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

ORDER MO-2649

Appeal MA11-17

London District Catholic School Board

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NATURE OF THE APPEAL:

The London District Catholic School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> I am requesting all of the responses that [an identified school principal at a specified school], said he had about me following [a specified sports event at an identified school] on [a date in February 2009].

The board located four emails and one letter responsive to the request and provided access to them, with the exception of the personal identifiers of the individuals who wrote them. Access was denied to the personal identifiers on the basis that this information is exempt under the mandatory personal privacy exemption in section 14(1) of the *Act*. The requester, now the appellant, appealed that decision.

During mediation, the appellant advised the mediator that he was only seeking access to the names of the individuals who wrote to the principal, and not the other personal identifiers that may be included in the records. It is his position that the board inappropriately applied the *Act* when it withheld the names of the individuals that wrote these emails and letter.

Because the appellant appeared to be is seeking access to records that contain both his own personal information and that of other identifiable individuals, the mediator raised the possible application of the discretionary personal privacy exemption in section 38(b) of the *Act*. The board agreed that section 38(b) should have been claimed for the undisclosed information in the records, but maintained its decision to deny access to it.

As further mediation was not possible, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the board, a complete copy of which was shared with the appellant, who also provided me with representations.

RECORDS:

The information remaining at issue consists of the names of the authors of four emails and a letter.

DISCUSSION:

PRELIMINARY MATTER

The appellant submits that the board provided him with a complete and unsevered copy of the letter which is one of the records at issue in this appeal, yet he continues to seek access to the name of the author of the letter. Based on my review of the appellant's representations and the complete appeal file, I am not satisfied that the appellant has tendered sufficient evidence to demonstrate that he in fact has an unsevered copy of the letter. The appellant could easily have

provided me with an unsevered version of the letter with his representations but did not do so. I will, accordingly, proceed on the basis that the board has not already granted the appellant unsevered access to the letter under appeal.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The letter and emails which form the subject matter of the request in this appeal contain the personal information of both the appellant and their authors. These records express the authors' views and opinions about the appellant, thereby qualifying as the appellant's personal information under paragraph (g) of the definition set out above. In addition, the records also contain the personal information of the authors of the emails and the letter as they include these individuals' names, along with other personal information about them, as contemplated by paragraph (h) of the definition of that term in section 2(1).

As noted above, the only information remaining at issue in the appeal consists of the names of the authors of the emails and the letter. This information qualifies as the personal information of these individuals under paragraph (h) of the definition.

INVASION OF PRIVACY

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239]. As noted above, in order to find that the discretionary exemption in section 38(b), I must determine that disclosure would constitute an unjustified invasion of personal privacy.

In this appeal, I find that none of the presumptions in section 14(3) apply. Therefore, I will determine whether the factors favouring privacy protection in section 14(2) relied upon by the Board outweigh those favouring disclosure that are claimed by the appellant. In the absence of a finding that the factors in favour of privacy protection outweigh those in favour of disclosure, the discretionary exemption in section 38(b) does not apply to the personal information remaining at issue in the records.

The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99]. In the present case, the board claims the application of the factors listed in section 14(2)(e), (h) and (i). While the appellant's representations do not specifically identify any of the section 14(2) considerations favouring disclosure, his submissions appear to raise the possible application of the factor in section 14(2)(d) as he argues that he requires the names of the authors of the letter and emails in order to defend his reputation and possibly institute legal action against these individuals. Sections 14(2)(d), (e), (h) and (i) state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Analysis and findings

The appellant's position

For section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

The appellant has provided me with extensive submissions setting forth his reasons for seeking access to the names of the individuals who wrote the emails and the letter. He is of the view that these communications were sent to the board for malicious purposes and are untrue. As a result, he is considering taking legal action against the authors. The appellant also provided me with detailed representations on the board's failure to properly apply the constitution and bylaws of the Thames Valley Regional Athletic Association (the TVRAA), specifically Bylaw 3.3 which reads, in part, as follows:

> **Discipline**
>
> Failure to comply with the "Duties of Coaches" or the *Coaching Code of Ethics* may result in the citing of the coach involved.
>
> Person(s) concerned with a coach's failure to comply shall notify the Coordinator of Athletics in writing and shall copy the coach involved, the Athletic Director or designate and the Principal of the coach's school.

He argues that the board failed to instruct those who complained about his conduct to provide him with a copy of the notification mandated by Bylaw 3.3; nor did it provide him with unsevered copies of the four emails that it received. Essentially, the appellant argues that he requires complete copies of the emails and letter that were sent to the board in order to pursue

legal action against their authors and to enforce the notification provision from the TVRAA Constitution that is cited above.

The board's position

The board argues that the individuals who submitted complaints about the appellant did so with a reasonably-held expectation that their communications would be treated confidentially (section 14(2)(h)). It goes on to add that the disclosure of the personal information contained in the records could reasonably be expected to result in unfair damage to the reputations of the individuals who wrote the emails and letter (section 14(2)(i)). Finally, it submits that the individuals to whom the personal information relates will be exposed unfairly to pecuniary or other harm if the information is disclosed (section 14(2)(e)).

Conclusion

Based on my review of the records and the undisclosed portions of the records, I find that the disclosure of the personal information is relevant to a fair determination of the appellant's rights under section 14(2)(d). The appellant indicates that he may wish to pursue legal action against the authors of the letter and emails, and in order to do so, he would require their identities. I find that this contemplated cause of action represents a common law legal right under the first part of the test under section 14(2)(d).

The appellant also seeks to enforce the notification procedures set out in the TVRAA Constitution. I must conclude that this process does not give rise to a legal right drawn from statute or the common law, as is required under the first part of the test under section 14(2)(d).

In my view, the proceeding being contemplated is based on the common law and the undisclosed personal information has some bearing on or significance to the appellant's ability to commence such an action. I also find that the disclosure of the names of the authors of the communications to the Board may be necessary in order for the appellant to pursue a legal action against them, thereby meeting all four requirements of the test. Whether the language in the records itself approaches the standard necessary for an action in libel is not for me to decide.

However, I note that the appellant could also obtain by way of a court order the names of the authors of each of the records at issue in this appeal should he actually proceed with an action for libel. This approach has been used where defendants are initially referred to as "John Doe" for the purposes of commencing an action and are identified by name following an application for a court order disclosing the names once the action has begun [see *Randeno v. Standevan* (1987), 61 O.R. (2d) 726 (H.C.) and *Hogan v. Great Central Publishing Ltd.* (1994), 16 O.R. (3d) 808 (Gen. Div.)].

I also find significant the fact that the appellant has obtained complete access to the records he is seeking, with the exception of the personal identifiers of the authors, which he is not interested in obtaining, and their names. The appellant has been apprised on the nature of the allegations made about him and is in a position to evaluate whether his reputation has been damaged to the extent that recourse to a legal action for libel is necessary. I find that the disclosure of the names of the

authors will not further assist the appellant in making the determination whether to commence an action against these individuals.

Accordingly, I will give this factor listed in section 14(2)(d), which favours disclosure to the appellant, only relatively modest weight in balancing the appellant's right of access to the information against the other individuals' right to privacy protection.

I further find that the considerations in sections 14(2)(e) and (i) are not particularly compelling in the circumstances of this appeal. In my view, the disclosure of the names of the authors of the emails and letter would not expose these individuals to unfair pecuniary or other harm as contemplated by section 14(2)(e); nor would disclosure unfairly damage their reputations under section 14(2)(i). Accordingly, I put little weight on these considerations when balancing the appellant's access rights against the privacy interests of the individuals named in the records.

However, in my view, the factor favouring privacy protection in section 14(2)(h) must be accorded significant weight. The nature of the information contained in the emails and letter themselves lend some credence to the board's position that the individuals who wrote these complaints did so with a reasonably-held expectation that they would be treated by the board in a confidential fashion.

Balancing the appellant's right of access against the writers of the emails personal privacy interests, I find on balance that the privacy rights prevail. If the appellant decides to commence an action, he may bring an application to court to have the identities of the authors revealed to him for the purpose of serving the originating documents on the proper defendants. Based on the contents of the records and the board's representations, I am satisfied that the emails and letter were sent with a reasonably-held expectation that they would be treated confidentially by the board. Accordingly, I find that they are exempt from disclosure under section 38(b).

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits 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.

The board has provided me with representations describing the considerations it took into account when deciding to exercise its discretion not to disclose the names of the authors of the records at issue to the appellant. The board points out that the appellant has received all of the information contained in the records, particularly that which relates to him, with the exception of the personal identifiers of the authors.

In my view, the board has provided me with sufficient evidence to demonstrate that it exercised its discretion in an appropriate manner and did not take into account any irrelevant considerations, or fail to take into account any relevant considerations. Accordingly, I uphold the board's exercise of discretion in this matter.

ORDER:

I uphold the board's decision to deny access to the undisclosed portions of the records.

Original Signed By: August 26, 2011
Donald Hale
Adjudicator