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

FINAL ORDER MO-1574-F

Appeal MA-010272-2

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a series of related requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records concerning the education of the requester's son, who is under the age of sixteen, and the involvement of their family with the Board. In response to the requests, the Board located a large number of records and granted access to some of them.

Access to the majority of the records was denied as the Board initially refused to confirm or deny the existence of such records under section 8(3) of the *Act*. In addition, the Board took the position that the records did not fall under the jurisdiction of the *Act* due to the operation of section 52 of the *Act*, or fell outside its custody or control and were not, therefore, subject to the *Act*. The Board also expressed its reliance on the provisions of section 54(c) as a grounds for denying access to the records. In the alternative, the Board claimed that even if the records were subject to the *Act*, they were exempt from disclosure on the basis of the following exemptions in the *Act*:

- Advice or recommendations – section 7(1), in conjunction with section 38(a);
- Invasion of privacy – sections 14(1) and 38(b);
- Danger to safety or health – section 13, in conjunction with section 38(a).

The requester, now the appellant, appealed the Board's decision to deny access to the records. During the mediation stage of the appeal, the Board withdrew its reliance on section 8(3) and purported to apply the discretionary exemptions in sections 8(1)(a), (b), (c), (d), (e) and 8(2)(c) of the *Act* to deny access to one sentence contained in page 4 of Record A25 and to Record C40. The appellant was provided with an Index of the records remaining at issue and was advised that records responsive to portions of his requests did not exist. Additional records were disclosed to the appellant in late December 2001. The appellant is of the view that additional records beyond those identified by the Board should exist and disputes the ability of the Board to raise the discretionary exemptions in sections 8(1) and (2) at the mediation stage of the appeal.

The requests and the Board's responses to them were delineated in the Revised Report of Mediator provided to the parties on December 28, 2001. The requests and the Board's decisions on each part were described as follows:

1. *All copies of personal file information kept by [a named school principal] about [the appellant, his wife and son];*

   The Board referred to section 4 (1) of the *Act* with respect to any additional records in this category, stating that they are not in the custody or under the control of the Board. In the alternative, the Board denied access under sections 13, 38(b) and 54 (c).

2. *All copies of personal file information kept by [the appellant's son's home room teacher] about [the appellant, his wife and son]*;

   The Board referred to section 4 (1) of the *Act* in its decision on these records, stating that they are not in the custody or under the control of the Board. In the alternative, the Board denied access under sections 13, 38(b) and 54 (c).

3. *All private file information kept by other staff members at[a named school] about [the appellant, his wife and son];*

   The Board referred to section 4 (1) of the *Act* in its decision on these records, stating that they are not in the custody or under the control of the Board. In the alternative, the Board denied access under sections 13, 38(b) and 54 (c).

4. *[the appellant's son's] Ontario Student Record;*

   [This point is not part of the appeal as these records were disclosed.]

5. *[the appellant's son's] attendance record*;

   [This point is not part of the appeal as these records were disclosed.]

6. *Sign-in book relating to[the appellant's son];*

   [This point is not part of the appeal as these records were disclosed.]

7. *All documentation from [a named diagnostic center] concerning [the appellant, his wife and son];*

   The Board referred to section 4 (1) of the *Act* as regards any additional records in this category, stating that they are not in the custody or under the control of the Board. In the alternative, the Board denied access under sections 13, 38(b) and 54 (c).

8. *All documentation [the Safe Schools Administrator for the Board's West Education Office] has in his files with regard to[the appellant's son];*

   The Board stated that there are no records responding to this point in the request.

9. *All documentation [a named Safe Schools Advisor] has in his files with regard to [the appellant's son];*

   The Board disclosed a letter with its first decision letter, and stated that there are no additional records responding to this point in the request.

10. *Any documentation in either [the safe Schools Administrator]'s files or [the Safe Schools Advisor]'s files with regard to a "restraining order" served by [the Safe Schools Advisor] on [the appellant];*

    The Board indicated that there are no such records. If the appellant was referring to a "no trespass" letter issued by [the Safe Schools Advisor], this letter was released in response to point 9 above.

I decided to seek the representations of the Board initially, as it bears the onus of proof that the records are, in fact, exempt under the provisions claimed. In its representations, the Board indicated that it is no longer relying on the exclusion from the *Act* contained in section 52; nor is it seeking to exempt any of the records under sections 7(1) or 8(2)(c) of the *Act*. The Board responded to the issues raised in the Notice of Inquiry and objected to the disclosure of some of the contents of its submissions to the appellant.

In Interim Order MO-1527-I, I determined that portions of the Board's representations ought not to be disclosed to the appellant but that other parts of them, despite the Board's objections, must be disclosed. As I did not receive any further objection from the Board, I attached those portions of the representations ordered disclosed in Interim Order MO-1527-I to the Notice of Inquiry sent to the appellant, along with the legal authorities relied upon by the Board. The appellant then made his representations, which were shared with the Board. I received additional representations from the Board by way of reply.

Following the conclusion of the Inquiry process, the appellant forwarded additional material to me. I have reviewed this material and determined that it is not relevant to the adjudication of the issues before me in this appeal. I will not, accordingly, consider this material in the determination of this appeal.

Throughout the adjudication process, I have spoken on the telephone with the Board's counsel and the appellant and his wife, who clearly indicated to me that the request had been made on her behalf, as well as that of the appellant and their son.

PRELIMINARY ISSUES:

CUSTODY OR CONTROL

The Board takes the position that certain records at issue in this appeal, particularly hand-written notes taken by its staff, are not within its "custody or control", within the meaning of section 4(1) of the *Act*, which reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In Order 120, former Commissioner Sidney B. Linden listed a number of criteria intended to assist an institution in determining whether it maintains custody or control of records which are subject to a request under the *Act*. In that decision, the former Commissioner held that:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the *Act*, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.
>
> In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:
>
> 1. Was the record created by an officer or employee of the institution?
>
> 2. What use did the creator intend to make of the record?
>
> 3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
>
> 4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
>
> 5. Does the institution have a right to possession of the record?
>
> 6. Does the content of the record relate to the institution's mandate and functions?
>
> 7. Does the institution have the authority to regulate the record's use?
>
> 8. To what extent has the record been relied upon by the institution?
>
> 9. How closely is the record integrated with other records held by the institution?
>
> 10. Does the institution have the authority to dispose of the record?

> These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

In support of its contention that the records at issue are not within its custody or control, the Board submits that:

(a) there are no statutory, Ministry or Board requirements that any of the records at issue were required;

(b) the records were kept in confidence and separate from the Board's official records, being the OSR (Ontario Student Register);

(c) with the exception of Record C40, which was provided [by a Board employee] to [a senior Board official], the Board was not aware of the records being kept;

(d) the records were kept on Board property only temporarily and by the determination of the administrators and staff involved in creating the records;

(e) the administrators and staff involved in creating the records established when the records were to be destroyed or removed from Board property;

(f) the records were made for the personal use of the authors and, in some cases, other staff with whom they worked, not for the instruction of [the appellant's son], and;

(g) the records have not been relied upon by the Board, except insofar as the Board is required to make submissions on this appeal.

Addressing the applicable factors outlined in Order 120, I find that the records at issue consist, in the main, of handwritten notes taken by educators and administrators within the schools attended by the appellant's son. These notes were intended to document the son's progress and his activities throughout the period for which they were kept. The records were maintained by Board staff on the Board's premises, regardless of the fact that they were not incorporated into the son's OSR and other permanent records. In addition, the records relate directly to the professional employment responsibilities of the staff person, recording the writer's observations and perceptions of the behaviour and progress of the son. As such, I find that the records relate directly to the mandate of the Board and the professional duties of their creators, which is the education and social development of the appellant's son.

In my view, the records are not the personal records of the individuals who prepared them, but rather, were intended, as the Board concedes, as a "memory aid" to assist these individuals in their evaluation and treatment of the appellant's son and to assist in addressing the problems identified in them. They are, moreover, directly related to the work responsibilities of its employees and have been integrated into the workplace record-holdings of each of the individuals who created them, who are Board employees.

Taking into consideration all of the indicia of control outlined by former Commissioner Linden in Order 120, I find that the records at issue are all in the Board's custody and that it also exercises the requisite degree of control for the purposes of section 4(1).

DOES SECTION 54(c) OF THE *ACT* ALLOW ACCESS TO THE RECORDS BY THE APPELLANT?

The Board takes the position that the appellant does not have an "unfettered" right to obtain access under section 54(c) of the *Act*. This section states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

The Board submits that, in accordance with the findings in Order P-673, the appellant has "failed to convince" the Board that he is entitled to access to the records under section 54(c) in the circumstances of this appeal. Order P-673 involved an unusual set of facts in which former Assistant Commissioner Irwin Glasberg found that the disclosure of records maintained by the Office of Child and Family Service Advocacy responsive to a request from a custodial parent for records relating to his son would not be in the best interest of the child. The records related to a custody and child protection dispute involving the father and his former spouse. The former Assistant Commissioner found that the requester father was seeking the information contained in the records in order to "meet his personal objectives and not those of his son." As a result, he held that the father was not entitled to exercise the access rights of his son in accordance with the provincial equivalent provision to section 54(c).

In support of its contention that the appellant in the present appeal is also seeking to exercise the access rights of his son for some improper purpose, the Board relies on certain statements taken from the records which paint the appellant in a negative light and suggests that his motives for seeking access to the records are consistent only with his wish to ensure that the documents are truthful and not intended to be used for some other purpose. For this reason, the Board indicates that the appellant ought not to be entitled to exercise the right of access contemplated by section 54(c).

In the present appeal, like the situation in Order P-673, the appellant has lawful custody of his son and has brought this request under the *Act* in order to gain access to records which the Board has created concerning a number of issues surrounding his son's education. It is apparent to me that a high degree of animosity exists between the appellant and the Board's administration.

What the Board may perceive as an improper or inappropriate use of the access provisions in the *Act* does not appear to be so from the appellant's perspective.

The situation in the present appeal is not comparable to the unique circumstances extant in Order P-673. I can find no basis for the Board's contention that the request was made for some improper or collateral purpose. As a result, I have no difficulty in finding that the appellant is properly exercising a right of access under section 54(c) and I dismiss this objection on the part of the Board.

WAS THE BOARD'S SEARCH FOR RECORDS RESPONSIVE TO THE REQUEST REASONABLE IN THE CIRCUMSTANCES OF THIS APPEAL?

The appellant is of the view that additional records beyond those identified by the Board ought to exist. This opinion is based, in part, on certain telephone conversations which the appellant describes with the Board's former Freedom of Information and Privacy Protection Co-ordinator (the Co-ordinator), who has since retired. The appellant refers to an alleged statement from the Co-ordinator in which she indicated to him that his son's former principal had assembled some 125 pages of notes concerning his son and family. I note that records matching this description form a large part of the records at issue in this appeal. The appellant expresses the view that, in the absence of the former Co-ordinator, not all of the records which she originally identified have been included in the records before me.

The Board has provided me with affidavits sworn by the individuals who conducted the searches for the records which it has identified as responsive to the request. They indicate that searches were conducted of the record-holdings of all of the individuals identified by the appellant's request for the time period stipulated. On this basis, the Board submits that all of the records relating to the appellant's family maintained by Board staff have been identified and included in the documents which are at issue or were disclosed in this appeal.

Based on my review of the records and the submissions of the Board, I am satisfied that all of the records pertaining to the appellant's son, for the time period covered by the request, have been identified and provided to me for adjudication in the present appeal. Accordingly, I dismiss this part of the appellant's appeal.

DISCUSSION:

PERSONAL INFORMATION

The term "personal information" is defined in section 2(1) of the *Act* to include, in part, "recorded information about an identifiable individual". It is accepted by both parties that the records contain the personal information of the appellant's son, as they relate primarily to his activities and educational progress. In addition, I find that the records also contain references to other students by name, along with other personal information about them, thereby meeting the definition of that term in section 2(1)(h). The records also contain, in part, the personal information of the appellant and his wife as they describe their "personal opinions or views" (section 2(1)(e)), the views or opinions of another individual about the appellant and his wife

(section 2(1)(g)) and the names of the appellant and his wife and son, along with other personal information relating to them (section 2(1)(h)).

In the Notice of Inquiry which I provided to the Board, I requested that it address the issue of whether the records also contain the personal information of its employees or whether such information contained in the records pertains only to these individuals in their professional capacity. In response, the Board submits that:

> . . . the personal/professional distinction must be considered in light of the recent Ontario Court of Appeal decision in *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (Ont. C.A.). In considering the interpretation of section 65(6) of the *Act*, the Court of Appeal found that words ought not to be imported into the text of the statute when doing so would subvert the intention of the legislature. (at p.369)
>
> It is submitted that the words "except when provided in a professional capacity" do not appear in the *Act* and that the personal/professional distinction in previous Commission decisions can no longer stand.

The appellant submits that "the information that is provided in the documentation does not qualify as the personal information by [of] Board employees but rather it relates to their normal professional activities" and relies upon the reasoning contained in Orders M-615, MO-1379 and P-473. The appellant specifically relies upon the following finding from Order M-615 in which former Inquiry Officer John Higgins found that:

> . . . it is the character of this information itself which must be considered. Because the information in the records about the principal, vice-principal and superintendent relate exclusively to their normal professional activities, I find that it does not qualify as their personal information.

I agree with the position expressed by the appellant and the analysis of former Inquiry Officer Higgins in Order M-615, and I do not accept the Board's submission based on the *Solicitor General* case. In my view, the exclusion of information about normal professional activities from the category of "personal information" is implicit in the term itself, and does not import words into the statute.

In the present case, the records contain only information which was compiled and recorded about occurrences and events which took place in the context of the appellant's son's education. The information relates to the professional staff of the Board only in their capacity as educators and administrators, and is not "about" them in their personal capacities. Accordingly, I find that the records do not contain their personal information for the purposes of section 2(1).

By way of summary, I find that only a small portion of the records, which relates to other students, contain personal information about anyone other than the appellant, his son and his wife.

INVASION OF PRIVACY

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 exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [Order PO-1764]

If none of the presumptions in section 14(3) applies, the Board must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Representations of the Parties

The Board submits that the records contain information which qualifies as “personal information relating to educational history” of identifiable students other than the appellant’s son within the meaning of the presumption in section 14(3)(d). The Board also indicates that, in its view, the personal information of other students which is contained in the records is “highly sensitive” as contemplated by section 14(2)(f) and that the disclosure of this information will expose these students unfairly to pecuniary or other harm under section 14(2)(e). The Board has provided me

with additional information in support of this contention which I am unable to refer to in the text of this order because of concerns about confidentiality.

The appellant has made very detailed and lengthy representations on the application of the considerations and presumptions in sections 14(2) and (3). The appellant suggests that the Board's submissions on the application of the section 14(3)(d) presumption are sketchy and it is difficult for him to respond to them. The appellant also takes issue with the potential application of the consideration in section 14(2)(e) though his submissions focus on unfair harm to the Board, rather than to the individual students and staff to whom the information relates. The appellant also takes the position that he is aware of the subject matter of much of what forms the records at issue and the information is not "highly sensitive" under section 14(2)(f).

The appellant also refers to section 14(2)(a) as a relevant consideration favouring the disclosure of the personal information in the records. This section states:

> 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,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

In support of this position, the appellant questions whether the Board has properly applied its own policies with respect to the sharing of information about his son with public authorities. He expresses concerns about the suspension process employed by the Board and the issue of student safety. He submits that:

> The public must be assured that the children, who are under the care of the school system, are entitled to have absolute confidence in the reporting structures developed and implemented by school systems. The public often never knows why the school calls police or a protection agency due to privacy regulations by the Young Offenders Act and the Child and Family Services Act. Therefore, there is a large wall of secrecy that is afforded these agencies due to privacy issues. Are children being reported to these agencies in an appropriate manner that is consistent with Board policies and the British North America Act?

The appellant adds that:

> The public has a right to know that it can confidently entrust its children to both the public and separate school systems. It has a further right to expect that, in the event that allegations are made about the propriety of the actions of teachers, Board staff will promptly report the concerns to the proper authorities and keep those who made the allegations apprised of the situation.

The appellant's submissions also raise the possible application of an unlisted consideration under section 14(2) which he describes as the requirement that he, on behalf of his son, receive "an

adequate degree of disclosure" in order to be able to properly respond to the actions and allegations made by the Board. He refers to the common law principles of procedural fairness and states that he has a right to know the particulars of allegations against family members in order to respond to them. The appellant also refers to the *Statutory Powers and Procedure Act* (which the appellant acknowledges does not apply to the appeal provisions in the *Act).*

The appellant's representations also refer to notices issued by the Board's Safe Schools Advisor and its counsel. The Board indicates that the records do not relate in any way to these notices.

The Board also indicates that the application of the unlisted factor referred to by the appellant and described as "public confidence in the integrity of the institution" is restricted by the findings in Order P-237 to "very unusual circumstances" which have not been approached in the current appeal. Further, the Board submits that, relying on the reasoning in Order M-619, when balancing the privacy interests extant in certain records against the appellant's right of access, "the question of whether the Board acted properly and followed its own policies and procedures did not support disclosure over privacy considerations."

Analysis

In Order M-619, a newspaper reporter submitted a request to a school board about its response to allegations of abuse by a teacher employed by the board. Former Adjudicator Anita Fineberg evaluated the considerations from section 14(2) weighing in favour of privacy protection and disclosure, as well as the consideration described as "public confidence in the institution". In that decision, she found that:

> The mandatory nature of the personal privacy exemption in section 14 of the *Act* is designed to further one of the primary purposes of the *Act* as set out in section 1(b). That is, to protect the privacy of individuals with respect to personal information about themselves held by institutions.
>
> However, the Legislature has recognized that these privacy rights are not absolute. They are subject to the six exceptions in section 14(1), one of which, section 14(1)(f) (disclosure does not constitute an unjustified invasion of privacy) is the subject of this appeal. The *Act* also lists a series of factors - some favouring privacy protection and others favouring disclosure - to be balanced in determining when and to what extent personal information may be disclosed to a requester. In addition, the *Act* requires that **all** the relevant circumstances must be taken into account when this decision is made.
>
> I acknowledge that disclosure of the personal information of the teacher, principal, superintendent and trustee would constitute an invasion of their personal privacy. However, the decision which I must make is whether such disclosure would be **unjustified**.
>
> In my view, this decision is **not**, as the reporter [the appellant in that case] suggests, nor should it be, related to her desire to corroborate the information she

has received from the parents. Nor is it a question of whether the Board acted properly and followed its own policies and the legislation.

Rather, in the words of the Williams Commission, whose report was the progenitor of freedom of information legislation in Ontario:

> We do not feel, however, that the privacy protection interest should be considered as absolute. It is an important value, of course, but one which must yield on occasion to the public interest in access to government information. Although each individual might prefer to mask all information concerning himself from others, **the rationale of open government** provides a competing interest which, in appropriate cases, will have a higher claim. [emphasis added] *(Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/ 1980* ("Williams Commission Report"), vol. 2, p. 325).

Public scrutiny of the activities of an institution and public confidence in its integrity can only be achieved if the public is afforded the opportunity to "see for itself" what the Board did in response to the allegations that were made. To satisfy these goals, the public requires access to information related to the allegations made against the teacher and the actions taken by the teacher, principal, superintendent and trustee to respond to them.

The manner in which the Board or its staff have dealt with the allegations has never been disclosed publicly. Based on the information contained in the records and the other documents provided to this office by the Board, it is not clear that even the parents of the children who were allegedly abused were apprised of exactly how the Board addressed the situation.

The privacy interests involved in this appeal are indeed substantial. However, in my view, this is one of those cases referred to by the Williams Commission, in which the competing disclosure considerations are more substantial. Accordingly, after considering all the relevant circumstances of this appeal, and balancing the competing interests of disclosure and privacy protection, I find that the interests in subjecting the Board to public scrutiny and ensuring public confidence in the Board outweigh the privacy interests of the teacher, the principal, the superintendent and the trustee. Thus, I find that release of some of the personal information of these individuals would not constitute an unjustified invasion of personal privacy.

In the present case, the records relate to the behaviour of the appellant and his son, rather than a Board employee, and the information has been requested by an individual whose personal information appears in the record, rather than by a member of the media with no personal involvement. In my view, in this case, the appellant's interest in disclosure relates primarily to the information about himself and his family members in the records. On that basis, a distinction

may be made between the personal information contained in the records that relates to the appellant, his wife and son on the one hand, and the personal information of other students on the other.

Findings

In my view, the disclosure of the personal information contained in the records which relates solely to the appellant, his wife and his son would not constitute an unjustified invasion of another individual's personal privacy. This information comprises the vast majority of the records at issue in this appeal. I find that this information is not exempt from disclosure under section 38(b).

As noted in my discussion of section 38(b), individuals have a right of access to their own personal information unless it is determined that granting access to one's own personal information would result in an unjustified invasion of the personal privacy of another individual. The appellant also indicates that he is not interested in obtaining access to "any identifying number, name or address of students that might be in the possession of the Board." The records, however, contain the personal information of other students which goes beyond these enumerated items.

I find that the presumption in section 14(3)(d) (educational history) applies to small portions of the records relating to other identifiable individuals. Other parts of the records which relate to other students are also properly described as "highly sensitive" within the meaning of section 14(2)(f) as they contain information about the students' activities, behaviour and other circumstances. I find that this is a highly relevant consideration with respect to this information and that the considerations favouring disclosure relied upon by the appellant, public scrutiny (section 14(2)(a)), reasonable degree of disclosure and public confidence (unlisted factors) have no application to it. The disclosure of personal information about these students to the appellant is not necessary in order to achieve a "reasonable degree of disclosure" to the appellant, nor is it "desirable for the purpose of subjecting the activities of the institution to public scrutiny", or to address issues surrounding "public confidence" in the Board.

I have provided the Board's Freedom of Information Co-ordinator with a highlighted copy of the records indicating those portions which should not be disclosed to the appellant as to do so would constitute an unjustified invasion of the personal privacy of the individuals referred to therein.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/DANGER TO HEALTH OR SAFETY

As noted above, section 36(1) of the *Act* provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. Section 38 provides a number of exceptions to this general right of access. Under section 38(a), a head may refuse to disclose to the individual to whom the information relates personal information where (among others) the exemption in section 13 would apply to the disclosure of that personal information.

The Board relies on the discretionary exemption in section 38(a), taken in conjunction with section 13 of the *Act*, as the basis for its refusal to disclose Record C40. I have found that portions of this document containing the personal information of other students is exempt under section 38(b), and I will confine my analysis to the remainder of the record.

Section 13 of the *Act* reads:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Board has provided me with confidential submissions with respect to the basis for its arguments that the disclosure of the contents of Record C40 could reasonably be expected to seriously threaten the safety of the individual who prepared them. The test to be applied in situations where an institution claims the application of section 13 is set out by the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (Ont. C. A.), at page 6:

> . . . section 20 [the provincial equivalent provision to section 13] calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

I have reviewed the affidavit material and the confidential arguments submitted by the Board in support of its claim that this exemption applies. On the basis of the information provided to me, I am not satisfied that the disclosure of the records *to the appellant* could reasonably be expected to seriously threaten the safety or health of any individual. The only evidence of threatening behaviour before me relates to the appellant's son who, as demonstrated by the contents of the records, has made various threats against his teachers and other students. While the threats and abusive behaviour of the son are a serious matter, the fact is that there is no evidence of such behaviour by the appellant. By contrast, in the *Ministry of Labour* case, the requester had a history of using threatening and profane language with staff at the institution, and there were psychiatric reports expressing "concern that the Requester would act out past threats of violence against WCB staff."

I also note that some time has elapsed since the creation of the records. The appellant's son is now enrolled in another school from that at which the author of Record C40 was employed. Moreover, Record C40 acts only as a summary of events described in greater detail in the other records at issue in this appeal. The individual who prepared Record C40 used professional and

carefully-chosen language to describe the events related in this record. There is nothing inflammatory or pejorative about the contents of the records; they simply set out a chronology of events involving the appellant, his wife and his son's interactions with the Board.

For these reasons, I find that Record C40 is not exempt from disclosure under section 13, taken in conjunction with section 38(a).

DISCRETION TO REFUSE ACCESS TO ONE'S OWN PERSONAL INFORMATION/ LAW ENFORCEMENT

Another exception to the general right of access set forth in section 38(a) is the situation where the records contain personal information relating to the requester and where the exemptions in section 8(1) would apply to the disclosure of that personal information.

The Board relies on the discretionary exemptions in section 38(a), taken in conjunction with sections 8(1)(a), (b), (c), (d) and (e) of the *Act*, as the basis for its refusal to disclose a small portion of page 4 of Record A25 and Record C40, which remain undisclosed. As noted above, portions of Record C40 were found to be exempt under section 38(b). I will, therefore, consider whether the remainder of this record, and the part of Record A25 that remains at issue, qualify for exemption under sections 8(1)(a), (b), (c), (d) or (e). These exemptions state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

Introduction

Section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 8 exemption bears the onus of providing

sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 42 of the *Act*.

[Order P-188]

The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption.

[Order P-948]

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].
>
> In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):
>
> > The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety . . . Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.
>
> In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must

> demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

Sections 8(1)(a) and (b)

In order for a record to qualify for exemption under section 8(1)(a) or (b), the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This definition states:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

The purpose of the exemption contained in section 8(1)(a) of the *Act* is to provide the Board with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an **ongoing** law enforcement matter. The Board bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter.

The purpose of the exemption contained in section 8(1)(b) of the *Act* is to provide the institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an **ongoing** law enforcement investigation. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement investigation is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the investigation.

[Orders P-324, P-403 and M-1067]

The Board submits that the information in Records A25 and C40 was either received from or provided to the CCAS and that investigations conducted by this agency can lead to court proceedings in which a type of sanction or penalty can be imposed. As a result, it argues that the subject matter of these records is a "law enforcement" matter within the meaning of that term in section 2(1).

In Order MO-1416, former Adjudicator Dawn Maruno addressed the question of whether records relating to an investigation by a Children's Aid Society qualified as a "law enforcement matter" for the purposes of section 8(1). She held that:

> The issue of whether a CAS investigation meets the definition of "law enforcement" has been addressed in previous orders. As former Inquiry Officer Anita Fineberg stated in Order M-328,
>
> > ...any investigation which "could lead to proceedings in a court or tribunal" would have had to have been conducted by either the Children's Aid Society or the Police.
>
> I adopt that conclusion here and find that a Children's Aid Society investigation "could lead to proceedings in a court or tribunal".
>
> For a court proceeding to meet the definition of a "law enforcement" matter, the Court must have the authority to impose a penalty or sanction in the proceedings arising from the investigation. Under sections 57(1) and 80(1) of the *Child and Family Services Act,* where the Court finds a child is in need of protection, the Court can make an order placing the child in the custody of someone other than the parent or prohibit a parent from having access to the child.
>
> In my opinion, based on the above statutory provisions, the Court can impose a sanction in a proceeding arising from a CAS investigation. Accordingly, I find that the matter which gave rise to the investigation meets the definition of "law enforcement" in section 2(1) of the *Act*.

In the present appeal, the contents of Records A25 and C40 relate directly to information received from or provided to the CCAS in the course of its investigation into certain concerns about the appellant's son. In accordance with the findings in Orders MO-1416 and M-328, I find that the subject matter of these records meets the definition of a "law enforcement matter" for the purposes of section 8(1).

The Board acknowledges that, to the best of its knowledge, the investigation undertaken by the CCAS has long since concluded. However, it suggests that the interpretation placed on the wording of sections 8(1)(a) and (b) in previous orders of the Commissioner's office, whereby the exemption only applies to *ongoing* law enforcement matters or investigations, is untenable. I do not accept the Board's argument. In my view, the analysis in previous decisions such as Orders P-324, P-403 and M-1067 is persuasive, since it is inconceivable that disclosure could reasonably be expected to interfere with a concluded matter under section 8(1)(a) or with a concluded investigation under section 8(1)(b).

Therefore, even though I am satisfied, as was former Adjudicator Dawn Maruno in Order MO-1416, that investigations such as those undertaken by the Children's Aid Society or, as in this case, analogous investigations conducted by the Catholic Children's Aid Society (CCAS), meet the definition of "law enforcement", I find that the disclosure of the remaining undisclosed information in Records A25 and C40 could not reasonably be expected to interfere with a law enforcement matter under section 8(1)(a) because the CCAS investigation has long since concluded. Similarly, the disclosure of the information in these records could not reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement

proceeding under section 8(1)(b). As a result, I find that section 8(1)(a) and (b) have no application to these records and that they are not exempt under section 38(a) on that basis.

Section 8(1)(c)

In order to constitute an "investigative technique or procedure" it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of section 8(1)(c).

[Orders P-170, M-761 and P-963]

The Board has not provided me with representations in support of its contention that the disclosure of the information in Records A25 and C40 could reasonably be expected to reveal investigative techniques and procedures which are either currently in use or likely to be used in law enforcement. In the absence of other evidence to support its application, I find that this exemption has no application to these records and, accordingly, they are not exempt under section 38(a) on this basis.

Section 8(1)(d)

The Board argues that the disclosure of the information contained in Record C40 "would disclose the identity of a confidential source of information with respect to a law enforcement matter". It has not applied this exemption to the undisclosed information in Record A25. The Board acknowledges that the appellant is aware that an individual employed by the Board "made a report to the CCAS". However, it argues that "identifying an individual who has provided information to the CCAS is compounded by providing details of the evidence given by that individual to the CCAS."

The appellant advised me that he is aware of the identity of the individual who contacted the CCAS on behalf of the Board.

I accept the Board's argument that the disclosure of the contents of Record C40 would result in the disclosure of "the identity of a confidential source of information" and that the information is "in respect of a law enforcement matter", as contemplated by section 8(1)(d). This record identifies the source of certain confidential information provided to the CCAS, thereby meeting the requirements of the exemption.

I therefore find that section 8(1)(d) applies to Record C40 and this document is exempt under section 38(a) on that basis.

Section 8(1)(e)

The Board relies on the exemption in section 8(1)(e) to refuse access to the contents of Record C40 on the basis that it has concerns for the safety of CCAS staff, as well as its own employees. It does not rely on this exemption with respect to the undisclosed portions of Record A25. I note

that Record C40 does not contain the names or other identifying information of any CCAS staff. The Board also indicates that it is relying on its representations with respect to the application of section 13 to Record C40 as the basis for its decision under section 8(1)(e). I am not satisfied that the disclosure of the information in Record C40 *to the appellant* could reasonably be expected to endanger the life or safety of any person. Accordingly, I find that section 8(1)(e) does not apply to this record, and it is not exempt under section 38(a) on that basis.

By way of summary, I find that none of the information in Record A25 qualifies for exemption under sections 8(1)(a), (b), (c), (d) or (e). Accordingly, this record is not exempt under section 38(a). However, Record C40 qualifies for exemption under section 38(a), taken in conjunction with section 8(1)(d).

PUBLIC INTEREST IN DISCLOSURE

The appellant's submissions with respect to the application of the "public interest override" provision at section 16 of the *Act* are focussed on his perceived need to receive access to the information contained in the records relating to his son, his wife and himself. As access to all of this information will result from this decision, it is not necessary for me to address the possible application of this section in the circumstances of this appeal.

ORDER:

1. I order the Board to disclose to the appellant all of the records with the exception of Records C40, 74, 75, 76, 77, 79 and 80 in their entirety and those portions of Records 5, 9, 12, 15, 22, 23, 24, 25, 26, 31, 36, 53, 54, 55, 58, 60, 69, 70 and 73 which are highlighted on the copy of the records which I provided to its Freedom of Information and Privacy Protection Co-ordinator with a copy of this order by **October 31, 2002** but not before **October 25, 2002.**

2. I uphold the Board's decision to deny access to Records C40, 74, 75, 76, 77, 79 and 80 in their entirety and those portions of Records 5, 9, 12, 15, 22, 23, 24, 25, 26, 31, 36, 53, 54, 55, 58, 60, 69, 70 and 73 which I have highlighted on the copy of the records which I have provided to the Board's Freedom of Information and Privacy Protection Co-ordinator.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Board to provide me with copies of the records which I have ordered to be disclosed in Provision 1.

Original signed by: September 26, 2002
Donald Hale
Adjudicator