

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-4141

Appeal MA20-00126

York Catholic District School Board

December 22, 2021

**Summary:** The requester sought a copy of a math exam paper from the York Catholic District School Board (the board) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The board denied access to the math exam paper and claimed the discretionary exemption in section 38(a), in conjunction with section 11(h) (examination questions) of the *Act*.

In this order, the adjudicator upholds the board's decision to deny access to the exam paper.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1), 11(h) and 38(a).

**Orders considered:** Order PO-2179.

### OVERVIEW:

[1] This appeal concerns a decision issued in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the York Catholic District School Board (the board) for the following information:

1. General Records – The number of supply teacher days that were used in a [specified course] from September 3, 2019 to February 3, 2020.

2. Personal Information – A copy of [the requester’s] written academic math exam [for a specified course] [the exam] was completed on Jan 27, 2020.

[2] The board issued a decision granting access to the information sought in the first part of the request and denying access in full to the information sought in the second part of the request. Without citing any exemption(s) under the *Act*, in its decision, the board stated:

We are unable to provide a copy of the exam. However, we are able to provide time to review the exam in person with a Principal or Designate present. Please contact your school administration to arrange for a time to review the original documents.

[3] The requester, now the appellant, appealed the board’s decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to explore the possibility of resolving the appeal.

[4] The mediator had discussions with the board and the appellant.<sup>1</sup>

[5] During mediation, the board issued a revised decision again stating that it was denying access to the written exam, but this time citing the economic and other interests exemption pursuant to section 11(h) of the *Act* for records that contain “questions that are to be used in an examination or test for an educational purpose.” The board subsequently advised the mediator that it wished to rely on section 38(a) (discretion to refuse requester’s own personal information) of the *Act*, in conjunction with section 11(h).

[6] The board stated that the appellant could review the exam in person with a principal or delegate present. The appellant’s representative confirmed that they did not wish to review the exam in person but wished to pursue access to a copy of the exam.

[7] As a mediated resolution was not achieved, the file was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal sought and received representations from the board. The appellant’s representative was invited to make representations on the issues set out in the Notice of Inquiry and to respond to the board’s representations but declined to do so. The board’s representations were shared in accordance with section 7 of the IPC’s Code of Procedure and *Practice Direction Number 7*.

[8] The file was then transferred to me to continue the inquiry.<sup>2</sup> In this order, I

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<sup>1</sup> The request was made by the parent of the appellant, under section 54(c) of the *Act*, which permits “a person who has lawful custody of an individual” to exercise “any right or power conferred on the individual” under the *Act*, if the individual is under 16 years of age. The appellant turned 16 during the mediation of this appeal and indicated that he wished to have his parent continue to represent him in the appeal. For simplicity, I use the term appellant.

uphold the board's decision to withhold the exam pursuant to section 38(a) in conjunction with section 11(h) of the *Act*.

## **RECORDS:**

[9] The record at issue in this appeal is the appellant's math exam (8 pages).

## **ISSUES:**

- A. Does the exam contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the exam question exemption in section 11(h) apply to the exam?
- C. Did the board properly exercise its discretion under section 38(a)?

## **DISCUSSION:**

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

[10] To determine whether the appellant has a right of access to the record under section 36(1) of the *Act*,<sup>3</sup> and whether section 38(a) of the *Act* may apply to exempt the record at issue, I must first decide whether the exam contains the appellant's "personal information", within the meaning of section 2(1) of the *Act*. Section 2(1) states, in part:

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

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

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<sup>2</sup> I have reviewed the complete file material, including the board's representations and correspondence from the appellant's representative confirming that he would not be submitting representations and wished for the adjudicator to proceed with issuing an order without them. I have concluded that I do not need any further information before rendering a decision.

<sup>3</sup> A request under section 36(1) of the *Act* is a request for one's own personal information, while general requests are made under section 4(1).

(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;

[11] In its representations, the board concedes that the record contains personal information as defined by paragraphs (b) and (h) of the definition in section 2(1), as it is the appellant's examination and the exam cover page and the answers contain the appellant's name and their work.

[12] The appellant made no representations on this issue.

### ***Analysis and findings***

[13] I agree with the board's submission that the exam contains the appellant's personal information in the form of their name appearing together with their answers to the exam questions, which is information relating to their education. I have reviewed the exam paper and note that the appellant's answers to the exam questions include their handwritten calculations and notations. Accordingly, I find that the exam contains the appellant's personal information as contemplated by paragraphs (b) and (h) of the definition in section 2(1) of the *Act*.

### **Issue B: Does the discretionary exemption at section 38(a) in conjunction with the exam question exemption in section 11(h) apply to the exam?**

[14] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. This general right of access is subject to the exemptions contained in section 38. Section 38(a) states:

38. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) If section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, **11**, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[15] The discretionary nature of section 38(a) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.<sup>4</sup>

[16] If the institution refuses to give an individual access to their own personal information under section 38(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information. I will address this, below.

[17] In this appeal, the board relies on section 38(a) in conjunction with section

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<sup>4</sup> Order M-352.

11(h), to deny access to the exam. Section 11(h) provides that:

11. A head may refuse to disclose a record that contains, ...

(h) questions that are to be used in an examination or test for an educational purpose;

[18] In its representations, the board submits that,

The record in question is the examination for a course that is offered annually by [the board] and the school. It does contain questions that are used for an educational purpose. This examination is a significant portion of the grade for the course, and is an evaluation of the quality and effectiveness of secondary education, and the administration and marking of testing materials completed by secondary students.

[19] The board's position is that the questions contained in the exam that the appellant completed in January 2020 are to be used in the future offerings of the course.

[20] The board explained that in reaching its decision to withhold the exam paper, it considered its two policies that cover access to examinations at secondary level: *Policy 316 - Secondary School Post Examination Review* (policy 316) and *Policy 309 - Assessment and Evaluation of Student Achievement* (policy 309).

[21] The board submits that its examinations may be used on multiple offerings within the school year and subsequent years and require a significant amount of work by both the curriculum department at the board and the individual teachers to ensure that they meet the standards outlined in the assessment and evaluation policy (policy 309).

[22] The board relies on Order M-1116, in which the IPC upheld a school board's decision to deny access to a secondary school final advanced mathematics examination, including instructions and correct answers, in circumstances where the school board relied upon the discretionary exemption under section 11(h) of the *Act*. In that appeal, the adjudicator reviewed copies of the exams used on each occasion and concluded that the material being tested was essentially the same but with some minor modifications and that the intention was to reuse the exam questions.

[23] The appellant did not provide representations.

### ***Analysis and findings***

[24] In previous IPC orders, the "to be used" requirement has been interpreted to include situations when records include questions that have been used in one

examination and are to be used in future examinations.<sup>5</sup> I am satisfied, on the basis of the board's representations, that the exam is for a course that is offered annually and that the questions are to be re-used in a future examination for the purposes of section 11(h) of the *Act*.

[25] As I explain below, I am also satisfied that the questions in the exam will be used in an examination for an educational purpose. I accept the board's submission that the exam is administered to secondary school students and that the exam at issue is the examination for the secondary math course and forms a significant portion of the student's grade.

[26] In my view, the assessment of student knowledge is a component of the education process and the use of the questions in the exam paper in this way points to the exam being used for an educational purpose. I have also considered the approach taken by Adjudicator Donald Hale in Order PO-2179, which was a decision concerning the application of the exam question exemption under the provincial access to information legislation that also uses the term "for an educational purpose" as is found in section 11(h) of the *Act*. Adjudicator Hale upheld the decision of the Education Quality and Accountability Office (EQAO) to deny access to a portion of the Ontario Secondary School Literary Test. In finding that the test was to be used for an educational purpose, Adjudicator Hale stated

The mandate of the EQAO ... includes an evaluation of the quality and effectiveness of elementary and secondary education. Part of that mandate, which clearly has an educational purpose, includes the development, administration and marking of testing materials completed by elementary and secondary students. The test which forms the subject matter of the request was created as part of that educational mandate.

[27] I agree with this reasoning and adopt this approach in the appeal before me. The board's policy 309 states that it uses assessment and evaluation information to support its planning processes and to provide effective and appropriate education programs for students. I find policy 309 supports the board's submission that the exam paper, besides assessing student performance, forms part of its evaluation of the quality and effectiveness of secondary education and the administration and marking of test materials.

[28] I am satisfied that as an institution providing secondary education programs, the use of the exam paper as part of the evaluation of those programs is an educational purpose. I find that the math exam will be used for the educational purposes of student assessment and program and testing evaluation.

[29] Accordingly, subject to my consideration of the board's exercise of discretion

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<sup>5</sup> Order PO-2179.

under section 38(a), I find that the discretionary exemption in section 38(a), in conjunction with the exam question exemption at section 11(h), applies to the exam paper.

**Issue C: Did the board properly exercise its discretion under section 38(a)?**

[30] As noted above, the section 38(a) exemption is discretionary so that the board may decide to disclose the information sought, despite the fact that it could be withheld. The board must exercise its discretion.

[31] In this appeal, I will review the board's decision to deny access to the exam under section 38(a), in conjunction with section 11(h), to determine whether the board exercised its discretion and, if so, whether it erred in doing so.

[32] I may find that the board erred in exercising its discretion where, for example, it did so in bad faith or for an improper purpose; it took into account irrelevant considerations; or it failed to take into account relevant considerations. If any of these circumstances are present, I may send the matter back to the board for an exercise of discretion based on proper considerations.<sup>6</sup> I may not, however, substitute my own discretion for that of the board.<sup>7</sup>

[33] Relevant considerations can include:

- 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 and the privacy of individuals should be protected;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking their 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;

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 43(2) of the *Act*.

- The age of the information; and
- The historic practice of the institution with respect to similar information.

[34] Not all of these considerations may be relevant in each case and additional considerations may be relevant.<sup>8</sup>

[35] In its representations, the board states that when it reviewed the appellant's request for access to the exam, it considered previous situations, its policies for accessing examinations and its pedagogical practices. The board explained that it considered its two policies that cover access to examinations at secondary level: policies 309 and 316.

[36] According to the board, the purpose of policy 316 is to implement a formalized and consistent approach for students to receive descriptive feedback on final examinations. It provides for the "Secondary School Post-Examination Review Day" for secondary school students to be given an opportunity to review, with their teachers, all final examinations.

[37] Next, the board submits that policy 309 includes guidelines for the board's post-examination review procedure that provide for students to review their examinations with teachers and for grade adjustment, in certain circumstances.

[38] As noted above, the board states that its examinations are used on multiple offerings within the school year and subsequent years and require a significant amount of work by both the curriculum department at the board and the individual teachers to ensure that they meet the standards outlined in the assessment and evaluation policy (policy 309).

[39] In addition and as I have set out above, the board refers to Order M-1116, and asks that I uphold its exercise of discretion to withhold the exam paper under section 11(h).

[40] As stated previously, the appellant has not provided representations.

### ***Analysis and findings***

[41] I have reviewed the board's representations in this appeal and note its submission that there is a procedure for post-examination review, which allows students to review an examination paper and their answers with a teacher. I also note that the board has offered the appellant and their representative this opportunity to review the exam paper and the appellant's answers.

[42] I find that the fact that the board offered the appellant an opportunity to review

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<sup>8</sup> Order MO-1573.



the exam paper with a teacher or school principal demonstrates an acknowledgement that the exam paper contains the appellant's personal information and their interest in accessing that information. I am satisfied that while taking account of the appellant's interest in reviewing the exam, the board also considered its desire to reuse the exam in future course offerings and the time and effort that would be expended in rewriting the exam questions to meet the required standards of assessment and evaluation. I find that the board also considered its previous practices when reaching its decision.

[43] I am satisfied that the board took into account the relevant considerations of its previous practice, its policy for reviewing examinations and the appellant's desire to receive feedback on the exam and that it appropriately exercised its discretion as required by section 38(a) of the *Act* in denying access to the exam paper.

[44] Accordingly, I am satisfied that the board exercised its discretion under section 38(a), in conjunction with section 11(h), in deciding not to disclose the exam and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant factors. I therefore uphold the board's decision to withhold the exam paper pursuant to section 38(a), in conjunction with section 11(h).

**ORDER:**

I uphold the board's decision to deny access to the exam paper.

Original Signed by: \_\_\_\_\_  
Katherine Ball  
Adjudicator

December 22, 2021 \_\_\_\_\_