



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-1527-I

Appeal MA-010272-2

Toronto District School Board



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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a series of related requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records concerning the requester's son's education and the involvement of their family with the Board. In response to the requests, the Board located a large number of records and granted access to some of them.

Access to the majority of the records was denied as the Board initially refused to confirm or deny the existence of such records under section 8(3) of the *Act*. In addition, the Board took the position that the records did not fall under the jurisdiction of the *Act* due to the operation of section 52 of the *Act* or were outside its custody or control and were not, therefore, subject to the *Act* under sections 1 and 4(1). The Board also expressed its reliance on the provisions of section 54(c) as a grounds for denying access to the records. In the alternative, the Board claimed that the records were subject to the following exemptions contained in the *Act*:

- advice or recommendations – section 7(1), in conjunction with section 38(a);
- invasion of privacy – sections 14(1) and 38(b);
- danger to safety or health – section 13.

The requester, now the appellant, appealed the Board's decision to deny access to the records. During the mediation stage of the appeal, the Board withdrew its reliance on section 8(3) and purported to apply the discretionary exemptions in sections 8(1)(a), (b), (c), (d), (e) and 8(2)(c) of the *Act* to one sentence contained in page 4 of Record A25. The appellant was provided with an Index of the records remaining at issue and was advised that records responsive to portions of his requests did not exist. Additional records were disclosed to the appellant in late December 2001. The appellant is of the view that additional records beyond those identified by the Board should exist and disputes the ability of the Board to raise the discretionary exemptions in sections 8(1) and (2) at the mediation stage of the appeal.

The requests and the Board's responses to them were delineated in the Revised Report of Mediator provided to the parties on December 28, 2001.

I decided to seek the representations of the Board initially, as it bears the onus of proof that the records are, in fact, exempt under the provisions claimed. The Board submitted detailed representations in response to the Notice of Inquiry.

ISSUE:

The Board has requested that portions of its representations not be shared with the appellant in the circumstances of this appeal. The purpose of this interim order is to rule on this confidentiality request.

DISCUSSION:

Sharing of representations procedure

In the Notice of Inquiry cover letter to the Board, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and
- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and

- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

The Board's confidentiality request

The Board objects to the disclosure of the highlighted portions of its representations to the appellant for the following reasons:

1. The information contained in the highlighted portion of its representations would, in some cases, reveal the contents of the records at issue in the appeal (paragraph (a) of the criteria);
2. Some of the information contained in the highlighted portions of its representations would be exempt from disclosure under the *Act* if it was contained in a record (paragraph (b) of the criteria); and
3. The very existence of some of the highlighted portions of the Board's representations ought not to be disclosed to the appellant as it is "essential to the relationship between the Board and the Commission" and would lead to insecurity on the part of Board staff (paragraph (c) of the criteria).

The Board goes on to submit that because it has raised concerns about the safety of Board staff, which I am unable to describe in any greater detail in this order, I ought to "place a high value" on these concerns and not disclose portions of the representations which address this subject.

Findings

I agree with the position of the Board that much of its representations ought not to be shared with the appellant, owing to the unique circumstances of this appeal. I cannot agree, however, with the degree of non-disclosure suggested by the Board. Much of what is proposed to remain undisclosed by the Board does not fall within the criteria set out above regarding the withholding of representations from opposing parties. Rather, the Board has taken what I perceive to be an overly-cautious and restrictive approach to the sharing of its submissions with the appellant.

In my view, in order to afford the appellant the opportunity to know the case he has to meet and to assist him in making meaningful submissions, it will be necessary for me to disclose more of the Board's representations than it has agreed to share. For example, the appellant is entitled to have access to information about those considerations listed under section 14(2) of the *Act* which the Board is relying on in support of its argument that many of the records are exempt from disclosure under section 38(b) of the *Act*.

In addition, the Board's representations disclosing the generic, non-specific nature of some of the responsive records do not meet any of the three criteria for withholding of submissions. Finally, the fact that the Board is relying on certain affidavit evidence regarding the issues of custody or

control over the records, reasonable search and the application of the exemptions, though not the specifics of that evidence, ought to be disclosed to the appellant.

Similarly, the Board's representations on the application of the exemptions in sections 8 and 13, except for those portions of the submissions which qualify under one of the criteria, also ought to be disclosed to the appellant.

The Board indicates its reliance on several decisions of the Commissioner's office (Orders 164 and M-875) predating the implementation of the current exchange of representations procedure. In my view, these decisions are not of assistance to the Board as they were issued at a time when the submissions of parties to appeals before the Commissioner were not exchanged as a matter of course. This is no longer the case, however.

Accordingly, I have decided that those portions of the Board's representations which do not qualify under one of the three criteria described above will be exchanged with the appellant. I have highlighted in green those portions of the Board's submissions which should not be shared with the appellant due to confidentiality concerns. The remaining portions of the Board's representations will be shared with the appellant.

PROCEDURE:

I have attached a copy of the Board's representations to this interim order being sent to the Board. The portions that I have highlighted in green indicate the passages which I will withhold from the appellant. I intend to send the attached material, with the exception of the green highlighted information to the appellant, along with a Notice of Inquiry, no earlier than **April 26, 2002**.

Order signed by: _____
Donald Hale
Adjudicator

April 12, 2002