COURT FILE NO.: 645/02
DATE: May 28, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THEN, MEEHAN AND SWINTON JJ.

B E T W E E N:	)	
	)	
TORONTO DISTRICT SCHOOL BOARD	)	*J. Paul R. Howard* and *Byrdena M. MacNeil*,
	)	for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
	)	
JOHN DOE, Requester and	)	*John Swaigen* and *John Higgins*, for the
INFORMATION AND PRIVACY	)	Respondent, Information and Privacy
COMMISSIONER/ONTARIO	)	Commissioner/Ontario.
	)	
Respondents	)	
	)	
	)	**HEARD:** May 28, 2004

THEN J.: (Orally)

[1] The applicant has abandoned the custody or control exclusion and the only remaining issue is the exclusion based on s.13 of the *Municipal Freedom of Information and Protection of Privacy Act*. Section 13 reads as follows:

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

[2] The applicant submits that the adjudicator was unreasonable in refusing to apply s.13 of the Act to prevent the disclosure of certain documents which chronicled the behaviour of the son to the Requester father on the basis that the evidence of the behaviour of both the father and the son outlined in the affidavits of three senior educators support the conclusion that the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[3] The initial reasons of the adjudicator indicate that he understood the legal content of s.13 by virtue of his reference to that issue in the decision of the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Big Canoe*, [1999] O.J. No. 4560 at p.6. With respect to the applicability of s.13 to the father, the adjudicator said this at p.14 of his initial decision:

> "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 the staff at the institution, and there were psychiatric reports expressing "concern that the Requester would act out past threats of violence against WCB staff."

[4] The burden of proof that the records fall within the s.13 exemption rests with the party resisting disclosure. In our view it was not unreasonable for the adjudicator to conclude that the Board failed to discharge the burden of proving that the disclosure of the records would create a serious threat of harm to the safety and health of anyone on the part of the father.

[5] Mr. Howard submits that while the adjudicator on the reconsideration did consider the consequences of the father providing the records to a son, the adjudicator erred in finding that this consequence did not trigger the s.13 exemption having found that "the threats and behaviour of the son are a serious matter in his initial decision."

[6] This error, it is submitted is compounded by the adjudicator's failure to explain why in the face of the finding with respect to the son's conduct, the adjudicator did not apply the exemption as *Big Canoe* would require (see paras. 26 and 27).

[7] In his reconsideration decision, the adjudicator stated the following at p.5:

> "In its application for judicial review, the Board criticizes my failure to apply section 13 to Record C40 on the basis that I did not consider "... the consequences of the father providing the records to a son." As noted previously, I found that the Record C40 is exempt under sections 8(1)(d) and 38(a), and I am not dealing with that record in this reconsideration. The fact remains that the appellant might decide to share any information that is disclosed with his son. Even assuming that the remaining records, or parts of records, at issue will be shared with the appellant's son, in view of their contents and the manner in which they are written, I have concluded that there is no reasonable basis for finding that disclosure could reasonably be expected to seriously threaten the safety or health of any individual".

[8] In his reconsideration, he also referred by incorporating his first decision to the lapse of time and the fact that the son was enrolled in another school, as well as to his finding that the records were prepared using professionally and carefully chosen language which could not be considered pejorative or inflammatory.

[9] In our view, while the reasons of the adjudicator could have been more extensive in rejecting the concerns of the Board with respect to the son's access to the records, we are not persuaded that the adjudicator was unreasonable in doing so on the evidentiary record before him. It must be noted that notwithstanding the worst of the incidents involving the threats made by the son when 13 years old toward an individual in January and February of 2001, no disciplinary action was taken nor is there any evidence of any specific fear of the son expressed by the object of the threats. The only evidence of any fear of the son is expressed by an educator who was not the object of the threats, but who on reviewing the records formed an opinion. However, there is no psychiatric evidence of a propensity to carry out threats nor has the adjudicator made his decision in the face of evidence "pointed toward the opposite result" as in the *Big Canoe* case. The absence of extensive reasons does not detract from the reasonableness of the adjudicator's conclusion on this evidentiary record. Accordingly, we would dismiss the application. The Board has fairly agreed with the respondent that there should be no costs and accordingly, no costs are awarded.

THEN J.
MEEHAN J.
SWINTON J.

Date of Reasons for Judgment: May 28, 2004
Date of Release: June 30, 2004

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TORONTO DISTRICT SCHOOL BOARD

Applicant

- and -

JOHN DOE, Requester and INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Respondents

ORAL REASONS FOR JUDGMENT

THEN J.

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