Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

# INTERIM ORDER MO-3736-I

Appeal MA17-320

Toronto Catholic District School Board

February 25, 2019

**Summary:** In this decision, the adjudicator concludes that the appellant does not have a right of access to data including course marks from students enrolled in the Arrowsmith Program offered at the Toronto Catholic District School Board (TCDSB). She finds that the information qualifies as the personal information of the students and its disclosure would result in a presumed unjustified invasion of their personal privacy under section 14(3)(d) (educational history) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Therefore, she finds that the information is exempt under the mandatory personal privacy exemption at section 14(1) of the *Act*. The adjudicator upholds the TCDSB's decision not to disclose the information.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(1) and 14(3)(d).

**Orders and Investigation Reports Considered:** Orders PO-2811, PO-3643, PO-3819, MO-2467 and MO-3320.

## OVERVIEW:

[1] The Toronto Catholic District School Board (the TCDSB) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for data and course marks from students enrolled in:

1. The Arrowsmith Program offered at the Toronto Catholic District School Board;

2. The traditional special education programs at the Toronto Catholic District School Board; and

3. Regular courses; i.e. non-special education courses.

[2] In his request, the appellant explained that he seeks the requested information in order to research and compare the effectiveness of the Arrowsmith Program versus traditional special education methods for remediating learning disabilities. He explained that he seeks the information of regular students who were not enrolled in either the Arrowsmith Program or other special education programs in order to create a baseline against which the other marks can be compared. He also indicated that he wants all student identifiers and all school names anonymized.

[3] The request also specified that the appellant seeks this data for "all schools who were enrolled in the Arrowsmith Program" and that this means "at least 20 years of data on many students at different schools."

[4] In his request, the appellant provided sample data tables setting out the information he seeks. For each student, these tables set out a personal identifier, a school identifier, the program enrolled in, and individual marks for each course for each reporting period. Further, if the student attended the school for all eight years of their elementary education, the appellant sought this information for each year. He also indicated that he was requesting the data for as many students as possible with the minimum being determined by the number of students enrolled in the Arrowsmith Program. He stated, for example, that if there were 50 students enrolled in the Arrowsmith Program since its inception, he sought the data for those 50 students as well as data for 50 students enrolled in each of the traditional special education programs and the regular program.

[5] The TCDSB denied access to the responsive record, a spreadsheet, pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*, taking into consideration the presumption against disclosure at section 14(3)(d) for information relating to educational history. In the decision the TCDSB explained the following:

> …several special education categories exist where only a small number of students are enrolled. Within these categories, even if both the pupils' names and the school were anonymized, we consider that the data sets are of such a small size that pupils could indeed be rendered identifiable, thus constituting an unjustified invasion of personal privacy relating to their educational history.

[6] The appellant appealed the TCDSB's decision.

[7] During mediation, the appellant advised that he wants to pursue access to the withheld records. The TCDSB advised that it is not prepared to change its decision.

[8] As a mediated resolution was attempted but not reached, the matter was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry into this appeal, I sought and received representations from the parties which were shared pursuant to this office's *Code of Procedure* and *Practice Direction 7*. I then sought reply representations from the TCDSB and subsequently, sur-reply representations from the appellant. I decided that it was not necessary to provide the TCDSB with the appellant's sur-reply representations.

[9] In this interim order, I find that the information about TCDSB students enrolled in the Arrowsmith Program consists of their personal information and is subject to the mandatory exemption for personal privacy at section 14(1) of the *Act*. On that basis, I uphold the TCDSB's decision to deny access to it.

[10] In light of the evaluative purpose of the request explained by the appellant – to assess the Arrowsmith Program's effectiveness against TCDSB's special education programs and regular program – I have not addressed the possible application of section 14(1) to the information related to the other programs. Neither party has specifically addressed whether the information relating to the students in the traditional grade 7 class or the traditional special education classes qualifies as their personal information under section 2(1) and, if so, whether the exemption at section 14(1) applies to that information. Therefore, I have decided that I will continue the inquiry into this issue only if the appellant continues to seek access to that information and advises me of his intentions as outlined in the order provisions below.

## RECORDS:

[11] The record at issue is a spreadsheet that was created by the TCDSB in response to the request. It contains the following extracted or isolated essential data elements:

- school name ("School A" and "School B");
- school year;
- class description (e.g. "Grade 7," "Arrowsmith Class");
- student ID number (to provide a unique identifier in place of student name);
- subject;
- strand [topic];
- interim mark; and,
- final mark.

[12] Due to the high volume of responsive information, TCDSB provided this office

with a representative sample set out in spreadsheet format. The sample spreadsheet provided the information outlined above for all students in a regular program grade 7 class, an Arrowsmith Program class, and a traditional special education program class.

## ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

## DISCUSSION:

### A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[13] In order to determine if the personal privacy exemption applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates, because the exemption can apply only to personal information.

[14] The TCDSB maintains that the record contains the personal information of the students, while the appellant argues that even if the record contains students' personal information, it can be de-identified to ensure that personal information is not disclosed. From my consideration of the parties' representations and the sample record, and for the following reasons, I find that the record contains the students' personal information as that term is defined in section 2(1) of the *Act* and, additionally, due to its nature, that personal information cannot be de-identified.

[15] "Personal information" is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> ...
>
> (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,
>
> ...

[16] 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.[1] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

***Representations***

[17] The TCDSB submits that the requested information, the class marks, "is the numerical evaluation of an individual student's work over the course of the year." It submits that "marks measure the student's progress and achievement in all areas of their school life." It submits, therefore, that the information relates to the educational history of the student, as contemplated by paragraph (b) of the definition of personal information in section 2(1) of the *Act*, and includes their student number, which is an identifying number assigned to an individual, as contemplated by paragraph (c) of the definition of personal information.

[18] The TCDSB submits that it is reasonable to expect that an individual may be identified if the information is disclosed. It explains that as the request indicated that the appellant seeks to compare marks from students in the Arrowsmith Program to those from students in other special education Programs, and those enrolled in the standard curriculum, it began its search for responsive records by determining which TCDSB schools offered the Arrowsmith Program at the time of the request, and to which students. It explains that it determined that two schools offered the Arrowsmith Program: in one school there was one student at the grade 6 level and two students at the grade 7 level, while in the other there was one student at the grade 6 level, two students at the grade 7 level and one student at the grade 8 level.

[19] The TCDSB explains that based on the limited number of students enrolled in the Arrowsmith Program it determined that the "small cell count" identifiability concept discussed in prior orders applies and the information should not be disclosed. It points to Order PO-2811 where the term "small cell" count was described by Adjudicator John Higgins as:

> [A] situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a "small cell" count varies depending on the situations…. If …5 individuals is a "small cell" count, this would mean a person was looking for one individual in a pool of 5. By contrast, the evidence in this case indicates that one would be looking for

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[1] Order 11.
[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> 5 individuals in a pool of anywhere from 396 to 113, 918. This is not a "small cell" count.

[20] The TCDSB submits that in the current appeal, the circumstances differ from that in Order PO-2811 and "clearly demonstrate a proper application of the concept." It reiterates that only two TCDSB schools were operating the Arrowsmith Program at the time covered by the request: one school at two grade levels and the other at three grade levels. It submits that the enrolment level is below a threshold of five students in each grade level, across both schools offering the Arrowsmith Program. It submits that although the appellant has asked that the names of the schools offering the Program be anonymized, the schools at which the Program is offered is public information that is easily gleaned by the appellant. In all cases of Arrowsmith Program enrolment during the 2016-2017 school year, the complete pool of each data element is less than five. Although the cell count of the standard curriculum marks, for instance, is greater than five in the example provided, the appellant's stated aim is to use these marks as a comparator to the Arrowsmith marks. As such, providing a data set of standard curriculum marks without disclosing the small cell count Arrowsmith enrollee data set would not suffice to serve the appellant's research aims.

[21] The TCDSB submits that Order MO-1708 also supports its position that the various small cell counts across the data requested could serve to re-identify the students to which the marks relate, even if school names are anonymized. It submits that the information at issue in Order MO-1708, student mark data sets requested for the purpose of a comparative study, is similar to that at issue in this appeal. It points to the following statement of Assistant Commissioner Sherry Liang:

> The appellant has indicated that he is willing to accept the grades by class or course, but without identification of the school. On my review of the material before me, I find that this would not serve to remove the likelihood of the identification of particular students with their grades. It is apparent that the schools for which the appellant has requested information vary in their size and, in my view, reasonable assumptions could be made about what schools the information is referable to.

[22] The TCDSB also points to Order PO-3643 which it submits also discusses the concept of identifying individuals in records that, though anonymized, contain small cell counts. In Order PO-3643, Adjudicator Stella Ball considered a listing of the number of suicides committed in Ontario hospitals and psychiatric facilities, broken down by year and facility. Adjudicator Ball found that the small cell count principle did not apply in that appeal because the appropriate ratio to consider was that between the number of suicides at a facility for each year in question and the total number of deaths at that facility. As none of the facilities had fewer than five total deaths in one year, the statistical information could not reasonably be expected to identify individuals and therefore, did not qualify as personal information.

[23] The TCDSB submits that following the reasoning expressed in Order MO-1708

and Order PO-3643, it applied the small cell count principle to protect the personal information of the individuals whose marks are contained in the data requested.

[24] The appellant submits that despite the fact that he seeks information regarding, amongst other things, student performance in the Arrowsmith Program, he wants the data to be "completely anonymized before its release." He specified that by "completely anonymized," he means that the student's name and the school's name should be severed from the records. He also submits that "if it is deemed necessary, the grade [year] could be anonymized." He suggests that a grade number could be uniformly identified by another identifier, for example, "grade Z9."

[25] The appellant refutes the argument that one can infer the name of the students because the program is only offered at two schools because, he states, "an individual cannot walk into a school and start asking for the name of students." He further submits that "[t]he only other way of knowing which students are in the Arrowsmith Program is if their parents have released their child's name in the press." He submits that he knows the names of two children enrolled in the Arrowsmith Program in the requested years because their names were made public by their parents in a Globe and Mail article, a link that was attached to his representations.

### *Analysis and findings*

[26] On my consideration of the evidence before me, I find that the information about the students in the Arrowsmith Program set out in the spreadsheet prepared by the TCDSB to respond to the appellant's request consists of their "personal information" within the meaning of the definition of that term in section 2(1) of the *Act*.

[27] The information sought by the appellant is about TCDSB students enrolled in the Arrowsmith Program. For each Arrowsmith Program student the spreadsheet identifies the school they attended, the years they attended that school, the fact that they are enrolled in the Arrowsmith Program, their student ID numbers, the courses attended, as well as their interim and final marks for those courses. Information of this type has previously been found to qualify as "personal information" of the type set out in paragraph (b) (educational history) and (c) (identifying number assigned to an individual).

[28] However, as previously mentioned, to qualify as "personal information" under the *Act* the introductory language of the definition of that term requires that it must be reasonable to expect that an individual may be identified if the information is disclosed.[3] In the circumstances of this appeal, the appellant has requested that the information be

[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

anonymized so that it no longer qualifies as personal information. In the spreadsheet it created the TCDSB has anonymized the name of the two schools that offer the Arrowsmith Program and has identified the students enrolled in that program by student number, not by name. The TCDSB submits, however, that even with these modifications, the students in the Arrowsmith Program could reasonably be expected to be identified if the information were disclosed. The appellant disagrees.

[29] As set out in the TCDSB's representations, the "small cell" count concept has been addressed in previous orders of this office that considered whether the disclosure of numerical or statistical data could reasonably be expected to identify individuals. In addition to Order PO-2811, referred to by the TCDSB, Adjudicator Colin Bhattacharjee applied the small cell count concept in Order MO-3320 and found that attempting to identify two individuals in a pool of 1,500 students was not a small cell count situation. I accept that the small cell count concept applied in previous orders is relevant and informative to my determination of whether the information at issue in this appeal qualifies as personal information.

[30] From the evidence before me, there are only two TCDSB schools with students in the Arrowsmith Program for the period to which the request relates; in each school the total number of students in that program is less than five students spread out over two or three grades. In my view, the small cell count concept is relevant in this situation because the pool of possible students to whom the information relates is sufficiently limited that it becomes possible to identify who those individuals might be.

[31] The appellant argues that in the absence of the names of the Arrowsmith Program students together with the name of the school that each of them attends, their identities cannot be determined. I disagree. Given the nature of the program and the limited number of Arrowsmith Program students, I conclude it is reasonable to expect that the identities of those students (including the school and the grade that they were in during specific years) is publicly known or ascertainable, most particularly (but not exclusively) within their communities and to the other students at the schools that they attend. Moreover, the appellant provides evidence of information that is more widely publicly available which could lead to the identification of a number of Arrowsmith Program students whose information appears in the record. From the Globe and Mail article provided by the appellant in his representations, for example, the appellant or any interested person is aware of the names and ages of two of the seven students who were enrolled in the Arrowsmith Program in the TCDSB during the 2016-2017 school year.

[32] I have considered the information that is at issue, the representations of the parties and the circumstances of this case. Due to the small pool of students who could reasonably be expected to be identified as part of the Arrowsmith Program, I accept that even when certain information about those students has been anonymized as the TCDSB has done in its spreadsheet, disclosure may reasonably be expected to result in the identification of the students to whom the information relates. As a result, in my

view, it is reasonable to expect that, if the spreadsheet were to be disclosed in the form suggested by the appellant, reasonable assumptions could be made about what individuals the information, including student marks, is in relation to.

[33] Accordingly, I find that the information at issue qualifies as the personal information of the students in the Arrowsmith Program as defined in paragraphs (b) and (c) as well as the introductory wording of the definition of that term at section 2(1) of the *Act*.

**B. Does the mandatory exemption at section 14(1) apply to the information at issue?**

[34] I have found that the information relating to the students enrolled in the Arrowsmith Program contained in the record at issue in this appeal consists of their personal information. I must now determine whether the mandatory personal privacy exemption applies to prohibit the disclosure of that personal information. For the reasons that follow, I find that it does.

[35] Under section 14(1), where a record contains the personal information of another individual but not the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) apply. In the circumstances, the only exception that could apply is paragraph (f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[36] Sections 14(2), (3) and (4) assist in the determination of whether disclosure of personal information would amount to an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if either one of the exceptions at section 14(4) or the public interest override at section 16 applies.[4] In the circumstances, none of the exceptions at section 14(4) are relevant and the possible application of the public interest override at section 16 has not been raised.

[37] If the personal information does not fit into a presumption in section 14(3),

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[4] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993) CanLII 3388 (ON SCDC), 13 O.R. 767 (Div. Ct.).

section 14(2) lists various criteria that might be relevant in determining whether its disclosure would result in an unjustified invasion of personal privacy. In such cases, the personal information will be exempt from disclosure unless the circumstances favour disclosure.

[38] The TCDSB submits that the presumption at section 14(3)(d) applies. That section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > Relates to employment or educational history[.]

[39] The TCDSB submits that student marks, which is the key data element at issue, clearly relate to the educational history of the individuals that would be identified if the data were to be disclosed. It submits:

> Section 266 of Ontario *Education Act* discusses pupil record, of which student report cards, and thus student marks, form a part. Under section 266(2):
>
> > (2) A record is privileged for the information and use of supervisory officers and the principal, teachers and designated early childhood educators of the school for the improvement of instruction and other education of the pupil, and such record,
> >
> > (a) subject to subsections (2.1), (3), (5), (5.1), (5.2) and (5.3), is not available to any other person;

[40] The TCDSB also submits that the Ontario Student Record (OSR) guidelines which derive from the *Education Act* discuss pupil records in *Section 3: Components of the OSR*, and state that the Report Card is a component of the OSR. Therefore, it submits that as established by the *Education Act* and its derivative guidelines, student marks, as captured in the OSR, form a part of a student's educational history.

[41] The appellant does not make any specific submissions on whether the presumption at section 14(3)(b) applies to the information that he seeks; nor does he provide evidence to refute the TCDSB's position.

[42] Past orders of this office that have addressed the application of the presumption against disclosure in section 14(3) (and its provincial equivalent at section 21(3)(d) of the *Freedom of Information and Protection of Privacy Act*) have determined that for information to qualify as "employment or educational history," it must contain some

significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.[5]

[43] More specifically, past orders have considered records held by educational institutions that contain information about students. For example, in Order PO-3819, Adjudicator Jaime Cardy found that the records before her contained information that qualified as the students' "educational history" for the purposes of section 14(3)(d). The records included information that identified students as having enrolled in a course, and revealed information about their academic performance in that course, including whether the student failed that course and whether or not they were afforded an opportunity to sit a re-examination so as to allow them to graduate on time. In Order MO-2467, Adjudicator Bhattacharjee found that attendance "registers" of students attending a particular school within a particular timeframe qualified as educational history falling within the section 14(3)(d) presumption because it included the students' grade and marks as well as their attendance records.

[44] Based on my consideration of the TCDSB's representations and the content of the sample record, I am satisfied that the information at issue consists of the educational history of the students enrolled in the Arrowsmith Program. The record identifies the specific courses that they took, and it provides their marks in each of those courses, which amounts to information about their academic performance. I accept that this information is sufficiently significant to be described as "educational history" for the purpose of the presumption against disclosure at section 14(3)(d).

[45] Having considered the information that is before me, I accept that the TCDSB has established that the responsive information falls under the presumption at section 14(3)(d) in that it is the educational history of the individuals to whom it relates. As none of the exceptions set out in section 14(4) apply and the public interest override at section 16 has not been claimed, I find that the disclosure of this information about students in the Arrowsmith Program would result in a presumed unjustified invasion of their personal privacy. As a result, I find that the information is exempt under section 14(1) of the *Act*.

[46] As noted above, I am not making a determination about the remaining information in the record, the information relating to students in the traditional special educations programs or regular program, at this time.

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[5] Orders M-609, MO-1343 and PO-3819.

## ORDER:

1. I uphold the TCDSB's decision not to disclose the information relating to the Arrowsmith students.

2. Should the appellant wish to pursue access to the information of students in TCDSB's traditional special education program or its regular program, he should advise me within 30 days of the date of this order, so that I may seek further representations from the parties on the application of section 14(1) to that information. If I do not receive such notice from the appellant, the appeal will be closed.

3. I remain seized of this appeal to address any outstanding issues arising from provision 2.

Original signed by: February 25, 2019

Catherine Corban
Adjudicator