not be made aware of their special education identification in order to prevent ridicule, pity, discrimination or feelings of inadequacy on the part of the student. The appellant or others to whom the information has been disseminated would have information that the student's parents have deliberately kept confidential. As well, many students work very hard at "fitting in" and ensuring that others do not know that they have special needs. For the appellant or others to have access to this information could potentially affect a student's self esteem and educational development.

The appellant acknowledges that a label of one of the Ministry exceptionalities is based on a psychological assessment, but takes the position that it is not personal information once names and gender have been removed. She argues that it is merely a label assigned to an unnamed and unidentifiable student.

As I indicated above, disclosure of the alternative record, in its entirety or in severed form, would provide an observer with sufficient information to enable that person to identify specific students and would thus provide the observer with information relating to the specific special education identification(s) given to that student.

I accept that the identification of students is an involved process of testing and observation by psychologists and other professionals in related fields and that the special education identifications themselves relate to a diagnosis, condition or evaluation of the student. Moreover, I find that the exceptionalities by which the student is characterized relate to the treatment of that student in the educational setting and context. On this basis, I find that disclosure of the personal information contained in the alternative record would constitute a presumed unjustified invasion of personal privacy.

I find further that neither section 14(4) nor section 16 are applicable to the personal information in the circumstances of this appeal. Accordingly, I find that this record is properly exempt under section 14(1) of the *Act*.

I appreciate that this decision will likely not be satisfactory to either the Board or the appellant. The Board on the one hand is, and should be concerned about exposure of its students and information about them to the public. The appellant, on the other hand, is a parent attempting to investigate the placement options that are available within the Board (whether or not they may be, practically, available to her child is not the issue here). In order to do so, she indicates that she needs to know what those options are, not minimally, through a generic description of a class as is found in the Guide, but through concrete understanding of the class makeup.

In my view, in order for parents to be able to work constructively with their respective school boards in assessing and achieving assistance and programs relative to their children's needs, basic information such as that requested by the appellant would appear to be relevant to the issue. Although the *Act* may not be the best vehicle for sharing such information and facilitating dialogue in this regard, it may be appropriate for the Board to consider other means of working with parents to enable them to obtain information relevant to the specific programs available, including class structures.

ORDER:

1. I order the Board to disclose the September Reports and Reconciliation Reports for the 1999/2000 and 2000/2001 school years to the appellant by providing her with copies of these records no later than **November 15, 2001**, but not earlier than **November 10, 2001**.

2. I uphold the Board's decision to withhold the alternative record from disclosure.

3. 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 1.

Original signed by: October 11, 2001
Laurel Cropley
Adjudicator