Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3463-I

Appeal MA15-288

Toronto Catholic District School Board

June 30, 2017

Summary: The appellant, a student at a Toronto Catholic District School Board (board) school, made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an investigation into an incident in which he had been involved. The board provided partial access to the responsive records, withholding two records in full on the basis of the discretionary personal privacy exemption at section 38(b) of the *Act*, and section 38(a) in conjunction with the health and safety exemption at section 13. The appellant appealed. In this interim order, the adjudicator partially upholds the board's decision to withhold personal information under section 38(b) and partially upholds its decision to withhold information under section 38(a) in conjunction with section 13. She defers her findings on the application of section 38(a) in conjunction with section 13 to the remaining information pending notification of affected parties.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of "personal information"), 13, 38(a) and 38(b).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

BACKGROUND:

[1] A student at a Toronto Catholic District School Board (board) school, together with his mother, made a request to the board under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act*) for access to records relating to an investigation into an incident in which the student had been involved. The request was for the following records:

A. A complete copy of any and all records generated as a result of the principal's investigation under s. 310 of the Education Act, including but not limited to any emails, handwritten notes, draft reports, witness statements, memoranda, or other similar documents;

B. A copy of any internal TCDSB policies, procedures, directions, instructions or other similar documents with respect to how a principal is expected to conduct an investigation under s. 310 of the Education Act;

C. A complete copy of any and all records relevant to the threat assessment, including the final threat assessment document, any drafts of the threat assessment document, any notes taken during the threat assessment meeting on [specified date], notes from any participants or contributors to the threat assessment, and any emails relevant to the threat assessment;

D. A complete copy of the social worker's notes and records with respect to her provision of services to the appellant during the 2014/15 school year; and

E. A copy of any internal TCDSB policies, procedures, directions, instructions, memoranda or other similar documents with respect to "threat assessments".

[2] The board issued a total of three decisions in response to the request. The student and his mother appealed the board's initial decision to this office, following which the board made its second decision. The effect of the two decisions was to grant access to the records responsive to parts b), d) and e) of the request, but to deny access to the records responsive to items a) and c). In denying access to the latter information, the board maintained that its disclosure could reasonably be expected to seriously threaten the safety or health of an individual, such that the discretionary exemption at section 13 applied. The board also relied on the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] The appeal then moved to the mediation stage, where a mediator discussed the issues with the parties in an attempt to settle some or all of them. During mediation, counsel for the appellants advised the mediator that she was satisfied with the board's decision with respect to parts b), d) and e) of the request, but wished to pursue access to the records responsive to items a) and c). In addition, she advised that she was of the view that additional records should exist, specifically with respect to part a) of the request, including handwritten notes from the principal, emails and witness statements.

[4] The board advised the mediator that it had located additional records responsive to part a) of the request, and issued a third decision letter in which it denied access to them pursuant to sections 13 and 38(b) of the *Act*.

[5] Counsel for the appellants advised the mediator that the appellants wished to pursue the appeal at adjudication and clarified that access is sought to the threat assessment documents and the principal's handwritten investigation notes, but not to the full, non-redacted, principal's investigation report. Additionally, she advised that the possible existence of further records responsive to part a) of the request is no longer an issue.

[6] The appeal was then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act.* I invited and received representations from the board and the appellants' counsel.

[7] Also during the adjudication of this appeal, I identified a potential complication arising out the fact that both the student and his mother had appealed the board's decision. I notified the appellants' counsel of this potential complication,[1] and she consented on behalf of the appellants to having this appeal proceed with the student as the only appellant. My references to the "appellant" in the remainder of this order refer to the student appellant.

[8] In this order, I uphold the board's decision, in part, and find that some of the information at issue is exempt from disclosure pursuant to the personal privacy exemption at section 38(b) of the *Act*. I find, further, that the exemption at section 38(a) in conjunction with the threat to health and safety exemption at section 13 applies to some information. I defer my findings on the application of section 38(a) in conjunction with section 13 to the remaining information pending notification of affected parties.

RECORDS:

[9] The records at issue are the principal's handwritten investigation notes and a package of threat assessment documents.

ISSUES:

A. Do the records 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(b) apply to the personal information at issue?

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[1] I did not elaborate on the nature of the complication and also cannot do so in this order, because to do so would reveal the content of the records.

C. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information at issue?

D. Did the institution exercise its discretion under section 38(b), and/or section 38(a) in conjunction with section 13? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and

> (h) the individual's name if 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] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[2]

[12] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[14] In addition, for information to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

Representations

[15] The appellant submits that information about teachers and other staff members that may be contained in the records does not constitute the personal information of those individuals, as it does not relate to them in their personal capacities, but rather in their professional capacities as employees of the school. The appellant submits that, to the extent that the records identify other students, he is content to have the names of those other students redacted.

[16] The board acknowledges that information contained in the records about those

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

who are identified in a professional capacity (for example, school staff and other members of the threat assessment team) does not meet the definition of personal information in the *Act*.

[17] The board submits, however, that information in the records relating to the subject of the investigation (the appellant) and others constitutes the personal information of these individuals.

Analysis and findings

[18] Having reviewed the records at issue, I find that they contain the appellant's personal information. The records relate to an investigation of which the appellant was the subject. I find that the information about the appellant in this context constitutes recorded information about an identifiable individual, and is therefore his personal information within the meaning of the introductory wording of the definition. Some of the information also constitutes his personal information according to paragraphs (b) and (d) of the definition.

[19] The records also contain information about individuals other than the appellant. They contain personal information of the student's mother, as she was contacted by the school following the incident in question. The information in the records is "about" the mother in her personal capacity, and is therefore her personal information under the introductory wording of the definition. Some of the information also constitutes her personal information according to paragraphs (a) and (d) of the definition.

[20] In addition, the records contain some information relating to other members of the appellant's family, which constitutes their personal information under paragraph (b) of the definition as well as the introductory wording of the definition.

[21] The records also contain the personal information of several students other than the appellant. They contain a description of the events under investigation, as related by the appellant and several other students. Both the fact that the other students were interviewed, and the information they gave to the principal, constitute their personal information according to the introductory wording of the definition, as it is recorded information about an identifiable individual. Moreover, information about their activities on the day in question, as related by themselves or by others, constitutes their personal information under the introductory wording of the definition. In addition, other information about them contained in the records (for example, information regarding their academic and/or behavioural history at the school) is also their personal information.

[22] I acknowledge the appellant's argument that, under paragraph (e) of the definition of personal information, if any the information consists of "views and opinions" of the witnesses about the appellant, the information is only the appellant's information, and not the personal information of the witnesses. However, based on my

review of the records, I find that they do not contain the "views and opinions" of the witnesses about the appellant; rather, they contain the witnesses' observations about the events being investigated. This is the witnesses' personal information.

[23] In order for information to be considered "personal information", the individuals to whom it relates must be identifiable. While I have considered the appellant's implicit submission that redacting the students' names would be sufficient to de-identify them, I find from my review of the records that redacting the individuals' names would not render the individuals unidentifiable. Since the investigation was in respect of a particular incident known to the appellant, these individuals would still be identifiable by virtue of the nature of the information about them, even if their names were redacted.

[24] I agree with the parties' submissions that the information about individuals acting in their professional capacities (for example, school staff) does not generally constitute their personal information. I note however, that if the information would reveal something of a personal nature about the individual, it may still qualify as personal information.[6] There is one instance of this in the records. Otherwise, I find that the information pertaining to individuals acting in their professional capacities is not their personal information. Information that is not personal information cannot be exempt from disclosure under the personal privacy exemption at section 38(b). Therefore, subject to my findings on whether any of this information is exempt from disclosure under section 38(a) in conjunction with section 13 (threat to health and safety), which I address below under Issue C, this information is not exempt from disclosure.

[25] I conclude that the records contain the personal information of the appellant, and that portions of the records also contain the personal information of other individuals.

[26] I will turn next to whether the personal information of the other individuals is exempt from disclosure under the personal privacy exemption at section 38(b) of the *Act.*

Issue B. Does the discretionary exemption at section 38(b) apply to the personal information at issue?

[27] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. In this case, therefore, the appellant has a general right to the records at issue, as they contain his personal information.

[28] Section 38 provides a number of exemptions from this general right of access to one's own personal information. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the

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[6] See Order PO-2225.

information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[7]

[29] I have found above that the records contain the personal information of several individuals other than the appellant. The issue is whether disclosure of this information (the personal information at issue) would be an unjustified invasion of their personal privacy.

[30] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

Section 14(1)

[31] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[32] Section 14(1)(a) is relevant in the circumstances of this appeal, and provides as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[33] I find that the appellant's mother has consented to the disclosure of her personal information to the appellant, as evidenced by a Consent to Divulge signed by her and submitted to the board with the access request. As a result, I find that the disclosure of the mother's personal information to the appellant would not constitute an unjustified invasion of her personal privacy.

[34] Section 14(1)(a) does not apply to the personal information of any of the remaining individuals whose personal information appears in the records, since these individuals have not consented to the disclosure of their information to the appellant.

[35] The parties have not argued the application of any of sections 14(1)(b) through (e), and I find that none of them apply here.

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[7] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

Sections 14(2) and (3)

[36] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office considers and weighs the factors and presumptions in sections 14(2) and (3) and balances the interests of the parties.[8]

Section 14(3) presumptions weighing in favour of non-disclosure

[37] The board cites (but does not appear to rely on) the presumption at section 14(3)(b), which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[38] The board explains that the threat assessment package contains evidence of the police's involvement in the threat assessment process. The board states:

> During incidents such as the one currently being discussed, [board] schools and Toronto Police regularly share information as part of a threat assessment. The limits and specifics of this information-sharing [are] predicated on the assessed threat level, and [are] prescribed by the Toronto Police/School Board Protocol… to which [the board] and Toronto Police Services are joint signatories. *There is, however, no specific indication in the record that police would conduct an investigation as a result of the threat assessment process.* (emphasis added)

[39] The board provided a copy of the Police/School Board Protocol with its representations. Under the protocol, the police are responsible for delivering police services related to young people and the school community. Examples of such services include conducting investigations, assisting victims of crime and assisting in the development of young peoples' understanding of good citizenship.

[40] Section 14(3)(b) can still apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.[9]

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[8] Order MO-2954.
[9] Orders P-242 and MO-2235.

[41] However, based on my review of the records, I agree that there is no indication that the police conducted any investigation into a possible violation of law as a result of the threat assessment process. Further, the board does not argue that the principal's own investigation into the incident in question falls within the section 14(3)(b) presumption. From my review of the records, I agree that the principal's investigation did not constitute an investigation into a possible violation of law within the meaning of section 14(3)(b).

[42] The board does not raise the possible application of any other section 14(3) presumptions, and I find that none apply here.

Section 14(2) factors weighing in favour of non-disclosure

[43] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[10] The factors listed at paragraphs 14(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 14(2)(e) through (i), if present, generally weigh in favour of non-disclosure.

[44] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[11]

[45] I will begin by discussing whether there are any factors weighing in favour of non-disclosure. The board submits that the factors at sections 14(2)(e), (f) and (h) apply. These provisions state:

> 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,
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> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

<u>The board's representations</u>

[46] In arguing that the above-noted factors apply, the board relies on its representations in support of its position that the disclosure of the records could

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[10] Order P-239.
[11] Order P-99.

reasonably be expected to seriously threaten the safety or health of an individual. While I deal with this issue separately below under Issue C, I will also refer to the board's representations here.

[47] The board submits that disclosure of the records at issue could reasonably be expected to result in harm to the individuals named in the documents. It submits that the records were prepared in order to assess the seriousness of a perceived threat to staff and students at the school and to determine a course of action to neutralize the threat. The board submits:

> As part of this assessment, the incidents that led to this perceived threat are frankly discussed, and the staff and students involved in the incident itself are named, and well as those involved in the assessment process….
>
> [T]he records at issue were created in order to investigate a serious incident in which the subject is alleged to have made bullying, violent threats to other students related to his stated involvement in a gang. Once an incident of this nature is reported to the school principal, he or she is compelled to investigate as per the principal's duties under the authority of Part XIII of the *Education Act*. During this investigation, the principal interviewed students involved in the incident and other staff members about the alleged threat. Guaranteed a high level of confidentiality, students and staff members provided frank responses to the principal's questions. The responses, including the personal information of students and staff,[12] were recorded in the principal's notes and formed the basis for the threat assessment that was subsequently initiated, which also included personal information…. Considering the frank responses of the students and staff, and given the nature of the alleged threats originally made by the subject, it is our opinion that the safety of those named in relation to the incident could reasonably be compromised by disclosure.

[48] The board goes on to explain the statutory context within which the principal's investigation took place. The board notes, in particular, that under section 300.3(7) of the *Education Act*, principals who notify parents of incidents where a pupil has been harmed shall not disclose the name of or identifying or personal information about the pupil who has been harmed as a result of the incident except to the extent necessary for the notification.

[49] The board also refers to Ministry of Education Policy/Program Memorandum No. 144, which provides direction to boards in establishing policies and guidelines of bullying prevention and intervention pursuant to Part XIII of the *Education Act*. That

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[12] The board, in its reply representations, abandoned its claim that the information relating to staff constitutes their personal information.

document states:

> Boards must also put in place procedures to allow students to report bullying incidents safely and in a way that will minimize the possibility of reprisal.

The appellant's representations

[50] The appellant points out that there has never been any hearing into the allegations made against him, and that he has always denied the principal's characterization of the events that occurred on the day in question. The appellant offers his version of the incident in question.

[51] The appellant disputes the application of any of the factors at sections 14(2)(e), (f) or (h) to the personal information at issue. With respect to section 14(2)(e), the appellant points out that in order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. The appellant submits that the evidence that the board has provided in this regard is seriously deficient. He points out that he is no longer a current student of the school where the incident took place and has had no discipline issues since leaving the school.

[52] With respect to section 14(2)(f), the appellant submits that there is no reasonable expectation of significant personal distress if the statements of the other students are disclosed, so long as their names are otherwise redacted. The appellant also submits that the board already disclosed considerable information to him when it provided him with a Principal's Report at the conclusion of the principal's investigation (with the names of other students referred to as Peer #1 or Victim #1, for example, rather than by name).

[53] With respect to section 14(2)(h), the appellant submits that the board has given no specific indication of what assurances of confidentiality were given to the individuals in question, or who gave the alleged assurances.

The board's reply representations

[54] In reply, the board points to particular portions of the threat assessment package that, in the board's submission, support its argument that the section 14(2)(e), (f) and (h) factors apply. I cannot be specific without disclosing the contents of the records.

Analysis and findings

[55] I will first consider whether the factor at section 14(2)(f) (highly sensitive) applies. In my view, there is a reasonable expectation that the individuals whose personal information appears in the records will experience significant personal distress if their personal information is disclosed to the appellant. Their personal information

appears in the context of an investigation into an allegation that the appellant made a serious threat against another student. While, as noted by the appellant in his representations, there has not been any hearing into the allegations, this does not alter the sensitive nature of the information collected in the course of the investigation. I find that it is reasonable to expect that these individuals will experience significant personal distress if the personal information gathered about them in the course of the principal's investigation into the incident is disclosed to the appellant.

[56] While I also note the appellant's submission that he is no longer at the school in question, I have no information about his current proximity to the other students whose personal information appears in the records, for example, whether they all moved on to a new school together. In any event, even if there is no current contact between the appellant and the individuals whose personal information appears in the records, this does not alter the highly sensitive nature of the information.

[57] I also make this finding notwithstanding that some information about the incident has already been provided to the appellant in the Principal's Report. I have reviewed the Principal's Report and find that, for the most part, it does not allow inferences to be drawn about which students provided the information to the principal. Even if it did, the information in the records at issue is more detailed and, in my view, more sensitive.

[58] I also find that the personal information relating to certain members of the appellant's family (not his mother) is highly sensitive. I also make this finding with respect to the personal information of one teacher. I cannot be more specific without disclosing the nature of the information.

[59] However, I find that the personal information of individuals other than the appellant that is contained in the appellant's *own* statements is not highly sensitive. Having reviewed the records, I find that to the extent that the appellant's own statements to the principal contain the personal information of others, there is not a reasonable expectation of significant personal distress on the part of these other individuals if the appellant's own statements are released to him.

[60] As a result of my findings after balancing the factors in favour of disclosure against the factors weighing in favour of non-disclosure, below, it is not necessary for me to consider whether the factors at sections 14(2)(e) (pecuniary or other harm) or 14(2)(h) (supplied in confidence) also apply to the personal information at issue, except to observe that, even if these factors apply to some of the information, I find that they do not apply to personal information contained in the appellant's own statements. In my view, it is not foreseeable that any individuals will suffer harm if the appellant receives his own statements, so the factor at section 14(2)(e) does not apply to that information. In addition, the factor at section 14(2)(h) does not apply to any personal information of other individuals that may be contained in the appellant's statements, because the information was supplied by the appellant, not the individuals in question.

Section 14(2) factors weighing in favour of disclosure

[61] I now turn to the question of whether there are factors present that weigh in favour of disclosure. The appellant does not explicitly raise any of the factors listed under section 14(2) weighing in favour of disclosure. However, the appellant's representations implicitly raise the factor at section 14(2)(d), which reads:

> 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,
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> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request

[62] In his representations, the appellant takes issue with the board having released personal information to staff and police for the purposes of the threat assessment process, pursuant to section 32(h) of the *Act.*[13] He states that without access to the records, he is deprived of any opportunity to vindicate his rights in this regard.

[63] Previous orders of this office have found that in order for section 14(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
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> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
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> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[14]

[64] The appellant refers to a potential breach of section 32 of the *Act* on the part of

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[13] Section 32(h) provides:

> An institution shall not disclose personal information in its custody or under its control except,
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> > In compelling circumstances affecting the health or safety of an individual if upon disclosure notification is mailed to the last known address of the individual to whom the information relates;

[14] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

the board. I find, therefore, that the first requirement is met. With respect to the second requirement, however, the appellant refers only in a general sense to vindicating his rights. He has not advised whether any specific proceeding is existing or contemplated.

[65] Even assuming the second requirement is met, however, the appellant has not explained how the contents of the records are required in order for him to vindicate his rights. He is already aware of the fact that the disclosure at issue took place and would appear to be in a position to commence a proceeding, should he wish to do so. In my view, and particularly in light of the limited information I have been given about the manner in which the appellant may intend to vindicate his rights, that proceeding would be the better forum in which to argue the necessity of the disclosure of the records to the appellant. I find, therefore, that the third and fourth requirements are not met. As a result, the factor at section 14(2)(d) does not apply.

[66] The appellant has not raised any other factors listed under section 14(2). However, the list of factors under section 14(2) is not exhaustive. All relevant circumstances must be considered, even if they are not listed under section 14(2). In my view, there are two unlisted factors that are relevant here.

Unlisted factor: fairness to the appellant

[67] The appellant submits that, as a matter of fairness, he is entitled to know the contents of the records, particularly the threat assessment documents, as their contents are highly sensitive and may affect how he is perceived and dealt with by staff for the rest of his high school career. I accept that this is a relevant factor weighing in favour of disclosure. While the board submits that the appeal of the disciplinary action was the appropriate venue in which to disclose relevant information to the appellant, the records at issue contain information beyond that contained in the Principal's Report that was disclosed to the appellant. Moreover, the records are significant to the appellant for purposes beyond his appeal of his suspension. As noted above, he wishes to know, as a matter of fairness, information about him contained in the board's files.

[68] I conclude that this is a factor weighing in favour of the disclosure of the personal information of the individuals in question. However, I have little evidence before me about the extent to which the threat assessment documents are accessible by board staff. Under the circumstances, although I recognize fairness to the appellant as a factor weighing in favour of disclosure, I assign it only moderate weight.

Unlisted factor: some of the withheld information consists of the appellant's own statements

[69] The principal spoke to the appellant in the course of his investigation, and the appellant's statements are contained in the records. In my view, the fact that the appellant himself provided this information is a factor that weighs strongly in favour of

disclosure of these statements to him.

Weighing the section 14(2) factors for and against disclosure

Personal information at issue (other than personal information contained in the appellant's own statements)

[70] I have found that the personal information at issue is highly sensitive (with the exception of any personal information that may appear in the appellant's own statements). I find that this factor weighs strongly in favour of non-disclosure of this information.

[71] On the other hand, I have found that fairness to the appellant is a factor weighing in favour of disclosure. However, balancing these factors, and considering the interests of the parties, I find that the balance tips in favour of the non-disclosure of this information. As a result of the appellant having already received the Principal's Report, he is aware of the allegations against him insofar as the narrative of the incident in question is concerned. As for the personal information in the records relating to matters other than the narrative of the incident in question, I find that this information is not responsive to the fairness issue. An example of such information is background information relating to members of the appellant's family. Having reviewed the records, I find that fairness concerns do not outweigh the highly sensitive nature of the personal information of other individuals. Fairness does not require the disclosure of the personal information of the other individuals to the appellant in this case.

[72] As a result, I find that the disclosure of the personal information at issue, other than personal information contained in the appellant's own statements, would be an unjustified invasion of personal privacy under section 38(b).[15]

Personal information at issue contained in the appellant's own statements

[73] I have found above that none of the factors weighing in favour of non-disclosure relied on by the board apply to the appellant's own statements, since the individuals to whom the information relates will not be exposed unfairly to pecuniary or other harm (section 14(2)(e)), the information is not highly sensitive (section 14(2)(f)), and it was not supplied in confidence by the individuals to whom it relates (section 14(2)(h)).

[74] On the other hand, I have found that fairness to the appellant is a factor that weighs in favour of disclosing the information to the appellant. In addition, the fact that the information appears in the appellant's own statements is a factor strongly favouring disclosure.

[75] Since there are no factors weighing against disclosure of this information and

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[15] Orders M-444 and MO-1323.

there are factors weighing in favour of disclosure, I find that the disclosure of this information would not be an unjustified invasion of personal privacy under section 38(b).[16]

[76] I note that I would have reached the same result applying the "absurd result" principle, discussed below.

Does the absurd result principle apply to any of the information?

[77] Previous orders of this office have found that where the requester originally supplied the information at issue, or is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.

[78] The absurd result principle has been applied where, for example, a requester sought access to his or her own witness statement;[17] the requester was present when the information was provided to the institution;[18] or where the information is otherwise clearly within the requester's knowledge.[19]

[79] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[20]

The appellant's own statements

[80] Even if I had found that the appellant's own statements fall within section 38(b), I find that to withhold this information would be absurd and inconsistent with the purpose of the exemption. Although section 38(b) is designed to protect personal privacy, I find that the personal information of other individuals contained in the appellant's own statements is not particularly sensitive and that its disclosure would not be inconsistent with the purpose of section 38(b). I find, therefore, that it is not exempt from disclosure under section 38(b).

The statements given by the other students to the principal

[81] The appellant argues that the absurd result principle applies in respect of the statements given by the other students to the principal. He submits that the Principal's Report already provided the appellant with a detailed summary of the allegations against the appellant leading to the suspension in question. The appellant submits that

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[16] Furthermore, section 14(4), which lists certain types of records whose disclosure does not constitute an unjustified invasion of personal privacy, has no application to the records at issue in this appeal.
[17] Orders M-444 and M-451.
[18] Orders M-444 and P-1414.
[19] Orders MO-1196, PO-1679 and MO-1755.
[20] Orders M-757, MO-1323 and MO-1378.

it is clear that this information came from the students interviewed by the principal, and that it is absurd to withhold the principal's handwritten notes containing the students' answers to the principal's questions. The appellant also reiterates that the names of the students could be redacted.

[82] I have reviewed the Principal's Report that the appellant received following the principal's investigation, and I find that it does contain information that is similar to some of the information in the records at issue. Therefore, some of the personal information that I have found to be exempt under section 38(b) may already be known to the appellant.

[83] However, in large part, the Principal's Report does not state which student(s) gave the information to the principal, instead using language such as "it is reported that". The manner in which the information is recorded in the Principal's Report tends to make the students less likely to be identified, whereas I have found above that they are reasonably identifiable in the context of the more detailed principal's investigation notes, even if their names are redacted. Moreover, the principal's investigation notes contain more information than the Principal's Report. For these reasons, I am not satisfied that the entire content of the students' statements contained in the principal's investigation notes is already known to the appellant.

[84] Moreover, to the extent that the appellant may already be aware of some of the information in the students' statements, I decline to apply the absurd result principle here, because I find that to do so would be inconsistent with the purpose of the section 38(b) exemption. I have found above that the personal information as a whole is highly sensitive. I therefore decline to apply the absurd result principle to this information.

Conclusion

[85] In summary, I find that the personal information at issue is exempt from disclosure under section 38(b) of the *Act*, with the following exceptions:

- personal information of the appellant's mother
- personal information of others appearing in the appellant's own statements

Given my conclusion on this information, I do not need to consider whether the exemption at section 38(a) in conjunction with the section 13 exemption also applies to it.

[86] I will now consider whether the exemption at section 38(a) in conjunction with the section 13 exemption applies to the remainder of the information in the records.

Issue C. Does the discretionary exemption at section 38(a) in conjunction with the section 13 exemption apply to the information at issue?

[87] As I mentioned above, section 36(1) gives individuals a general right of access to their own personal information held by an institution, subject to the exemptions from this right found in section 38.

[88] Section 38(a) allows for the withholding of information if certain other exemptions would apply to that information. Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[89] Section 38(a) of the *Act* 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 personal information.[21] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[90] In this case, the institution relies on section 38(a) in conjunction with section 13, which states:

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

[91] For this exemption to apply, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[22]

[92] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[23]

Representations of the board

[93] The board submits that the section 13 exemption applies to both records at issue. It submits that the records were used to assess the seriousness of a perceived

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[21] Order M-352.
[22] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[23] Order PO-1817-R.

threat to staff and students at the school, and to determine an appropriate course of action to neutralize the threat. As part of this assessment, the incidents that led to the perceived threat were frankly discussed, and the staff and students involved in the incident, as well as those involved in the assessment process, are named.

[94] The board further submits:

> [The] records at issue were created in order to investigate a serious incident in which the subject is alleged to have made bullying, violent threats to other students related to his stated involvment in a gang. Once an incident of this nature is reported to the school principal, he or she is compelled to investigate as per the principal's duties under the authority of Part XIII of the *Education Act*. During the investigation, the principal interviewed students involved in the incident and other staff members about the alleged threat. Guaranteed a high level of confidentiality, students and staff members provided frank responses to the principal's questions. The responses, including the personal information of students and staff,[24] were recorded in the principal's notes and formed the basis for the threat assessment that was subsequently initiated, which also included personal information. In this [instance], considering the frank responses of the students and staff, and given the nature of the alleged threat originally made by the subject it is our opinion that the safety of those named in relation to the incident could reasonably be compromised by disclosure.

[95] The board goes on to elaborate on the confidentiality inherent in the notification process involved in investigations under the *Education Act.* As noted above under Issue B, the board refers to Policy/Program Memorandum No. 144 from the Ministry of Education to school boards, which states:

> Boards must … put in place procedures to allow students to report bullying incidents safely and in a way that will minimize the possibility of reprisal.

[96] The board also refers to its duty as an employer under the *Occupational Health and Safety Act* to maintain the safety of its school workers. The board submits that the records at issue must remain confidential in their entirety in order to fulfill its obligations to maintain the safety of its school workers.

Representations of the appellant

[97] The appellant relies on *Ontario (Community Safety and Correctional Services) v.*

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[24] As indicated above, the board, in its reply representations, abandoned its claim that the information relating to staff constitutes their personal information.

Ontario (Information and Privacy Commissioner)[25] and submits that, in order to make out this exemption, the board must establish that:

1. There is a reasonable basis for concluding that disclosure could be expected to seriously threaten the safety or health of an individual;

2. The board's reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. In other words, the risk of harm is beyond the merely possible or speculative; and

3. There is detailed and convincing evidence about the potential for harm. The board must provide evidence "well beyond" or "considerably above" a mere possibility of harm.

[98] The appellant submits that the board has provided almost no detail to support its position. The appellant notes, in particular, that the board does not submit that he has made any threat to staff. The appellant submits that, at their highest, the board's submissions contain nothing more than vague statements and a subjective belief that there is a safety threat. The appellant submits that the board has not met its burden of establishing that section 13 of the *Act* applies to the records at issue.

[99] The appellant notes that he is no longer a student at the school and does not have any contact with staff from his former school. He notes, further, that even the incident in question ultimately only resulted in a seven-day suspension, and the principal did not recommend his expulsion, nor did he attempt to exclude him from the school. The appellant submits that the school's actions do not support the characterization of him as a serious threat.

Reply representations of the board

[100] In reply, the board refers to specific information contained in the threat assessment documents which, in the board's view, supports its submission that the records are exempt under section 13. I cannot elaborate, because to do so would reveal the contents of the record.

Analysis and findings

[101] The information remaining at issue consists of all the information in the records other than the personal information that I have found to be exempt under section 38(b).

[102] The party with the burden of proof under section 13, that is, the party resisting disclosure, must demonstrate a risk of harm that is well beyond the merely possible or

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[25] Cited above.

speculative although it need not prove that disclosure will in fact result in such harm.

[103] I have carefully reviewed the records at issue and the parties' representations. For the reasons set out below, I find that some of the information in the records is exempt from disclosure under section 38(a), read in conjuction with section 13.

[104] Section 13 requires that any threat to health and safety be a result of disclosure of the records at issue. Bearing this in mind, I find that there is a particular type of information in the records to which section 13 applies. Various members of the threat assessment team offered their opinions as to the level of risk posed by the appellant. In my view, this information has the potential to be inflammatory. Although the evidence before me does not suggest that the appellant has ever made specific threats against any members of the threat assessment team, there is other information in the records that leads me to conclude that disclosure of this particular information could reasonably be expected to seriously threaten the safety or health of those who offered those opinions. While I cannot refer to the substance of that information, it is found on page 19 of the first set of numbered pages of the threat assessment package and on pages 4, 5 and 6 of the second set of numbered pages in the threat assessment package. In my view, in light of this information, the risk of harm in this case goes well beyond the merely possible or speculative.

[105] In coming to my conclusion, I have also taken into account and weighed the appellant's submission that since moving on to a new school, he has received no suspensions or other disciplinary action, and has received universally positive feedback from his teachers. However, weighing this evidence against the evidence referred to above, I am satisfied that the risk of harm in this case goes well beyond the merely possible or speculative. The Supreme Court has stated that in the case of harms-based exemptions under freedom of information legislation, how much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[26] Here, the potential consequence is a serious threat to personal safety. Weighing all of the evidence in the record before me, I find that disclosure of the identifying information associated with each opinion could reasonably be expected to seriously threaten the safety or health of an individual.

[106] I find, therefore, that the identifying information associated with each opinion is exempt from disclosure pursuant to section 38(a) in conjunction with section 13. Because there were a number of members on the threat assessment team, and based on my review of the opinions themselves, I find that, for the most part, it is not reasonable to expect that the holders of the opinions will be identified if their names are severed. However, the opinions themselves are exempt in a few areas of the records where the holder of the opinion would be identifiable from a review of the opinion itself.

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[26] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[107] In conclusion, I find that the exemption at section 38(a), read in conjuction with section 13 of the *Act* applies to identifying information associated with the threat assessment team members' opinions on the level of risk posed by the appellant.

[108] However, the other information remaining at issue, and for which the board claims the section 38(a) exemption in conjunction with section 13, is qualitatively different. It does not contain the opinions of identifiable threat assessment team members about the level of risk posed by the appellant. For example, some of it is factual information relayed by the threat assessment team members, and other information consists of standard template forms.

[109] Before making a decision with respect to the applicability of section 38(a) in conjuction with section 13 to this remaining information, I have decided to notify various professionals mentioned in the records.

Issue D. Did the institution exercise its discretion under section 38(b), and section 38(a) in conjunction with section 13? If so, should this office uphold the exercise of discretion?

[110] The exemptions at sections 38(b), and section 38(a) in conjuction with section 13 are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[111] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations.

[112] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] This office may not, however, substitute its own discretion for that of the institution.[28]

Relevant considerations

[113] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[29]

- the purposes of the *Act*, including the principles that
    - information should be available to the public

[27] Order MO-1573.
[28] Section 43(2).
[29] Orders P-344 and MO-1573.

  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her 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
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[114] The board submits that it exercised its discretion based on relevant considerations, including the appellant's right of access to his own personal information, the principle that the privacy of individuals should be protected, the relationship between the appellant and any affected parties, and the nature of the information and the extent to which it is sensitive to any party.

[115] The board acknowledges its statutory duty to provide individuals access to their own personal information, but submits that the context in which the records were created is important.

[116] The appellant submits that the board's exercise of discretion was unreasonable because it relied on irrelevant factors. The appellant submits that, while the board has explained how the threat assessment documents are important to it, it has not explained why this justified withholding them. The appellant also reiterates his submission that the personal information of the other students is not exempt under section 38(b).

[117] The appellant submits, further, that the board failed to take into account relevant

factors, such as the compelling need on the part of the appellant to access the information or the extent to which disclosure would increase public confidence in the board.

Analysis and conclusion

[118] Having reviewed the records and the parties' representations, I find that the board appropriately exercised its discretion in withholding the information that I have found to be exempt from disclosure. The board took into account the appellant's right of access to his own personal information, but also the privacy interests of the other individuals. In my view, the board appropriately took into account the context in which the statements were given in exercising its discretion to withhold the personal information of the other students.

[119] From my review of the board's representations in their entirety, I am satisfied that, although the board may not have enumerated all factors it considered in its exercise of discretion, it did not fail to consider relevant factors. I am also satisfied that the board did not take into account any irrelevant factors in exercising its discretion to withhold information under section 38(b), nor did it exercise its discretion in bad faith or for an improper purpose. I also do not share the appellant's concern that the board relied on irrelevant factors in withholding the information that I have found to be exempt under section 38(a) in conjunction with section 13.

[120] I uphold the board's exercise of discretion.

ORDER:

1. I uphold the board's decision, in part, and find that portions of the records at issue are exempt from disclosure pursuant to section 38(b) of the *Act* as well as section 38(a) in conjunction with section 13 of the *Act*. With the board's copy of this order, I am providing a copy of the records with the information exempt under section 38(b) highlighted in yellow, and the information exempt under section 38(a) in conjunction with section 13 highlighted in blue.

2. I defer my findings about the application of section 38(a) in conjunction with section 13 to the remaining information pending notification of affected parties.

Original Signed by: June 30, 2017

Gillian Shaw
Adjudicator