

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3388

Appeal MA15-577

York Catholic District School Board

December 13, 2016

**Summary:** The York Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for copies of complaints made against the requester. The board denied access to the records, relying on the discretionary personal privacy exemption in section 38(b). This order upholds the board's decision except for one record that does not contain the personal information of other identifiable individuals.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 38(b), 14(2)(e), (f) and (h).

### OVERVIEW:

[1] The York Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the following:

Any and all documentation regarding complaints made against [the requester] during the 2014/2015 school year at [named school]. Ensure dates and names are inclusive of the request.

[2] The board located records responsive to the request and issued a decision to the requester denying access to the records in full pursuant to the mandatory personal

privacy exemption in section 14(1) of the *Act*.

[3] The requester (now the appellant) appealed the board's decision.

[4] During mediation, the board advised the mediator that it was maintaining its position that the information should be denied pursuant to section 14(1) of the *Act*. In addition, the board advised that, as the records may contain the personal information of the appellant, the discretionary personal privacy exemption in section 38(b) would also apply to these records.

[5] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[6] I received representations from the board, the appellant and an individual whose personal information may be contained in the records (the affected person). These representations were shared with the parties in accordance with section 7 of the IPC's<sup>1</sup> *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I partly uphold the board's decision under section 38(b).

## **RECORDS:**

[8] The records remaining at issue consist of emails and letters containing information about complaints made against the appellant by other parents<sup>2</sup> of students in a specific school.

## **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 personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

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<sup>1</sup> The Information and Privacy Commissioner, Ontario, Canada.

<sup>2</sup> These other parents are also referred to as the complainants in this order.

## **DISCUSSION:**

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

[9] 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;

[10] 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.<sup>3</sup>

[11] Sections 2(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.

[12] 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.<sup>4</sup>

[13] 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.<sup>5</sup>

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>6</sup>

[15] None of the parties addressed this issue directly in their representations. Based on my review of the records, I find that all of the records contain the personal information of identifiable individuals, including the appellant. This information consists of information about family status, educational history, personal email addresses, personal telephone numbers, personal opinions or views, correspondence that is private or confidential, and names where disclosure would reveal other personal information about the individual in accordance with the definition of personal information in section 2(1) as set out above.

[16] I find, however, that one of the records at issue does not contain the personal information of identifiable individuals in their personal capacity, other than that of the appellant and her minor child. The other identifiable individuals in this record are all board employees. This record is an email from the affected person to other board

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<sup>3</sup> Order 11.

<sup>4</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>6</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

employees about the appellant and her child.<sup>7</sup> The information in the record is that of the affected person and the other board employees<sup>8</sup> in their professional capacity and I find that disclosure would not reveal something of a personal nature about the affected person or the other board employees. Therefore, I find that this information is not these board employees' personal information.

[17] As this one record does not contain the personal information of other identifiable individuals the personal privacy exemption in section 38(b) cannot apply. As no mandatory exemptions apply and no other discretionary exemptions have been claimed for this one record, I will order disclosure of this one record that does not reveal the personal information of other identifiable individuals.<sup>9</sup>

[18] I will now consider whether the personal privacy exemption in section 38(b) applies to the personal information of individuals other than the appellant in the remaining records.

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

[19] 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.

[20] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the 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.

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

[22] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, these paragraphs do not apply.

[23] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

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<sup>7</sup> Under section 54(c) any right or power conferred on an individual by this *Act* may be exercised, if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

<sup>8</sup> Other than that of the appellant and her minor child.

<sup>9</sup> Other than that of the appellant and her minor child.

[24] 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 will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>10</sup>

[25] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In this appeal, none of the presumptions in section 14(3) apply.

[26] 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.<sup>11</sup>

[27] 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).<sup>12</sup>

[28] Only the board identified specific factors in section 14(2) in its representations.

[29] The board relies on the factors in sections 14(2)(f) and (h). It describes the records as highly sensitive letters and emails written in confidence to a school principal and school superintendent complaining about the appellant, a parent of a child in the school.

[30] The board submits that if the parents of the school have no trust in the school administration, i.e. that information shared will be held in the strictest of confidence, then relationships will not be successful. It states that further disclosure will decrease the public confidence of the school and the school board. It submits that parents will not feel comfortable discussing concerns with principals if they know that their conversations will not be held in confidence.

[31] The board states that the appellant is specifically asking for the names of the complainants<sup>13</sup> and that even if the documents had appropriate severances, it is reasonable to expect that individuals may be identified, notwithstanding the removal of their names, because the records contain classroom and student information.

[32] The affected person states that as a school principal, she is privy to confidential information which is often shared by parents in confidence with the principal, who is in

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<sup>10</sup> Order MO-2954.

<sup>11</sup> Order P-239.

<sup>12</sup> Order P-99.

<sup>13</sup> The board states that the appellant is only interested in the names of the other parents who made complaints against her. Based on my review of the appellant's representations, it is clear that the appellant wants not only the complainants' names but also the entirety of their complaints.

a position of trust. She submits that this is a crucial role in that it speaks to the working relationship between the principal and the school community.

[33] The affected person states that the emails and letter in question were provided to her, in confidence. She states that before sending one email/letter one of the parents asked that her name be kept confidential. She states that she assured this parent of confidentiality and that sharing her name with the appellant at this point would be a gross breach of trust and would chip away at the very relationship the school is seeking to foster in schools: parents as partners.

[34] The affected person states that the letters and emails were provided because parents were very concerned about possible repercussions from the appellant. She states that now disclosing the identity of these parents who came to her in confidence would simply instigate further ill-feelings within the school community.

[35] The appellant states that she has a right to know what complaints were made against her and the nature of these complaints. She states that the complaints were made with malicious and cruel intention and used by the school in issuing a no trespassing letter against her. She states that at no time were any concerns ever addressed to her. She states that her complaints related to safety concerns, bullying and negligence on behalf of the school. She states that the actions of issuing a no trespassing letter against her should not be a careless act or one of personal discretion based on complaints which may be inaccurate or unreliable.

[36] The appellant further states that her complaints made against the school of negligence were not welcomed. She states that the outcome of issuing a no trespassing letter against her caused defamation of her character within the community. She further states that there must be accountability in the board regarding making a complaint against an individual and in issuing a no trespassing letter.

### ***Analysis/Findings***

[37] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>14</sup> In this appeal, as stated above, none of the presumptions in section 14(3)(b) apply.

[38] Concerning section 14(2), the board relies on the factors in sections 14(2)(f) and (h), which read:

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<sup>14</sup> Order MO-2954.

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,

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence

[39] To be considered highly sensitive under section 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>15</sup>

[40] To be considered supplied in confidence under section 14(2)(h), both the individual supplying the information and the recipient need to have an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>16</sup>

[41] Based on my review of the records and the parties' representations, I agree with the board that these two factors, both which favour privacy protection, in sections 14(2)(f) and (h), apply as the personal information of other individuals was supplied in confidence and is highly sensitive information. This information relates to confidential complaints made to the board about the appellant by other parents. I agree with the board that the personal information in the remaining records is sensitive information and has been supplied by the individuals to whom the information relates in confidence.

[42] The affected person appears to be raising the factor that favours privacy protection in section 14(2)(e), 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,

the individual to whom the information relates will be exposed unfairly to pecuniary or other harm.

[43] 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. Based on my review of the parties' representations, and considering the relationship between the appellant and the other parents whose personal information is in the records, I find that disclosure of the personal information at issue will expose these other parents to unfair pecuniary or

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<sup>15</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>16</sup> Order PO-1670.



other harm. The affected person refers to repercussions against the other parents in the records. In addition, based on my review of the records, I agree that the factor in section 14(2)(e) applies.

[44] The appellant did not refer to any listed factors, however, in previous orders, considerations which have also been found relevant in determining whether the disclosure would be an unjustified invasion of personal privacy include:

- inherent fairness issues;<sup>17</sup>
- ensuring public confidence in an institution;<sup>18</sup>
- personal information about a deceased person;<sup>19</sup> and
- benefit to unknown heirs.<sup>20</sup>

[45] It appears to me that the appellant is relying on the unlisted factor of inherent fairness as she would like to know the details of the complaints by other parents made against her. Although this factor may apply, I find that disclosure of the record that I have found does not contain the personal information of identifiable individuals is sufficient to address any inherent fairness issues. This record summarizes the details of the complaints against the appellant. It also sheds light on why the board proceeded with issuing a no trespassing letter against the appellant. Therefore, I am giving this factor that favours disclosure little weight.

[46] Based on the contents of the records and the parties' representations, and after considering and weighing the applicable factors in section 14(2), as noted above, most of which favour privacy protection, and having also balanced the interests of the parties, I find that disclosure of the remaining records would be an unjustified invasion of personal privacy under section 38(b). Accordingly, subject to my review of the board's exercise of discretion, I find that the remaining records are exempt under this section.

**C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

[47] The section 38(b) 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.

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<sup>17</sup> Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

<sup>18</sup> Orders M-129, P-237, P-1014 and PO-2657.

<sup>19</sup> Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

<sup>20</sup> Orders P-1493, PO-1717 and PO-2012-R.

[48] 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
- it fails to take into account relevant considerations.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>22</sup>

[50] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>23</sup>

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

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<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 43(2).

<sup>23</sup> Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[51] The board states that disclosure will decrease the public confidence in the school and the school board. It submits that parents will not feel comfortable discussing concerns with principals if they know that their conversations will not be held in confidence.

[52] The board submits that there is no sympathetic or compelling need for the appellant to receive this information. It states that it has met numerous times with the appellant regarding her concerns. It further states that disclosure of the records would constitute an unjustified invasion of personal privacy, and injury to all the relationships would result from disclosure.

[53] The appellant did not address this issue in her representations.

### ***Analysis/Findings***

[54] Based on my review of the records remaining at issue and the parties' representations, I find that the board exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[55] I am ordering disclosure of one record that summarizes the complaints against the appellant. The remaining records contain information that is both sensitive and significant to the complainants and in the circumstances of this appeal, considering the relationship between the appellant and the complainants, I find that the complainants' privacy should be protected.

[56] Accordingly, I am upholding the board's exercise of discretion and find that the remaining records are exempt under section 38(b).

### **ORDER:**

1. I order the board to disclose to the appellant the one record I have found to not contain the personal information of other identifiable individuals **by January 20, 2017 but not before January 16, 2017**. For ease of reference, I have provided the board with a copy of this record with this order.
2. I uphold the board's decision to deny access to the remaining records at issue.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

December 13, 2016 \_\_\_\_\_

