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

INTERIM ORDER MO-2267-I

Appeal MA07-163

Hamilton-Wentworth District School Board

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NATURE OF THE APPEAL:

The Hamilton-Wentworth District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of:

> …all documents relating to the condition of secondary school gym floors for the 2006-07 school year. This was referenced in a March 5, 2007 report to the Board by [a named superintendent and a named facilities manager]: "Information pertaining to the condition of gym floors in the system has been assembled".

The Board located four responsive records and issued a decision providing access to two of them. In denying access to the other two records, the Board relied on the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 11 (economic and other interests) of the *Act*.

The requester, now the appellant, appealed this decision.

Mediation was not successful and the file was moved to the adjudication stage of the inquiry process. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Board, initially, seeking its representations. I received representations from the Board. I then sent a Notice of Inquiry to the appellant, along with a copy of the Board's representations. Portions of the Board's representations were withheld due to confidentiality concerns. The appellant did not provide representations in response to the Notice of Inquiry.

RECORDS:

The two records at issue are described in the following chart:

Record #	Description	Date of Record
1	Gym Floor Replacement Summary	January 30, 2007
2	Draft Executive Report to Board	February 19, 2007

DISCUSSION:

CLOSED MEETING

I will first determine whether the discretionary exemption at section 6(1)(b) applies to the records. Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of

> them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the Board must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

In accordance with this three part test, I will now determine whether the records qualify for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting in the absence of the public

The Board in its representations indicates that on January 30, 2007, various members of the Board's Executive Council, which is comprised largely of Board superintendents, met to discuss the development of a long-range plan regarding the Board's secondary school gymnasium floors that were in need of renewal. To assist in these deliberations the Board's Superintendent of Business and the Board's Senior Manager, Facilities, with the assistance of staff, prepared Record 1, the Gym Floor Replacement Summary. Based upon the recommendations contained in Record 1 and the discussions of Executive Council on January 30, 2007, recommendations for a long-range renewal plan were formulated. On February 19, 2007 the Board's Superintendent of Business communicated a general proposal for renewal to the Director of Education. This proposal is outlined in Record 2, the Draft Report. The Draft Report attaches Appendix "A" which is entitled "Hamilton-Wentworth District School Board Gym Floor Assessment and

Renewal Table".

Analysis/Findings

Although a meeting did take place on January 30, 2007, based on the representations of the Board, I have no evidence before me to find that the Board, or one of its committees, held a meeting in the absence of the public (a closed meeting). Nowhere in its representations does the Board explicitly state that a closed meeting took place, nor has the Board provided me with any other supporting evidence that a closed meeting took place, such as the minutes or agenda from a closed meeting, or a even a Board or committee resolution closing the meeting to the public. Therefore, I find that part 1 of the test has not been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

Even if I had found that a closed meeting had taken place, I would not have found that part 2 of the test has been met. The Board, relying on the Ontario Court of Appeal case in *Vanderkloet v. Leeds & Grenville (County) Board of Education* (1985), 51 O.L. (2d) 577, 20 D.L.R. (4th) 738, submits that the *Education Act* does not preclude officers and employees of the Board meeting in the absence of the public to deliberate issues and formulate proposals, recommendations, plans for action, etc. It submits that:

> Provided that open public discussion precedes the affirmation of such proposals, the substance of these prior deliberations is not required to be made public. In turn, documents prepared to assist officers and employees of an institution in developing plans, projects, recommendations, proposals, etc. need not be made public.

I disagree with the Board that the case of *Vanderkloet* (supra) authorizes the Board in this case to hold a closed meeting under the *Act*. The *Act* was enacted in 1990, after the Court of Appeal decided the *Vanderkloet* case. The *Act* requires that a statute authorize the holding of the board or committee meeting in the absence of the public. The *Education Act* provides in section 207(1) that:

> The meetings of a board and, subject to subsection (2), meetings of a committee of the board, including a committee of the whole board, shall be open to the public, and no person shall be excluded from a meeting that is open to the public except for improper conduct.

Section 207(2) of the *Education Act* provides the authority for when a board, or one of its committees, may hold a meeting in the absence of the public. This section states that:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,
>
> (a) the security of the property of the board;

(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

(c) the acquisition or disposal of a school site;

(d) decisions in respect of negotiations with employees of the board; or

(e) litigation affecting the board.

Accordingly, even if I had found that the Board, or one of its committees, had held a closed meeting on January 30, 2007, based on the representations of the Board and the provisions of the *Education Act*, I would not find that this closed meeting was authorized by statute. The subject-matter under consideration at the January 30, 2007 meeting involved the priorities for developing and proposing a long-range plan regarding the Board's secondary school gymnasium floors in need of renewal. This subject-matter did not involve any of the permitted subject-matters listed in section 207(2) of the *Education Act*. Therefore, I find that part 2 of the test has not been met. As the Board was not authorized by statute to consider the subject-matter of the records in a closed meeting, there is no need for me to consider whether part 3 of the test has been met that is whether disclosure of the records would reveal the actual substance of the deliberations of the meeting.

In conclusion, as both parts 1 and 2 of the test have not been met, the records are not exempt by reason of section 6(1)(b) of the *Act*.

ADVICE TO GOVERNMENT

I will now determine whether the discretionary exemption at section 7(1) applies to the records.

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker's or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will

ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

The Board submits that the records contain information that proposes a course of action that will ultimately be accepted or rejected by the person being advised. In particular, it submits that:

> As noted, information in the records was assembled to assist officers and staff of the Board in developing a long-range proposal for gymnasium floor renewal. The

> records were prepared on the basis of a frank assessment of the present status and comparative condition of gymnasium floors. They were not prepared for disclosure to the public. The Board objects to the production of the records in issue, in part, on the basis that such disclosure would reveal advice or recommendations of officers and employees of the Board. To perform their respective job duties properly and efficiently, such individuals must be able to freely and frankly advise government and to prepare such reports and documents as are necessary to assist them. They must be able to do so with respect to all undertakings, but especially those that are inherently contentious or controversial, without fear of being unfairly influenced by public pressure.
>
> In turn, the integrity of the Board's decision-making and policy-making process must be protected. Decisions regarding future renewal will be impacted by the rate at which floors deteriorate, the budget allocated for gym floor renewal in any particular year, changes in student population, etc. These factors will have to be assessed on an annual basis. For example, no renewal may be authorized in a given year if no funds are available to allocate for that purpose. Accordingly, to disclose the information in Appendix "A" [the Gym Floor Assessment and Renewal Table which is an attachment to the Draft Report (Record 2)], would jeopardize the integrity of the Board's decision-making and policy-making process by misrepresenting what has and can be determined at this time and by undermining the function of the Director and the trustees to deliberate and affirm annual renewal priorities in a public forum.

Analysis/Findings re: Record 1

Record 1 is the Gym Floor Replacement Summary of January 30, 2007. Only certain portions of this record sets out a recommended course of action provided by Board employees to the Executive Council of the Board. In my view, the remaining portions of this record do not set out a recommended course of action that would ultimately be accepted or rejected by the Executive Council, and I find that these portions of this record are not exempt under section 7(1). Therefore, I find that section 7(1) applies to the part of Record 1 that discusses the recommendation of the Board employees.

Analysis/Findings re: Record 2

This record is the draft Executive Report to Board re: Secondary School Gym Floors. Upon review of this record, I find that only certain portions of this record suggest a course of action from the Board's Superintendent of Business to the Board's Director of Education that will ultimately be accepted or rejected. Therefore, I find that section 7(1) applies only to the portions of Record 2 that reveals the recommendations of the Board's Superintendent of Business.

As none of the exceptions in section 7(2) apply to either record, therefore, I find that section 7(1) applies to the portions of both records at issue that contain advice or recommendations.

ECONOMIC AND OTHER INTERESTS

I will now determine whether the discretionary exemptions at sections 11(c), (d), (f) and (g) apply to the records.

Sections 11(c), (d), (f) and (g) state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(c): prejudice to economic interests and Section 11(d) injury to financial interests

The Board combined its representations concerning paragraphs (c) and (d) of section 11, as follows:

> Pursuant to subsections (c) and (d), disclosure of the records in issue could reasonably be expected to prejudice the economic interests or competitive position of the Board or be injurious to the financial interests of the Board. The records, and particularly Appendix "A" [the attachment to Record 2], contain a frank and largely subjective assessment of the condition of gymnasium floor. [N]o explanation regarding the criteria used to assign a particular rating in each of these categories is provided. The disclosure of this information is likely to impact negatively upon the Board by:
>
> - implying that its secondary schools are in a state of disrepair and/or are not cared for;
> - misrepresenting some schools as unsafe based upon the number of accidents recorded for a particular gym;
> - unfairly representing a given school as poorly maintained on the basis of the condition of its gym floor;
> - prompting parents to select non-Board secondary schools based upon an inaccurate perception that the Board's secondary schools are not properly maintained…
>
> The Board "competes" with other school boards for students…
>
> The media has recognized this competitiveness and has responded by focusing greater attention on the education "marketplace". Maclean's Magazine, for example, purports to rank secondary schools. In August 2005 it published an article entitled "Canada's Best High Schools"… This ranking purports to identify "the best schools in 10 categories: top overall, innovation, sports, academics, special focus, rising to the challenge, special community, community outreach, top principals, top teachers." In the context of this media scrutiny, the Board submits that disclosure of the records in issue to the [appellant], and particularly Appendix "A", could reasonably be expected to harm its competitive position [*vis-à-vis*] other school boards. In turn, any decline in enrolment that results from disclosure could reasonably be expected to prejudice the Board's economic and financial interests, as monies and resources are allocated to the Board, in part, on the basis of student population.

Analysis/Findings re: Sections 11(c) and (d)

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

The exemption in section 11(c) does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

I have carefully reviewed the Board's representations and the information at issue. I am not persuaded that the Board has satisfied the requirements of the sections 11(c) or (d) exemptions.

The evidence adduced by the Board amounts to a speculation of possible harm, which is insufficient to meet the requirements of sections 11(c) or (d). The records contain information concerning the condition of the Board's secondary school gym floors. Upon review of both the confidential and non-confidential portions of the Board's representations, I find that the Board has failed to provide the requisite detailed and convincing evidence to demonstrate that disclosure of the records could reasonably be expected to prejudice the economic interests of the Board or be injurious to the financial interests of the Board.

In particular, the Board has not demonstrated that disclosure of the records "could reasonably be expected to" lead to a corresponding decline in enrolment of students because parents would choose to enroll their children in a school in a different school board on the basis of the condition of certain gym floors. Accordingly, I find that sections 11(c) and (d) do not apply to the records at issue as disclosure of the records could not reasonably be expected to prejudice the Board's economic interests or competitive position or be injurious to its financial interests.

Section 11(f): plans relating to the administration of an institution

The Board provided non-confidential representations on this exemption. The Board submits that:

> [T]he records in issue contain a plan for the administration of an institution i.e. a long-range plan for the renewal of gymnasium floors, which has not yet been put into operation or made public: Order PO-2071. The March 5 Report sets out a general plan for renewal. It does not, however, set the priorities for renewal beyond [two named] secondary schools. Contrary to subsection (f), disclosure of the records in issue, and particularly Appendix "A", would disclose an aspect of the recommendations for renewal i.e. prioritization, that has not yet been confirmed by the Director and trustees, and as a result, has not yet been made public.

Analysis/Findings re: Section 11(f) plans relating to the administration of an institution

In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

I will deal with each record separately.

Record 1 is the Gym Floor Replacement Summary of January 30, 2007. This record does not qualify as a "plan" for the purpose of section 11(f). This record does not contain information which qualifies as an "especially detailed method by which a thing is to be done"; rather, this record contains suggestions or ideas about possible approaches to take regarding the replacement of gym floors. As stated above, based upon the recommendations contained in Record 1 and the discussions of Executive Council on January 30, 2007, recommendations for a long-range renewal plan were formulated from the information in this record.

Record 2 is the draft Executive Report to Board with the attached Appendix "A", the "Hamilton-Wentworth District School Board Gym Floor Assessment and Renewal Table". The final report of March 5, 2007 has been disclosed to the appellant and has been made available publicly. In particular, the final report was presented to the Committee of the Whole Board at its public meeting of March 5, 2007. The agenda for this meeting was disclosed to the appellant and the minutes for this meeting are available on the Board's website. However, Appendix "A" is not part of the final report. In order to qualify for exemption under section 11(f), the third requirement is that "the plan or plans have not yet been put into operation or made public" (Order PO-2071). The "plan" to which this record (except for Appendix "A") relates to has been made public.

In conclusion, I find that section 11(f) only applies to Appendix "A" of Record 2 as this part of Record 2 contains plans relating to the administration of the Board that have not yet been put into operation or made public.

Section 11(g): proposed plans, policies or projects

The Board provided both confidential and non-confidential representations on this exemption. The Board submits that:

> …the records in issue contain a proposed plan, policy or project for renewal. Contrary to subsection (g), disclosure of the records, and particularly Appendix "A", would result in the premature disclosure of a pending policy-decision of the Board regarding the priority of gym floor renewal…
>
> The order of renewal for 2006-2007 [two named secondary schools], was deliberated and affirmed at the public meeting of the Board on March 5, 2007. The priority of renewal of other gym floors is pending and will be deliberated and affirmed by the Board on an annual basis, following open public discussion, based upon existing conditions, allocated budget and other considerations.

***Analysis/Findings re: Section 11(g) proposed plans, policies or project*s**

In order for section 11(g) to apply, the institution must show that:

> 1. the record contains information including proposed plans, policies or projects of an institution; and
>
> 2. disclosure of the record could reasonably be expected to result in:
>
> (i) premature disclosure of a pending policy decision, or
>
> (ii) undue financial benefit or loss to a person.
>
> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

As noted above, to qualify for exemption under section 11(g), the Board must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", the harm being that disclosure of proposed plans, policies or projects could reasonably be expected to result in either the premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (C.A.)].

I have already found that section 11(f) applies to Appendix "A" of Record 2. With respect to the remainder of Record 2 and Record 1, based on the already publicly available information concerning the renewal of gym floors referred to above, I find that neither of these documents contains proposed plans, policies or projects disclosure of which could reasonably be expected to result in the premature disclosure of a pending policy decision. In addition, the Board has not provided me with representations that disclosure of these two records would result in an undue

financial benefit or loss to a person. I find that the Board has failed to provide the necessary detailed and convincing evidence required to demonstrate that disclosure of the information at issue could reasonably be expected to result in the harm contemplated by section 11(g). Therefore, I find that Section 11(g) does not apply to Record 1 or the remaining portion of Record 2.

EXERCISE OF DISCRETION

I will now determine whether the Board exercised its discretion in a proper manner under section 7(1) with respect to the recommendations in both records and under section 11(f) with respect to Appendix "A" of Record 2.

The sections 7 and 11 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Board provided only non-confidential representations on this issue. It submits that it considered the following factors:

- the basic purposes of the *Act*, including the principle that information should be made available to the public;
- the important function that the media serve in our society;
- the importance of maintaining public confidence in the integrity of the Board's decision-making and policy-making process;
- the need for officers and employees to be able to perform their assigned functions without unfair pressure;
- whether disclosure is likely to increase public confidence in the operation of the Board;
- the sensitivity of the information to the Board.

Balancing these competing interests, the Board decided not to disclose the records in issue. The Board based its determination upon a belief that its officers and employees must be able to perform their assigned responsibilities freely, efficiently and without fear of undue public pressure. With respect to Facilities personnel, these responsibilities frequently include developing and proposing long-range plans that are essential to the responsible management of Board property and infrastructure.

> In addition, the Board considered that disclosure of the records in issue, and particularly Appendix "A", is likely to impact negatively upon public perceptions of the Board's schools and upon the Board's competitive position in the education marketplace.
>
> Finally, and most importantly, the Board considered that the priority for renewal for schools other than [two named secondary schools] has been proposed, but not yet deliberated and affirmed at a public meeting of Board members charged with this specific responsibility. In the result, the Board submits that in exercising its discretion it acted in good faith, took into account relevant factors, and considered valid business considerations.

Analysis/Findings

I find that the Board did not exercise its discretion under sections 7 and 11(f) in a proper manner in denying access to the recommendations in both records and to Appendix "A" of Record 2. The Board did not take into account relevant factors and took into account irrelevant factors. In particular, the Board has not taken into account the wording of sections 7(1) and 11(f) and the interests these sections seek to protect.

Section 7(1) seeks to allow the institution to not disclose information that would reveal advice or recommendations. However, with respect to specific recommendations at issue, namely the renewal of the Board's secondary school gym floors, I note that several publicly available Board documents already contain recommendations concerning this issue. There are recommendations contained in the March 5, 2007 Executive Report to Board re: Secondary School Gym Floors report which was disclosed to the appellant with the Board's decision letter. In addition, both the minutes of the March 5, 2007 Committee of the Whole Board Meeting and the March 26, 2007 Minutes of the Open Session of the Regular Board Meeting are available on the Board's website. Both sets of minutes contain recommendations concerning the renewal of the Board's secondary school gym floors. The Board did not take into account this relevant publicly available information concerning the renewal of its secondary school gym floors. As the Board has not exercised its discretion in a proper manner concerning the recommendations in both records, I will order the Board to re-exercise its discretion under section 7(1) of the *Act* with respect to the recommendations in both records.

I also find that the Board has not exercised its discretion in a proper manner concerning the information I have found section 11(f) to apply to, namely Appendix "A" of Record 2. Record 2 was created after various members of the Board's Executive Council, which is comprised largely of Board superintendents, met to discuss and propose priorities for the development of a long-range plan regarding the Board's secondary school gymnasium floors in need of renewal. The Board's Superintendent of Business communicated a general proposal for renewal to the Director of Education. This proposal is outlined in Record 2, the Draft Report. The Draft Report attaches Appendix "A" which is entitled "Hamilton-Wentworth District School Board Gym Floor Assessment and Renewal Table".

As stated by the Board in its representations, Appendix "A" contains information about the prioritization for the renewal of its secondary school gym floors. I find that the Board has not taken into account in a proper manner whether disclosure of Appendix "A" will increase public confidence in the operation of the Board by revealing the priorities it has placed on the renewal of its secondary school gym floors. I also find that in the circumstances of this appeal, the Board has taken into account an irrelevant factor, namely its competitive position in the education marketplace. As stated above, the Board has failed to demonstrate that disclosure of the records could reasonably be expected to lead to a corresponding decline in enrolment of students because parents would choose to enroll their children in a school in a different school board on the basis of the condition of certain secondary school gym floors.

The purpose of section 11 is to protect commercially valuable information of institutions. I find that the Board has not taken into account in a proper manner the wording of the section 11(f) exemption and the interests it seeks to protect. As the Board has not exercised its discretion in a proper manner concerning Appendix "A", I will order the Board to re-exercise its discretion under section 11(f) of the *Act* with respect to this portion of Record 2.

ORDER:

1. I order the Board to disclose both records at issue to the appellant, except for the recommendations in both records and Appendix "A" which is an attachment to Record 2 by **March 3, 2008**. For greater certainty, I have highlighted the recommendations in both records which are not to be disclosed to the appellant on the copy of the records sent to the Board along with this Order.

2. In order to verify compliance with this Order, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant pursuant to provision 1, upon my request.

3. I order the Board to re-exercise its discretion with respect to the recommendations in both records and Appendix "A" which is an attachment to Record 2 in accordance with the discussion of that issue above and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the Board continues to withhold all or part of this remaining information, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The Board is required to send the results of its re-exercise, and its explanation to the appellant, with the copy to this office, no later than **February 22, 2008**. If the appellant wishes to respond to the Board's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the Board's correspondence by providing me with written representations.

4. I remain seized of this matter pending the resolution of the issue outlined in provision 3.

Original signed by: January 31, 2008
Diane Smith
Adjudicator