Adjudicator Upholds School Board's Decision To Deny Non-Custodial Parent's Request For Access To Information

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In Order MO-3706, a decision of the office of the Information and Privacy Commissioner of Ontario (the IPC), released on December 17, 2018, the IPC adjudicator, Jennifer James, held that the Toronto District School Board (the TDSB) was correct to deny a non-custodial parent access to information about the location of his daughters' current school as disclosure would have constituted an unjustified invasion of personal privacy under subsection 14(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

Background

The appellant in this case, a father, filed a request to the TDSB under MFIPPA to obtain information about the location of his daughters' current school. The TDSB located the information in the Ontario Student Records (OSR) for each child, but issued a letter denying the appellant access to the requested information. The TDSB claimed that the disclosure of the information would constitute an unjustified invasion of personal privacy under section 14(1) of MFIPPA.

The father appealed the TDSB's decision to the IPC and the appeal was assigned to mediation. Mediation did not settle the appeal and the file was transferred to the adjudication stage of the appeals process, which resulted in Order MO-3706.

Analysis and Decision

The adjudicator's analysis was based on its interpretation and application of certain relevant provisions of MFIPPA, namely sections 14 and 54.

Under subsection 14(1) of MFIPPA, heads of institutions are directed to refuse to disclose personal information to any person other than the individual to whom the information relates, unless one of the exceptions listed in that section applies. These exceptions are:

a) prior written request or consent of the individual;

b) compelling circumstances affecting health or safety;

c) where the personal information is collected and maintained specifically for a public record;

d) under an act of Ontario or Canada;

e) for a research purpose that meets certain prescribed criteria, or

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

With respect to what constitutes an unjustified invasion of personal privacy, subsection 14(2) provides a list of criteria to be considered in making such a determination. Additionally, subsection 14(3) of MFIPPA states that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy in certain circumstances, including if the personal information "relates to employment or educational history," as specified in subsection 14(3)(d). The presumption under subsection 14(3) can only be overcome in certain situations listed in subsection 14(4) or if the public interest overrides the presumption pursuant to section 16.

Section 54 of MFIPPA operates as a further exception to the requirement that personal information not be disclosed to persons other than the individuals to whom the information relates. Under section 54, certain persons other than the individual may exercise the rights and powers conferred on an individual by MFIPPA in some circumstances. Most relevant to the facts of this case, subsection 54(c) states that, if the individual is less than 16 years of age, a person who has lawful custody of the individual can exercise the rights and powers conferred on that individual by MFIPPA, meaning that custodial parents can access personal information about their children who are under 16.

As one of the appellant's daughters was under the age of 16, the IPC adjudicator began her analysis by first addressing the application of subsection 54(c) of MFIPPAas a preliminary issue. The decision notes that a Notice of Inquiry was sent to the appellant asking him whether he met the requirements of subsection 54(c); however he did not respond. The TDSB referred the IPC to a publicly reported family law matter between the appellant and his daughters' mother in which the court concluded that a final court order was already in place which awarded the mother sole custody of the children. Based on the appellant's lack of response and the information in the family law matter, the IPC adjudicator concluded that the appellant could not exercise a right of access on behalf of his daughters:

"As stated above, the appellant was given an opportunity to provide submissions as to whether he is entitled to exercise access under section 54(c) but declined to do so. I have reviewed the submissions of the board, including the court decision referred to by the board, and am satisfied that there is insufficient evidence establishing that the appellant has lawful custody of his child who is less than 16 years of age. Accordingly, I find that the appellant cannot exercise a right of access on behalf of this individual under section 54(c) in the circumstances of this appeal."

Given the above finding, the adjudicator then turned to determining whether the mandatory exemption under subsection 14(1) applied to the personal information of a child who is less than 16 years, along with the other personal information at issue about the appellant's child who was over the age of 16. Before performing an analysis under section 14, the adjudicator first commented that there was no dispute that the records at issue contained "personal information" within the meaning of MFIPPA and that she was satisfied that the records did in fact contain the appellant's daughters' personal information, specifically their names, ages, information relating to their education, and information about the location of their schools, but that the records did not contain the appellant's own personal information.

As set out in subsection 14(1), where a person seeks access to personal information of another individual, institutions are prohibited from disclosing such information unless one of the listed exceptions applies. The parties had not claimed that any of the exceptions (a) – (e) (described above) applied and the adjudicator also concluded that they did not apply. She found that the only exception that could apply was (f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

However, the adjudicator found that there was a presumption of unjustified invasion of personal privacy under subsection 14(3) because the information related to the employment or educational history of the daughters. In coming to this conclusion, she first referred to previous decisions from the IPC office, which had concluded that information relating to a student located in their OSR constitutes "educational history." Then, having found the presumption to be established, she found that it could not be rebutted because none of the circumstances in 14(4) existed and the "public interest override" in section 16 also did not apply:

"Applying the reasoning of previous decisions, I find that the presumption at section 14(3)(d) applies to the information at issue. In addition, I find that this presumption cannot be rebutted by any factors favouring disclosure under section 14(2). As mentioned above, once established, when considering whether information is exempt under section 14(1), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. In this case, I found that none of the circumstances listed in paragraphs (a) to (d) of section 14(4) apply to this appeal. In addition, the appellant did not raise the possible application of the public interest override in section 16, nor am I persuaded that it applies in the circumstances."

The adjudicator ultimately concluded that the disclosure of the withheld personal information to the appellant would result in an unjustified invasion of personal privacy under subsection 14(1) and upheld the TDSB's denial of access to the appellant.

Comment

This decision demonstrates that school boards must be vigilant in protecting the personal information of their students, even if such personal information is requested by a parent. The majority of requests to access personal information come from custodial parents of children under 16 who are entitled to access such information under MFIPPA. However, as this case demonstrates,school boards should be prepared to provide the appropriate response to non-custodial parents or other individuals who seek

access to information about children under 16 and cases where any person other than the student him/herself seeks to access information about a student that is 16 or older.

In cases where entitlement to access personal information is not clear due to custodial parenthood of a child under 16, school boards should undertake a careful analysis like the one conducted by the adjudicator in this case. First, school boards should determine whether any of the exceptions under subsection 14(1) apply. If this step necessitates considering whether the exception under subsection 14(1)(f) applies, namely that the disclosure does not constitute an unjustified invasion of personal privacy, school boards should include in their analysis a consideration of whether the nature of the requested information creates a presumption of unjustified invasion of personal privacy under subsection 14(3). Where such a presumption is established, school boards should determine whether any of the exceptions under subsection 14(4) or the public interest exception under section 16 rebut that presumption. As this decision did not provide substantive analysis on the application of these aforementioned exceptions, nor did it discuss the entirety of the MFIPPAscheme, school boards may require legal advice in carrying out this analysis.

By

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