

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3301-F

Appeal MA14-159

Limestone District School Board

March 29, 2016

Summary: The appellant submitted a request to the board under the *Act* for records relating to trustee conflict of interest. The board denied access to the records on the basis of the discretionary exemption for solicitor-client communications found at section 12 of the *Act* and the discretionary exemption for advice and recommendations at section 7(1). In Interim Order MO-3253-I, the adjudicator partially upheld the board's decision. For one record, she deferred consideration of the application the section 7(2) exceptions to the section 7(1) exemption pending receipt of further representations on the application of the section 7(2)(j) exception. In this order, the adjudicator finds that the record is not a "report", and the section 7(2)(j) exception, therefore, does not apply. She partially upholds the board's decision to withhold the record under section 7(1) and orders the disclosure of non-exempt information in the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 7(2)(j).

Orders Considered: Order PO-3111.

BACKGROUND:

[1] The Limestone District School Board (the board) adopted a controversial plan to close two schools and consolidate them in a new school, contingent on funding. The chair of the Program and Accommodation Committee (PARC), which proposed the plan, was a board trustee whom the appellant believes was in a conflict of interest.

[2] The appellant, who was one of many individuals opposed to the plan, made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- Letters, emails, reports, opinions other correspondence related to legal opinions regarding Trustee actual, perceived or possible conflict of interest between June 2011 and Feb 2014
- Invoices, statement of account, record of payment of legal fees related to the above matters

[3] The board denied access to the records on the basis of the discretionary exemption for solicitor-client communications found at section 12 of the *Act* and the discretionary exemption for advice and recommendations at section 7(1).

[4] The appellant appealed the board's decision to this office. I sought and received representations on all issues, including the potential application of the public interest override, which had been raised by the appellant. In Interim Order MO-3253-I, I partially upheld the board's decision to withhold records pursuant to sections 7(1) and 12 of the *Act*.

[5] I deferred my full findings on record 1. I found that record 1 was exempt, in part, pursuant to section 12, and I also found that section 7(1) applies to record 1, in part. However, I deferred consideration of the application the section 7(2) exceptions to the section 7(1) exemption pending receipt of further representations on the section 7(2)(j) exception. The board filed representations, which were adopted by the Ontario Public School Boards' Association (OPSBA). The appellant did not file representations.

[6] In this order, I find that the exception at section 7(2)(j) does not apply to record 1, but that the exception at section 7(2)(a) applies to part of it. I confirm that the record is exempt from disclosure, in part, pursuant to section 7(1) (as well as being exempt from disclosure, in part, pursuant to section 12), and that the public interest override at section 16 does not apply to it. I order the board to sever and disclose those portions of record 1 that can be disclosed without revealing exempt information.

RECORD:

[7] The only record at issue is record 1, an email and attachment from the Ontario Public School Boards' Association (OPSBA) that was received by, among others, the board. This record is one of several that were attached to record 2, a report prepared by the board's Director of Education and addressed to its trustees.

[8] In Interim Order MO-3253-I, I found that record 1 was exempt from disclosure, in part, pursuant to the solicitor-client privilege exemption at section 12 of the *Act*. The information remaining at issue consists of the portions of record 1 that are not exempt

under section 12.

ISSUES:

- A. Do any of the section 7(2) exceptions to the discretionary exemption for advice and recommendations at section 7(1), including the section 7(2)(j) exception, apply to record 1?
- B. Did the board exercise its discretion under 7(1) of the *Act*? If so, should this office uphold the exercise of discretion?
- C. Is there a compelling public interest in disclosure of record 1 that clearly outweighs the purpose of the section 7(1) exemption?

DISCUSSION:

Issue A: Do any of the section 7(2) exceptions to the discretionary exemption for advice and recommendations at section 7(1), including the section 7(2)(j) exception, apply to record 1?

[9] Section 7(1) of the *Act* states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[10] In Interim Order MO-3253-I, I found as follows:

Having reviewed record 1 and the board's representations, I find that it reveals advice and recommendations.... I find that record 1 contains one of the policy options presented to the trustees by the Director of Education. Disclosure of record 1, therefore, would permit the drawing of accurate inferences as to the nature of the advice contained in record 2. Record 1, in fact, forms part of the advice provided in record 2.

... I find that disclosure of the draft document [the attachment in record 1] that forms part of record 1 would reveal the advice of the Director of Education to the trustees. Some of the advice reflected in the draft document is repeated in the email, and disclosure of those portions of the email, too, would reveal the advice of the Director of Education. Accordingly, subject to the consideration of the exceptions to the exemption found at section 7(2), and particularly the exception at section 7(2)(j), I find that record 1 meets the requirements for exemption under section 7(1) of the *Act*.

[11] Section 7(2) states in part:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual information;

(j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

[12] Section 7(2)(j) has three essential requirements:

(1) the record must be a "report" of a "committee, council or other body";

This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.¹

(2) the committee, council or other body must be "attached to" an institution;

A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution.²

(3) the committee, council or other body must have been established "for the purpose of undertaking inquiries and making reports or recommendations to the institution".³

I begin my addressing section 7(2)(j), and will then address section 7(2)(a).

Representations

[13] The board provided representations which were adopted by the OPSBA. The appellant did not file representations.

[14] The board submits that the OPSBA, a corporation without share capital, is a non-profit organization that represents public district school boards and public school

¹ Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

² Order PO-2681; PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, cited above; and Order PO-1823.

³ Order PO-2681.

authorities across Ontario. The OPSBA was created in 1988 because of the need for public school boards to cooperate on issues of mutual concern and benefit. Its members include public district school boards and public school authorities in Ontario. Membership in the OPSBA is voluntary and each school board or school authority pays a fee to be a member. The OPSBA receives no funding from the Ontario government.

[15] The board submits that the OPSBA advocates on behalf of the best interests and needs of the public school system in Ontario, and is seen as the credible voice of public education in Ontario. It is routinely called on by the provincial government for input and advice on legislation and the impact of government policy directions.

[16] The board submits that the OPSBA is a coordinated voice for public education on behalf of member school boards, and provides assistance to its member school boards with respect to common issues. In addition, pursuant to the recent enactment of the *School Boards Collective Bargaining Act*, the OPSBA is the designated employer bargaining agency for English-language public district school boards for "central bargaining".

[17] The board submits that the OPSBA is not an organization which is created by statute. Rather, it exists pursuant to a constitution and by-laws, and collects membership fees from its member school boards. There is no mandatory membership in OPSBA and each public school board is free to join or not join OPSBA and to withdraw its membership at any time.

[18] The board submits that pursuant to section 3.03 of the OPSBA's constitution, each member school board appoints a trustee as a "delegate" to the OPSBA. The affairs of the OPSBA are overseen and managed by a Board of Directors. Pursuant to section 9 of the constitution, each member board is entitled to appoint a trustee to the Board of Directors, with provisions being made for larger school boards to be able to appoint more than one trustee.

[19] The board also provided the following representations on each of the three section 7(2)(j) requirements.

Report of a committee, council or other body

[20] The board submits that record 1 contains an email and a draft document which was developed by the OPSBA with the intent of providing member school boards with a template document they could utilize in developing their similar documents. The board submits that the record is not a "report" as that term is generally understood within the meaning of section 7(2)(j). It is not a collation of information, as any documents considered by the OPSBA in drafting the template do not form any part of the information provided. It is simply OPSBA's advice regarding a draft document embedded with policy options.

[21] The board also notes that this was the first of a few drafts of the document and

therefore does not meet the requisite degree of formalization in order to fall within the definition of "report".

Attached to the institution

[22] The board submits that the OPSBA is an entirely separate and distinct organization from the board and is not in any way, statutorily or otherwise, "attached" to the board. It submits that although previous orders have found that a body can be considered attached to an institution, even if it maintains "some degree of independence", the OPSBA's independence goes well beyond "some degree of independence" from the board. The board submits that it exercises no control over the OPSBA and it is only one of approximately 31 public school boards who are paying members of the OPSBA.

[23] The board notes that in Order PO-1709, the adjudicator determined that the Health Professions Regulatory Advisory Council ("HPRAC") was attached to the Ministry of Health⁴ and cited a number of reasons for that finding. The board submits that the reasons cited for that finding focus on both the statutory connection between the ministry and the HPRAC and the level of control the ministry or minister had over the HPRAC.

[24] The board submits that there is no statutory connection between the OPSBA and the board. It submits that the OPSBA was not created by statute and the only statutory obligation OPSBA has is with respect to central collective agreement negotiations, an issue which is not relevant to record 1.

[25] The board submits that the only direct connection between it and the OPSBA is that the board is a member school board and that a trustee of the board is, pursuant to the constitution, on the OPSBA's Board of Directors. The board has only one vote on the Board of Directors of the OPSBA and accordingly cannot unilaterally direct the activities of OPSBA or appoint staff.

Established for the purpose of undertaking inquiries and making reports or recommendations to the institution

[26] The board submits that the OPSBA was not established to undertake inquiries and make reports or recommendations to the board or any of its other members. Rather, the OPSBA was established to be an advocate for public education and its member school boards. It promotes public education in Ontario and, for issues which are common across school boards, it provides assistance to school boards.

[27] The board submits that the typical assistance the OPSBA would provide to the board is the assistance provided in record 1 - providing a draft template document on

⁴ Now the Ministry of Health and Long-Term Care.

an issue which was common among school boards. The OPSBA submits that it provides assistance only; it does not undertake inquiries on behalf of the board, nor does it make recommendations to the board. It submits that the draft template in record 1 had various options imbedded in it that are in the nature of policy options that individual school boards could choose to adopt or not. Therefore, the template was advice and not a recommendation.

Analysis and findings

Report of a committee, council or other body

[28] I must first consider whether record 1 is a report. The word "report" appears in several parts of section 7(2), and this office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.⁵

[29] As noted above, record 1 consists of an email sent by the OPSBA, attaching a draft template document and soliciting feedback from its member school boards about the draft.

[30] In Order PO-3111, Adjudicator Laurel Cropley had to decide whether draft recommendations were subject to the exception at section 13(2)(f) of the provincial *Act*. In finding that they were not, Adjudicator Cropley stated:

I find that none of the records at issue in this discussion constitute a "report" within the meaning of this term as defined above. As noted above, the records at issue contain drafts of recommendations that have been provided to ministry staff for discussion purposes or contain the comments and recommendations of ministry staff as part of the on-going development of government policy-making. None of the records contains a formal statement or account of the results of the collation and consideration of information. On this basis, I find that the exception at section 13(2)(f) does not apply.

[31] I agree with Adjudicator Cropley's reasoning and apply it to the record before me. Having carefully reviewed record 1, I agree with the board that it does not constitute a "report" within the meaning of this term as defined above. It is clear from the face of the record that further drafts of the attached document were contemplated, and the board has confirmed that further drafts were prepared. I find that the record is part of the ongoing back-and-forth between the OPSBA and its member boards in the OPSBA's development of a particular template document for use or modification by its member boards. The record is relatively informal in nature, and contains little in the

⁵ Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

way of consideration or analysis of information. I find that this is not the type of record that constitutes a "report" for the purposes of the *Act*.

[32] Given my conclusion, I do not need to consider whether the OPSBA is a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution.

[33] I find, therefore, that the section 7(2)(j) exception to the section 7(1) exemption does not apply. Furthermore, none of the parties suggested that any of the other exceptions at sections 7(2)(b) through (k) apply, and I find that they do not.

[34] However, although the board submitted in its original representations that none of the section 7(2) exceptions apply, I find that some of the information in record 1 constitutes factual material which, pursuant to the exception at section 7(2)(a), should be disclosed. I also find that any other information that can be severed and disclosed without revealing the exempt information should also be disclosed.⁶ I will, therefore, order the board to disclose a severed copy of record 1 to the appellant.

Issue B: Did the institution exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[35] The section 7(1) exemption is discretionary, and permits 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

[38] In Interim Order MO-3253-I, I upheld the board's exercise of discretion, finding that, in deciding to withhold portions of records 2 through 7, it took into account relevant considerations and that there was no evidence that it acted in bad faith or for an improper purpose. For the same reasons, I uphold the board's exercise of discretion in withholding record 1 under section 7(1). The board expressly considered the fact that it is a public body, but it was also legitimate for it to consider the age of the information

⁶ See section 4(2) of the *Act*.

⁷ Order MO-1573.

⁸ Section 43(2).

and the fact that the records do not contain any of the appellant's personal information. I see no error in its implicit assessment that these factors outweigh any potential public interest in disclosure of the records.

[39] Therefore, I uphold the board's exercise of discretion.

Issue C: Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 7(1) exemption?

[40] The appellant raised the possible application of the public interest override at section 16 of the *Act*, which states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[41] In Interim Order MO-3253-I, after considering the parties' submissions, I found that the public interest override did not apply to the records at issue:

I accept that there is a public interest in knowing whether decisions that will lead to school closures have been undertaken in a procedurally fair manner, including whether the decision makers are in a conflict of interest. As noted above, the appellant argues that disclosure is desirable in the public interest because on the one hand, if there is no conflict of interest, then transparency should help put the matter to rest and restore public confidence in our elected officials. She argues that if, on the other hand, there is actual or perceived conflict of interest then there is a public interest in disclosure of this fact.

I find, however, that records 2, 2D and 2F do not respond to the applicable public interest raised by the appellant.⁹ Disclosure of these records would not shed any light whatsoever on whether the named trustee was or was not in a conflict of interest as the Chair of PARC or in any other capacity. None of them contain any reference to the trustee or any information about whether she was in a conflict of interest.

I find, therefore, that there is no public interest, compelling or otherwise, in the disclosure of these records...

Since I have found that there is no compelling public interest in disclosure of these records, I ... do not need to consider whether any public interest in their disclosure outweighs the purpose of the section 7(1) exemption.

⁹ See Orders MO-1994 and PO-2607.

[42] I find that similar reasoning applies with respect to record 1. Record 1 does not respond to the applicable public interest raised by the appellant. Disclosure of record 1 would not shed any light on whether the named trustee was or was not in a conflict of interest as the Chair of PARC or in any other capacity.

[43] I conclude that the public interest override at section 16 does not apply to record

ORDER:

1. I uphold the board's decision to withhold record 1, in part.
2. I order the board to disclose a severed copy of record 1 to the appellant, by **April 26, 2016**. A copy of record 1, with the information to be withheld highlighted in yellow, is being provided to the board with its copy of this Order. The highlighted portions include the information that was found in Interim Order MO-3253-I to be exempt under section 12 of the *Act*.
3. In order to verify compliance with provisions 1 and 2 of this Order, I reserve the right to require the board to provide me with a copy of the record provided to the appellant.

Original Signed by: _____
Gillian Shaw
Adjudicator

_____ March 29, 2016