

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3900

Appeal MA19-00068

Toronto Catholic District School Board

February 6, 2020

**Summary:** The Toronto Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to a class list. The board initially claimed the application of the discretionary personal privacy exemption in section 38(b) to deny access to the record. Because the record does not contain the appellant's personal information, the board later claimed that the record is exempt under the mandatory personal privacy exemption in section 14(1). The adjudicator finds that the record contains the personal information of individuals other than the appellant. She finds that the mandatory personal privacy exemption at section 14(1) of the *Act* applies to the record because there are no factors weighing in favour of disclosure. She upholds the board's decision to deny access and dismisses the appeal.

**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)(d), 14(1)(f), 14(2)(d), 14(3)(d) and 51(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (under the *Courts of Justice Act*, R.S.O. 1990, c. C-43).

**Orders and Investigation Reports Considered:** Orders M-852, MO-2647 and PO-3819.

### OVERVIEW:

[1] The Toronto Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to a class list. Specifically, the request was for:

Disclosure of class register list, setting out the full names and contact information of students that would have attended [a specified elementary school] and who would have been in the same class as [the requester] during the 1983/84 school year when he was in grade 3.

Classroom Teacher: [named individual]. Principal: [named individual]

[2] The access request was made in the context of litigation commenced by the requester (the appellant in this appeal) against the board for damages arising from alleged abuse. The litigation is ongoing. At an examination for discovery of a board representative, the appellant sought production of a document known as a Daily Enrolment Register (class list) in an effort to obtain the names and contact information of the appellant's classmates, who would have been witnesses to the alleged abuse.

[3] The board refused to produce the class list and the appellant brought a motion for production. The appellant states that the Master directed him to seek access to the class list through an access to information request under *MFIPPA*.<sup>1</sup>

[4] The appellant accordingly made his request to the board for access to the information.

[5] After locating a responsive record, the board issued a decision in which it denied access to the record, citing the discretionary personal privacy exemption at section 38(b) of *MFIPPA*, with reference to the presumption in section 14(3)(d) (educational history). In its decision, the board wrote that it had also weighed a number of relevant factors in accordance with section 14(2) and determined that those factors, on balance, favoured non-disclosure.

[6] The appellant appealed the board's decision to this office. Mediation was commenced. When the appeal could not be resolved by mediation, the appellant asked that this appeal be closed and he returned before the same Master seeking an order for production of the record in the litigation. Again, the Master did not order production because, according to the appellant, he had not exhausted his remedies under *MFIPPA*.

[7] As a result, this appeal was reopened. As no further mediation was possible, the appeal was transferred to the adjudication stage of the inquiry process, where an adjudicator may conduct a written inquiry.

[8] As part of my inquiry, I sought representations from both the appellant and the board, which were shared between them. In its representations, the board wrote that it was no longer relying on the discretionary personal privacy exemption in section 38(b)

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<sup>1</sup> According to material in the appeal file. A copy of the Master's order has not been provided to this office.

to withhold the record on the grounds that the record does not contain the appellant's personal information. The board explains that, although the record is a list of students in the appellant's class, his name was inadvertently left off the list when it was recreated (the original apparently having been lost). The board submits that because the record does not contain the appellant's personal information, the correct personal privacy exemption to consider is the mandatory exemption at section 14(1), and further, that the record is exempt under section 14(1).

[9] In this order, I find that the mandatory personal privacy exemption at section 14(1) of *MFIPPA* applies to the record. I uphold the board's decision to deny access and dismiss this appeal.

### **RECORD:**

[10] The record is a Daily Enrolment Register (class list) for a 1983/1984 third grade class at an elementary school within the jurisdiction of the board.

### **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:**

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

[11] In order to determine if the personal privacy exemption applies, it is necessary to decide whether the record contains "personal information" and, if so, whose.

[12] Section 2(1) of *MFIPPA* defines "personal information" as recorded information about an identifiable individual. Section 2(1) sets out a non-exhaustive list of examples of personal information which includes:

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

(h) the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.

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

[14] The board submits that the information in the record is the personal information of the students named in the class list. It says that the record relates to the grade three students' attendance at their school and that it is reasonable to expect that they may be identified, as the record situates them by name within a particular school class and within a specified timeframe.

[15] The appellant does not comment on whether the class list contains personal information, or whose. He submits only that the "requested information are the names of the students listed on the Register and their last known contact information."

[16] I have reviewed the record and find that it contains the personal information of individuals other than the appellant. Specifically, the record contains the names of 29 individuals identified as students in a specified third grade class at a particular school during the 1983/84 academic year, and I find that disclosure of their names would reveal other personal information about them. I therefore find that the information in the record is the recorded personal information of those individuals within the meaning of paragraphs (b) (education of an individual) and (h) (disclosure would reveal other personal information) of the definition of "personal information" in section 2(1), as well as the introductory wording of the definition of that term in section 2(1).

[17] Although the appellant's representations repeatedly refer to access to the students' "names and last known contact information contained in the record," I note that the board's decision indicated that the record does not contain any contact information. I have reviewed the record and confirm for the appellant that it does not contain any contact information for the named students.

[18] Because the record does not contain the appellant's name or any other information about him, I find that it does not contain the appellant's personal information. I must therefore determine whether the record is exempt from disclosure under the mandatory personal privacy exemption in section 14(1). For the reasons that follow, I find that it is.

[19] I do note the unusual circumstances, where the appellant asked for a class register for a class he was in, and that the record happens not to have his name on it. Even if I were to find that the record contains or reveals the personal information of the appellant, such that the appropriate personal privacy exemption to consider would be that at section 38(b), I would still find that the personal information of other identifiable individuals is exempt under section 38(b). This is because, as seen in my discussion below, there are no factors favouring its disclosure under *MFIPPA*.

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

[20] *MFIPPA* sets out different access rights to personal information, depending on whether the request is for an individual's own personal information, or the personal information of others. Requests for information that include an individual's own personal information are considered under Part II of *MFIPPA*, and section 38(b) would be the appropriate personal privacy exemption to consider. Requests for records that do not contain the requester's personal information are treated in the same way as other requests for general records under Part I, and the appropriate personal privacy exemption to consider is section 14(1).

[21] This distinction reflects the special nature of requests for one's own personal information. In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, this office has developed an approach for determining whether the request falls under Part I or Part II that requires considering the entire record.<sup>2</sup>

[22] In this case, the request is for access to a class list that would presumably have included the appellant's personal information. However, the board located a record in response to the request that I have found does not contain the appellant's personal information. The parties' representations do not address the omission and, while there is no dispute that the appellant was a student in the identified grade three class, the issue before me is whether the personal information in the record at issue should be disclosed to the appellant. Considering the record itself, because it does not contain the appellant's personal information, I find that the question of access to the record at issue falls under Part I of *MFIPPA*.

[23] Part I contains a complete set of exemptions in section 6 through 15. Under Part I, where disclosure of the personal information of individuals other than the requester would be an unjustified invasion of those individuals' personal privacy, the mandatory personal privacy exemption in section 14(1) prohibits the disclosure of the information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) apply.

[24] The appellant argues two of the exceptions: section 14(1)(d) and (f). These exceptions state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

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<sup>2</sup> Order M-352.

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

**Section 14(1)(d) does not apply**

[25] The appellant argues that section 51(1) of *MFIPPA* authorizes the disclosure he seeks. Section 51(1) states that:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[26] The appellant also relies on the exception in section 14(1)(d) of *MFIPPA* which provides that personal information is producible when an "Act of Ontario or Canada" expressly authorizes the disclosure. He submits that the *Courts of Justice Act (CJA)*<sup>3</sup> by virtue of the *Rules of Civil Procedure* (the *Rules*, which are a regulation under the *CJA*)<sup>4</sup> and section 51(1) of *MFIPPA* expressly authorize disclosure of the information sought.

[27] The appellant argues that section 51(1) of the *Act* expressly authorizes disclosure of the record because it states that *MFIPPA* cannot impose any limitation on the information otherwise available by law to a party to litigation so that the exception in section 14(1)(d) applies to allow disclosure. He notes that, as a party to litigation, he is entitled under Rules 30.02 and 31.06 to information that is relevant to a particular action, including every document relevant to any matter in issue in the litigation, and the names and addresses of persons who might reasonably be expected to have knowledge of the matters at issue in the litigation.

[28] The appellant also argues that any privacy concerns under *MFIPPA* associated with disclosure to the general public are removed by operation of the deemed undertaking rule in Rule 30.1 of the *Rules*. The deemed undertaking rule prohibits parties and their lawyers from using evidence or information obtained through the examination for discovery process for any purposes other than those of the proceeding in which the evidence was obtained.

[29] The *Rules* govern civil proceedings in the Superior Court of Justice and set out procedures to be followed by litigants. They do not govern proceedings before the IPC. Section 51(1) operates in such a way as to not restrict discovery or production mechanisms available to parties in litigation. It does not, however, create a substantive right of access parallel or adjunct to litigation. A similar question was considered in

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<sup>3</sup> R.S.O. 1990, c. C.43

<sup>4</sup> R.R.O. 1990, Reg. 194.

Order M-852, in which the adjudicator wrote:

Section 51(1) does not create a substantive right of access. The right of access created under the Act is found in section 4 and 36, and is subject to the exemptions found in the Act. Section 51 ensures that the Act and its exemptions do not operate in a way which would deny access to information through other legal rules or principles, including the rules of natural justice.... The Act can and should operate as an independent piece of legislation.

[30] Because access rights under *MFIPPA* are arguably more restrictive than discovery rights in litigation, section 51(1) operates to ensure that *MFIPPA* does not impose any limitations on the information otherwise available to litigants. Questions of whether or not access to information should be granted under *MFIPPA* are subject to specific exemptions and different considerations than questions of relevance in a matter in litigation. Section 51(1) does not limit a litigant's discovery rights during litigation, so that a document that might be exempt under *MFIPPA* can still be producible in litigation.

[31] In my view, section 51(1), by its very enactment and by its language (information "otherwise available" to a party to litigation) specifically contemplates that discovery rights in litigation are separate from access rights under *MFIPPA*. It would, in my view, be too broad an interpretation of express authorization to find that *MFIPPA* authorizes this office to order disclosure of any information that might be producible in a civil litigation because a court may determine that it is relevant to the findings of fact or issues in that particular litigation. In my view, therefore, the *Rules* cannot be characterized as legislation that expressly authorizes the disclosure of the record at issue in this appeal for the purpose of the exception in section 14(1)(d).

[32] I make no findings regarding whether the record is relevant to or producible in the appellant's court action. However, for the reasons described above, I find that the exception in section 14(1)(d) of the *Act* does not apply in the circumstances.

**Disclosure would be an unjustified invasion of personal privacy, so the section 14(1)(f) exception does not apply**

[33] 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)<sup>5</sup> or the public interest override at section 16 applies.<sup>6</sup>

[34] In this case, none of the exceptions at section 14(4) are relevant and the possible application of the public interest override is not an issue.<sup>7</sup>

[35] If the personal information does not fit into a presumption in section 14(3), section 14(2) lists various criteria that might be relevant in determining whether its disclosure would result in an unjustified invasion of personal privacy. For reasons that follow, I find that the information does not fit into a presumption in section 14(3). I also find that the appellant has not established the application of any factors favouring disclosure. Therefore, in the absence of any factors favouring disclosure, disclosure would constitute an unjustified invasion of personal privacy.

### ***Representations***

#### *Appellant's representations*

[36] The appellant states that, while a student at the school in question, he suffered various abuses at the hands of the principal and teacher. He says that some of this abuse occurred in the presence of his classmates. He seeks access to the class list because he says that it contains a list of possible witnesses to the alleged abuse whom he could attempt to locate and who could assist him in his claim.

[37] The appellant submits that the principle of common law procedural fairness, the *Rules of Civil Procedure* (the *Rules*), and *MFIPPA* all permit production of the requested information. He submits that it is highly prejudicial for the board to possess the names and last known contact information of witnesses of the abuse while withholding such materially relevant information from him.

[38] The appellant says that the information he has requested is relevant to a matter at issue in his lawsuit. He reiterates the arguments set out above that this information, a possible witness list, is producible under the *Rules*.

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<sup>5</sup> Section 14(4) of *MFIPPA* states that, despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it, (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; (b) discloses financial or other details of a contract for personal services between an individual and an institution; or (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

<sup>6</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. 767 (Div. Ct.).

<sup>7</sup> Section 16 of *MFIPPA* provides that an exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.



[39] The appellant disputes that the information in the class list relates to the students' educational history because the class list discloses only that they attended a particular school during a brief time period, which is information that the appellant would have known at the time he attended the school because he was a classmate of the individuals in the class list.

[40] The appellant submits that because the information he has requested does not relate to educational history, its disclosure would not be an unjustified invasion of personal privacy and is therefore not exempt under section 14(1). He submits therefore, that balancing the factors in section 14(2) results in the conclusion that the requested information should be disclosed. In this regard, he submits that the factor at section 14(2)(d) favours disclosure because the requested information is relevant to a fair determination of his rights, that the requested information will not result in pecuniary or other harm (the factor at section 14(2)(e)), is not highly sensitive (section 14(2)(f)), would not be inaccurate or unreliable (section 14(2)(g)), would not have been supplied to the board in confidence (section 14(2)(h)), and would not unfairly damage the reputation of any individuals named in the record (section 14(2)(i)).

#### *The board's representations*

[41] The board relies on the presumption in section 14(3)(d) which states that a disclosure of personal information is presumed to be an unjustified invasion of personal privacy if the personal information relates to employment or educational history.

[42] The board submits that the record relates to the 29 identified students' educational history because these logs are maintained and verified by classroom teachers, are part of schools' record keeping requirements mandated by the Ministry of Education (the ministry), and contain an alphabetical listing of students within a particular class, together with their attendance in the class, which is submitted to the ministry at certain points throughout an academic year.

[43] Finally, because the class list at issue situates individual students identified by full name within the context of their attendance in a class and within the time-frame of a full academic year, the board says that this information clearly relates to those individuals' educational history as it shows evidence of the progression of their academic career within the school system. The board submits that, since the record relates to the students' educational history, the presumption in section 14(3)(d) applies, disclosure is presumed to be an unjustified invasion of the students' personal privacy, and the record must therefore be withheld under section 14(1).

#### *Analysis and findings*

[44] First, I am not persuaded that the educational history presumption at section 14(3)(d) applies to the record.

[45] Section 14(3)(d) states that:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or educational history.

[46] Past orders of this office have addressed the application of the presumption against disclosure in section 14(3)(d) and have determined that, to qualify as "employment or educational history," the information 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.<sup>8</sup>

[47] More specifically, past orders have considered records held by institutions that contain information about students. In Order PO-3819, for example, the adjudicator found that the records before her qualified as students' educational history because they included information about, among other things, the students' course enrolment and academic performance. In Order MO-2467, the adjudicator 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 they included the students' grade, as well as their marks and attendance records.

[48] In this case, the record before me contains only the students' names and generic attendance information not associated with any particular student. I agree with the appellant that the record discloses nothing about the educational history of the individual students, other than that they attended a specified school during a brief point in time. Accordingly, I am not satisfied that the record contains information about any student's educational history that would fall within the presumption in section 14(3)(d), and I find that it does not apply.

[49] Second, based on my review of the record and the materials before me, I am not satisfied that the appellant has established any factors weighing in favour of disclosure. In order to establish the factor at section 14(2)(d), the appellant must show 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

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<sup>8</sup> Order M-609, MO-1343.

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

[50] In order for section 14(2)(d) to apply, all four parts must be established. Although I am mindful that the record appears to relate to a fair determination of the appellant's rights, which is the factor at section 14(2)(d), I find this factor does not apply because I find that this information is otherwise available to the appellant in his ongoing litigation before a court familiar with the issues in dispute and therefore able to make findings on what is relevant and required for a fair hearing. I find that the board's withholding of the record under *MFIPPA* does not prevent the appellant from pursuing remedies that might be available to him within the civil litigation process. Therefore, as the appellant has not persuaded me that the four-part test of section 14(2)(d) has been met, I find that section 14(2)(d) does not apply to this appeal.<sup>9</sup>

[51] I have also considered the argument that section 51(1) is an unlisted factor that favours disclosure. I find that section 51(1) is not an unlisted factor that favours disclosure for the same reasons that I find that section 14(1)(d) does not apply, namely, that disclosure under *MFIPPA* and production of relevant documents in litigation are two separate processes with different considerations in each.

[52] Finally, as noted above, had I considered the question of access under section 38(b), i.e., if the record contained the appellant's personal information as well as that of other identifiable individuals, I would come to the same conclusion regarding access to the personal information of individuals other than the appellant in the circumstances of this appeal.

[53] Since I find that there are no factors favouring disclosure that would outweigh considerations favouring privacy protection under *MFIPPA*, I find that the section 14(1)(f) exception is not made out and that the section 14(1) exemption applies to the record.

**ORDER:**

I uphold the board's decision and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

February 6, 2020 \_\_\_\_\_

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<sup>9</sup> Order PO-1833.