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

ORDER MO-2486

Appeal MA08-378

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> Detailed/ Relevant/ Applicable/ Specific email correspondence/ Internal TDSB memorandums/ Internal TDSB notes/ Internal TDSB written correspondence between all levels of TDSB hierarchy.

The requester subsequently clarified that he was interested in records related to the Board's decision or "authorization" to disclose a December 21, 2007 letter of complaint he had written to the Board Superintendent regarding an incident at a school event. The Board identified five records as responsive to the request, and issued a decision denying access to them, in their entirety, pursuant to section 12 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed the Board's decision to this office and a mediator was appointed to explore resolution of the issues. As the responsive records appeared to contain the appellant's personal information, sections 38(a) and (b) (discretion to refuse requester's personal information) were added as issues at the suggestion of the mediator. Accordingly, the possible application of section 38(a), together with section 12, and section 38(b), in conjunction with section 14(1), to the records will be reviewed in this appeal.

As it was not possible to resolve the appeal through mediation, it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

After the appeal was transferred, this office received correspondence from the appellant regarding the mediator's report, which included comments about a concurrent privacy complaint related to the disclosure of his letter to the Board Superintendant. At that time, I confirmed with the parties that this appeal, and my inquiry under the *Act*, is limited to reviewing the Board's decision respecting access to the records responsive to the appellant's request.

In addition, I drew the Board's attention to the fact that it had not issued a decision letter to the appellant citing its reliance on sections 38(a) and 38(b) of the *Act*. Subsequently, the Board issued a revised decision letter. Upon receipt of a copy of the revised decision letter, I sent a Notice of Inquiry to the Board initially, outlining the facts and the issues, and seeking representations, which I received. After addressing issues related to the sharing of the Board's representations with the appellant, I sent a modified Notice of Inquiry, along with the non-confidential representations of the Board, to the appellant to invite representations. The appellant chose not to submit representations.

RECORDS:

The five records at issue in this appeal consist of emails, memos and work log entries, totalling seven pages.

DISCUSSION:

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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 exemptions from this right. In circumstances where the record contains the appellant's personal information, the relevant exemption for section 12, as claimed in this appeal, is section 38(a) in Part II of the *Act*, which states:

> 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.

However, as a preliminary determination in deciding what sections of the *Act* may apply, it is necessary to determine whether the record contains "personal information" and, if so, to whom it belongs. In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual," and various examples are outlined by paragraphs (a) to (h). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. 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 [Orders P-1409, R-980015, PO-2225].

Although representations were requested from the parties on this issue, the Board did not make any submissions on this issue. Moreover, as noted, the appellant did not provide representations in response to the Notice of Inquiry.

Findings

On my own review of the records, I find that they contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a) (age, sex, martial or family status), (e) (personal opinions or views), (g) (views or opinions about him), and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*.

There is also personal information about other identifiable individuals in the records that falls under the following paragraphs of the definition: (a) (age, sex, marital or family status), (e) (personal opinions or views), and (h) (names, with other personal information relating to these individuals).

In summary, I find that the records contain the mixed personal information of both the appellant and other identifiable individuals. I will first review the possible application of section 38(a), in conjunction with section 12, to the records.

SOLICITOR-CLIENT PRIVILEGE

In view of my findings above, the Board's exemption claim for the records at issue in this appeal falls under section 38(a), read in conjunction with section 12. The discretionary exemption in section 12 of the *Act* states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches. Branch 1 arises from the common law. Branch 2 is a statutory privilege. The onus is on the Board to establish that at least one branch applies. In this appeal, the Board claims that both branches of section 12 apply.

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. The statutory solicitor-client communication privilege in Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

The common law and statutory exemption privileges, although not necessarily identical, exist for similar reasons.

Representations

The Board submits that both branches of the solicitor-client communication privilege exemption apply to the five records at issue, which are described in the following manner: Records 1 and 3 are email communications sent by the school principal to internal Board legal counsel, that were prepared for the purpose of seeking legal advice; Records 2 and 4 are memos to file prepared by the Board's internal legal counsel summarizing discussion with the school principal and the legal advice provided "on the [Board's] rights and obligations;" and Record 5 is an excerpt from the school principal's work log book summarizing the legal advice received from internal Board counsel.

The Board takes the position that, "in most cases, the test for protection under Branch 2 will be the threshold for protection" since only two criteria need to be met; namely, that the record must be prepared by or for Board counsel, and that it must be prepared for use in giving advice or in contemplation of or for use in litigation.

Referring to *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* [(2002), 62 O.R. (3d) 167 (C.A.), *"Big Canoe 2002"*], the Board submits that the common law requirement (under Branch 1) that it must be shown that the communication was made in confidence does not apply. According to the Board, this "reflects a simplifying presumption of confidentiality which is consistent with the expansive purpose of the Branch 2 privilege."

The Board continues by noting that:

> Although the Branch 2 privilege may generally be easier to meet, Branch 1 will be significant to claims of privilege based on communications that are neither prepared by nor for Crown [Board] counsel, but reveal Crown [Board] counsel's advice directly or by inference: see *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at para 9, and as in PO-2087-I at p. 7.

The Board asserts that there has been no waiver of privilege. The Board takes the position, based on *Big Canoe 2006* [*Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)], that a finding of waiver under Branch 2 privilege is precluded because waiver is not expressly contemplated by the language of Branch 2. Moreover, the Board also argues that the principle of severance may not be applied to a record once it is established that the record is subject to privilege, since the entire communication is exempt, including any factual information contained in the communication.

As noted previously, the appellant did not provide representations to this office for my review in this appeal.

Analysis and Findings

The discretionary exemption in section 12 contains two branches. Given the Board's claim that both branches of the exemption apply, it was required to establish that one or the other (or both) branches apply. Based on my own review of the records at issue in this appeal, and the Board's representations, I will uphold the Board's exemption claim under Branch 2 of section 12.

To support the application of Branch 2 of the section 12 exemption, the Board was required to provide sufficient evidence to establish that the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation."

First, I am satisfied that the individual from whom the legal advice was sought regarding the subject matter of the appellant's complaint is an individual employed or retained as legal counsel

by the Board. Accordingly, I find that the Board's internal legal counsel is in a solicitor-client relationship with the school principal, who is also a Board employee.

As previously noted, Records 1 and 3 are email communications written by the school principal and sent directly to Board legal counsel. Based on my review of the contents of these records, I find that they are directly related to the seeking or receiving of legal advice from the Board's legal counsel. I am also satisfied that Records 2 and 4, the internal memos prepared by the Board's legal counsel, are directly related to the seeking, formulating or giving of legal advice as they summarize this individual's advice to the school principal. I find, therefore, that Records 1 through 4 qualify for exemption under Branch 2 as they pertain to the legal issues surrounding the incident and resulting complaint, including potential responses to the complaint by the school's administration.

Record 5 is a work log book entry prepared by the school principal that does not on the face of it reflect a written communication between a solicitor and client. It was not prepared "by or for" counsel for the Board for use in giving or seeking legal advice. However, based on my review of the contents of the record, I am satisfied that its disclosure would reveal the same legal advice provided by Board counsel that appears in Record 4, which I have found to be exempt under section 12. Accordingly, I find that Record 5 contains legal advice and is properly withheld under section 12 for the same reasons as those given with Record 4.

In addition, I agree with the Board's submission respecting the severability of records found to be subject to privilege. In view of my finding that the records are exempt under Branch 2 of section 12 as solicitor-client privileged communications, the entire communication reflected in each of the records is privileged and not, therefore, capable of severance, notwithstanding the fact that the records may contain the appellant's own personal information. This is in accordance with the views expressed by the Divisional Court in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* [(1997), 46 Admin. L.R. (2d) 115]: that is, the solicitor-client privilege exemption is "class-based" and is, "one that protects the entire communication and not merely those specific items which involve actual advice."

Therefore, subject to my findings on the Board's exercise of discretion, I find that the records are exempt under section 38(a) in conjunction with section 12.

EXERCISE OF DISCRETION

After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. Section 38(a) is discretionary and the Board would be permitted to disclose information pursuant to it, despite the fact that it could withhold it.

An institution must exercise its discretion. On appeal, the Commissioner or her delegate may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it takes into account irrelevant considerations or fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper

considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Representations

The Board submits that it exercised its discretion in good faith and with regard to the relevant considerations, including the purpose of the solicitor-client privilege exemption and the interests protected by it. The Board states that it considered that "if the records were disclosed, the disclosure would reveal highly-sensitive deliberations within the legal advisory context." According to the Board, it also considered that disclosure could potentially compromise the "zone of privacy" the Board currently enjoys under section 12 of the *Act* to obtain confidential legal advice on its rights and obligations without interference.

Findings

I have considered the overall circumstances of this appeal, including the content of the records. Having regard to the Board's representations, I am satisfied that it exercised its discretion properly and with consideration of only relevant factors in choosing to withhold the records that I have found subject to solicitor-client communication privilege. I am also satisfied that the Board did not exercise its discretion in bad faith or take into account irrelevant factors. As I have noted, as long as the Board exercises its discretion considering relevant factors, this office will not intervene.

In the circumstances of this appeal, I do not find anything improper in the Board's exercise of discretion, and I will not interfere with it on appeal. Consequently, I find that the information withheld pursuant to section 12 is exempt under section 38(a) of the *Act*.

Given that I have found that the records are exempt under section 38(a) of the *Act*, it is not necessary to consider whether they are also exempt under section 38(b).

ORDER:

I uphold the Board's decision to deny access to the records.

Original signed by: December 17, 2009
Daphne Loukidelis
Adjudicator