Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3746 –I

Appeal MA17-363

Toronto Catholic District School Board

March 26, 2019

Summary: The appellants seek access to records relating a complaint of bullying they made to the school board on behalf of their son. The board granted partial access to the records claiming that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). The appellants appealed the board's access decision and claimed that additional responsive records should exist. In this order, the adjudicator finds that the absurd result principle applies to the appellants' son's statements made to the principal and vice-principal and on that basis, those statements are ordered to be disclosed to the appellants. However, the adjudicator upholds the board's decision to withhold the remaining portions of the records under section 38(b). She also orders the board to conduct a further search for records.

Statutes Considered: *Municipal Freedom of Information Protection of Privacy Act*, R.S.O. 1990 c. F.31, as amended, ss. 2(1) definition of "personal information", 14(2)(a), (b), (d), (e), (f), (g) and (h), 17, and 38(b).

OVERVIEW:

[1] The appellants, two parents, submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Catholic District School Board (the board or TCDSB) for records relating to their son and their allegations that he was being bullied by another student.

[2] The board granted the appellants partial access to records it identified as responsive to the request. The board claimed that disclosure of some of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). The board claimed that the remaining withheld information qualified for

exemption under section 38(a) (discretion to refuse requester's own personal information), in conjunction with section 7(1) (advice or recommendations).

[3] The appellants appealed the board's decision to this office and a mediator was assigned to the file to explore settlement. During mediation, the appellants raised questions about the reasonableness of the board's search and confirmed that they continue to seek access to the portions of the records withheld under section 38(a) in conjunction with section 7(1). At the time, it did not appear that the appellants took issue with the board's application of the personal privacy exemption to some portions of the records. The file was subsequently transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry.

[4] I decided to commence my inquiry by sending a Notice of Inquiry to the board and inviting its representations. In response, the board issued a revised decision letter granting the appellants partial access to the principal's and vice-principal's notes in addition to meeting notes taken on a specified date. The board advised that it no longer relies on the exemption under section 38(a) in conjunction with section 7(1) but continues to take the position that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b) in conjunction with section 14(1). The board sent this office a severed copy of the records it disclosed to the appellants. Based on my review, it appears that the board severed the names of students identified in the principal's and vice-principal's notes, along with a student's parent's name in one occasion. It does not appear that the board notified any of the affected parties under section 21(1) prior to disclosing this information to the appellants.

[5] Upon their receipt of the board's revised decision, the appellants sent me a letter explaining that they still believed that additional records should exist. In addition, the appellants confirmed that they wish to appeal the board's decision to withhold certain portions of the records disclosed to them under the personal privacy provisions under section 38(b). A copy of the appellants' letter was provided to the board along with a Notice of Inquiry inviting their representations. The board's representations were provided to the appellants, who provided further written submissions.

[6] Throughout their submissions, the appellants raise concerns about the board's investigation process and question the board's ability to investigate complaints against itself. The jurisdiction of this office is limited to reviewing decisions made under the *Act*. Accordingly, this order will not address the appellants' concerns about how the board handled their complaints.

[7] In this order, I uphold the board's decision to apply the personal privacy exemption under section 38(b) to the withheld information, but for the appellant's son's statement made to the school administrators. I find that the absurd result principle applies to the latter information and order the board to disclose the information withheld in the statements. However, I find that the board failed to conduct a reasonable search for records and order it to conduct a further search.

RECORDS:

[8] The records at issue consist of the withheld names of individuals contained in 27 pages of handwritten notes prepared by the principal and vice-principal (school administrators). The notes appear to have been made by the principal and vice-principal over several days during their in-person and telephone discussions with two students, their parents and teacher. One of the students identified in the records is the appellants' son. The principal's and vice-principal's notes appear to document in-person discussions they had with the appellants' son and the student the appellants allege bullied their son. In discussing the matter with their school administrators, the students identified other students. The board withheld the names of these students along with the name of the student the appellants alleged bullied their son. The names of this student's parents were also withheld.

ISSUES:

A. Did the board conduct a reasonable search for responsive records?

B. Does the discretionary exemption under section 38(b) apply to the withheld information in the records?

C. Did the board properly exercise its discretion to withhold information under section 38(b)?

DISCUSSION:

A. Did the board conduct a reasonable search for responsive records?

The Request

[9] The appellants' request sought access to:

> All materials pertaining to the reported incidents between [their son and another student], including but not limited to:
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> - Incident reports made by TCDSB personnel
> - Investigation notes, including but not limited to:
>
> ◦ [The vice-principal's] 8 pages of handwritten notes that were made during her conversations with [their son and other student] on [approximate date]
>
> ◦ [The principal's] notes based on conversation with [their son and other student] on [approximate date]

> ◦ [The superintendent's] review of [the principal's] investigation
>
> • Meeting notes by TCDSB personnel (made before, during or after the meetings) pertaining to in person meetings with [the appellants], specifically the meetings
>
> ◦ Between [the principal and the father] on February 22, 2017; and
>
> ◦ Among [the superintendent, the principal and the appellants] on March 29, 2017
>
> • Assessments of any kind pertaining either to the incidents or the TCDSB investigations
>
> • Internal correspondence among TCDSB personnel, primarily [the Education Director, superintendent and principal], between [specified dates] on which [either parent] is not a recipient.
>
> • Any other materials that would be relevant to the incidents.

Representations of the parties

[10] The board submits that it conducted a reasonable search for responsive records. The superintendent who met with the appellants concerning the subject-matter of the request filed an affidavit in support of the board's position. The superintendent indicates that the request was unambiguous and as a result the appellants were not contacted for clarification. The superintendent also advises that he instructed the principal to conduct a search for responsive records. In his affidavit, the superintendent states:

> My search at the school for the records under appeal was comprised of seeking all handwritten notes relating to the alleged incidents from the principal of [name of school], the person responsible for holding the records in question at the school. The principal was able to [provide] to me all records under appeal: handwritten notes taken by the principal in relation to the reported incidents, handwritten notes taken by the principal pertaining to a meeting with one of the appellants, and handwritten notes taken by the vice-principal in relation to the reported incidents.
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> I am satisfied that the records produced by the principal of [name of school] comprise the whole of the handwritten notes under appeal, and that no records were destroyed. In accordance with their duties under the Education Act, school principals are required to make a thorough investigation of all incidences of bullying. As such, logging and retention

of rough notes for any required subsequent reporting is an integral element of the investigative process.

[11] The appellants made the following arguments in support of their position that the board failed to conduct a reasonable search:

- The principal was not the appropriate individual to be responsible for conducting a search for records "outside his control, such as emails of third parties and any other correspondence etc. that were part of our appeal";

- The superintendent unilaterally narrowed the scope of the request to handwritten notes thus excluding any other records.

- The board's search should have located the following records:

    - the principal's notes of his meeting with the other student's parents. The appellants submit that the principal advised them that this meeting occurred and that they spent a "long time chatting" discussing the concerns relating to their son.

    - interview notes relating to witnesses that had been interviewed by the principal and vice-principal. The appellants advise that the superintendent and the principal told them that the principal and vice-principal had "interviewed multiple witnesses in the course of their investigation".

    - correspondence or emails between the director and the superintendent – the appellants advised that the director advised them that she had "been providing guidance" to the superintendent and the appellants note that she was copied on multiple email exchanges between them and the superintendent. However, the appellants argue that "remarkably little correspondence between [the director] and the person she was guiding" was identified as responsive to the request.

    - communications confirming that the superintendent and principal spoke with the Ombudsman office or forwarded the appellants emails which were critical of the superintendent's investigation. The appellants advise that the board's report to the Board of Trustees (which was obtained through another freedom of information request) indicate that the superintendent and principal had discussions with the Ombudsman office.

    - the superintendent's electronic notes he referenced during his meeting with the appellants. The appellants advise that during this meeting the superintendent read notes from his laptop when he presented his findings on each of the six reported incidents.

[12] The appellants also take the position that additional records should exist given

the involvement of various individuals, witnesses and third parties in the investigation of their allegations of bullying.

Decision and analysis

[13] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[14] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[16] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[17] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

[18] The institution is required to provide a written summary of all steps taken in response to the request. In this case, the Notice of Inquiry sent to the board asked it to respond to the following questions:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

a. choose to respond literally to the request?

b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[19] The appellants argue that the board unilaterally narrowed the scope of their request to handwritten notes. Though the board's submissions focus on its search efforts for handwritten notes, I note that the Index of Records the board provided the appellants with its decision letter indicates that it disclosed severed copies of the superintendent's report along with some emails to the appellants. Accordingly, it would appear that the board's search was not confined to handwritten notes.

[20] However, I find that the appellants have established a reasonable basis for believing that additional records may exist. Though I am satisfied that the searches were directed by an experienced individual, the principal, and that he was knowledgeable in the subject-matter of the request, the board's submissions did not provide a written summary of all of the steps taken in response to the superintendent's request to the principal. For instance, the board's submissions failed to provide details of who specifically carried out the searches along with details of what type of record holdings were searched for responsive records. As a result of the lack of detail provided by the board, I am unable to determine whether the vice-principal actually conducted a physical search of her records or whether the principal conducted this search. Similarly, I was not provided with sufficient evidence establishing that electronic searches of the principal's, vice-principal's, superintendent's, director's and trustee's record holdings were conducted.

[21] I agree with the board's view that the appellants' request was "sufficiently clear and detailed." Accordingly, a plain reading of the appellant's request would suggest that the request seeks access to internal and external notes, correspondence, emails and communications regarding the subject-matter of the request, including any communications board employees had with witnesses, other parents or oversight bodies. Whether or not the appellants have a right to access such records under the *Act*

is another matter. The board cannot pre-emptively narrow the scope of the request to exclude records the board has determined may qualify for exemption, such as internal communications or communications exchanged with third parties in which the appellants were not a party.

[22] Having regard to the above, I am not satisfied that the board conducted a reasonable search in the circumstances of this appeal and will order it to conduct a further search for responsive records, including electronic records exchanged with third parties.

B. Does the discretionary exemption under section 38(b) apply to the withheld information in the records?

[23] Upon its receipt of the Notice of Inquiry, the board revised its access decision and disclosed copies of handwritten notes prepared by the principal and vice-principal to the appellants. The board withheld the names of identifiable individuals contained in the records.

[24] In this appeal, there is no disagreement between the parties that the records contain the appellants' son's personal information and that his parents are entitled to exercise a right of access on his behalf under section 54(c).[7]

[25] I have reviewed the records and am satisfied that the withheld information constitutes the personal information of identifiable individuals and that this information appears with the appellants' son's personal information. Specifically, I find that the records contain information relating to the appellants' son and other individuals, including their names and ages, along with their personal opinions and views as defined in paragraphs (a), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act.*

[26] As the records contain the personal information of the appellant's son, I will determine whether disclosure of the withheld information to the appellants would constitute an unjustified invasion of personal privacy under section 38(b). Section 38(b) 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.[8] Section 38(b) states:

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[7] Section 54 states, in part:

> Any right or power conferred on an individual by this Act may be exercised,
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> (c) if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

[8] Order M-352.

> 38 (b) A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[27] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the appellants' personal information.

[28] In other words, where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[29] In the circumstances of this appeal, I must determine whether disclosing to the appellants the information the other individuals provided to the board would constitute an unjustified invasion of their personal privacy under section 38(b).

[30] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[31] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[9] However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[32] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, 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. Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).[10]

[33] The parties have not claimed that any of the exceptions in section 14(1) or section 14(4) apply and I find that none apply.

[34] The board submits that the factors favouring privacy protection at section

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[9] Order MO-2954.
[10] Order P-239.

14(2)(e), (f), (g) and (h) apply in this appeal. The appellants submit that the factors favouring disclosure at sections 14(2)(a), (b), (d) along with unlisted factors apply. The appellants also submit that the absurd result principle applies in the circumstances of this appeal.

[35] Sections 14(2)(a), (b), (d), (e), (f), (g) and (h) state:

> 14(2) 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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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (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

14(2)(a) and (b): public scrutiny & public health and safety

[36] The appellants submit that the factors favouring disclosure at sections 14(2)(a) and (b) apply because the board is publicly funded and should be subject to public scrutiny. The appellants state:

> It is in the public interest to be fully aware of the investigative practices and dispute resolution processes of the board, as this transparency drives accountability [which, in turn ensures] the safety of our children.

[37] The board submits and I agree that these factors do not apply to the circumstances of this appeal. The information remaining in dispute consists of the names of individuals contained in the school administrators' notes. Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as

opposed to the views or actions of private individuals) to public scrutiny.[11] In this case, I find that disclosure of the withheld names would not subject the activities of the board to any greater public scrutiny than that resulting from what has already been disclosed to the appellants. I also find that disclosure of the withheld information would not address the broader public safety health concerns contemplated by section 14(2)(b).[12]

[38] Accordingly, I find that the factors at sections 14(2)(a) and (b) do not apply.

14(2)(d): fair determination of rights

[39] The appellants submit that the factor favouring disclosure at section 14(2)(d) applies in the circumstances of this appeal. Section 14(2)(d) states:

> 14(2) 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request

[40] In support of their position, the appellants state that "the personal information being requested is absolutely essential to the fair determination [of] our rights" for the following reasons:

- They have a legal right to access the witness statements which formed the basis of the board's decision;
- They require the withheld information to "correlate the specific witness statements with the individuals who made those statements"; and
- Disclosure of the withheld information is necessary for them to "effectively represent our interests and those of our son" in formal proceedings, such as the contemplated mediation with the board.

[41] The appellants also raised concerns about the school administrators' objectivity, integrity and investigative techniques which resulted in their son not having an opportunity to fully express himself when questioned by the principal or vice-principal.

[42] For section 14(2)(d) to apply, the appellants must establish that:

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[11] Order P-1134.
[12] Order MO-1664.

> (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; and
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> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
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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
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[13]

[43] For section 14(2)(d) to be given any consideration, the appellants must establish that all four parts of the test have been met.

[44] The appellants submit that they require copies of witness statements taken by school administrators in order to prepare for a contemplated mediation proceeding. However, the only information withheld from the records before me is the names of students and the names of one set of parents.

[45] The board acknowledges that dispute resolution mechanisms, such as informal meetings with school administrators and formal trustee committee meetings, took place. However, it argues that the appellants were provided with "information relevant" to participate in these proceedings, including a recommendation report to the trustees "which discussed the alleged incidents in question, while de-identifying the other parties".[14]

[46] In response, the appellants submit that the board failed to provide them with "timely disclosure of information in advance of meetings with them, and in doing so, ensured that we would be unable to properly represent our interests in these discussions". In support of this position, the appellants provided several examples of incidents in which they question the decisions of various school administrators and the timing of the release of documents several weeks after they appeared to be relied upon by administrators to make the decisions in question.

[47] I have reviewed the submissions of the parties and am not satisfied that there is

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[13] 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.).

[14] It appears that the documents the board refers to in this paragraph were provided to the appellants outside of their request for records under the *Act*.

sufficient evidence demonstrating that the personal information at issue has some bearing on or is significant to the determination of the right in question or is required in order for the appellants to prepare for a proceeding or ensure an impartial hearing. Accordingly, I find that parts 3 and 4 of the test in section 14(2)(d) have not been met.

[48] Even if I found that parts 1 and 2 of the test were met, the factor at section 14(2)(d) could not apply as all four parts of the test must be met. As I result, I find that the factor at section 14(2)(d) has no application to the circumstances of this appeal.

14(2)(e): pecuniary or other harm

[49] 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.

[50] The board submits that disclosure of the withheld information would expose the named individuals unfairly to pecuniary or other harm. In support of its position, the board advises that the withheld names identify "elementary school students at the appellants' son's school". The board submits that the students were "interviewed and/or discussed" in the notes taken by the vice-principal and principal. The board states:

> If the students, who were assured by their principal and vice-principal that they would not be identified as a result of providing their frank response, were to have their trust in their principal/ vice-principal broken, it is foreseeable that they may develop undesirable attitudes about the processes that govern their school lives. It is our opinion that this represents an identifiable harm. This harm is arguably particularly unfair because, within the circumstances of the investigation, no formalized disciplinary action was triggered by the principal's investigation.

[51] The appellants submit that the factor at section 14(2)(e) does not apply as their objective in seeking the withheld information "is to determine which individuals were interviewed and what they said, so that we better understand the basis on which the board made their decisions". The appellants go on to state:

> Our objective is not to either publicize the names of the witnesses or to follow up with them to confirm the statements that they made to the Principal or Vice-Principal. Therefore, the release of the names of the individuals in the Principal's or Vice-Principal['s] notes will not expose those individuals to either pecuniary or other harm.

[52] In further support of its position, the appellants raised questions about the school's response to their complaint that their son was being bullied, including the manner in which they decided to investigate the matter. The appellants also argue that any assurances of confidentiality the school administrators provided the witnesses were given incorrectly "as there are circumstances under which disclosure could be

mandatory".

[53] Having regard to the submissions of the parties, I am satisfied that the board has adduced sufficient evidence to persuade me that disclosure of the withheld names in the records would expose the individuals in question to unfair pecuniary or other harm. The appellants suggest that the fact that the witnesses are children bears little weight on whether disclosure of their names would expose them to harm. The appellants also submit that no harm will come to the other students because they do not intend to publish their names. However, disclosure under the *Act* is considered disclosure to the world and the context in which the information appears must be considered. I agree with the board that releasing the names of students as they appear with information they provided their principal or vice-principal about themselves, or information about other students, would give rise to the harm contemplated under section 14(2)(e).

[54] Accordingly, I find that this factor favouring privacy protection applies and attribute moderate weight to it.

14(2)(f): highly sensitive

[55] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[15] The board submits that the factor favouring privacy protection at section 14(2)(f) applies for the same reasons it argued that the factor at section 14(2)(e) applies. In support of this position, the board states that the fact that the withheld names identify children "renders the protection of their identity a highly sensitive matter".

[56] The appellants take the position that the factor at section 14(2)(f) does not apply and also refer to the arguments they made in support of their position that the factor at section 14(2)(e) does not apply.

[57] Based on the submissions of the parties and the records themselves, I am satisfied that it is reasonable to expect that disclosure of the names of students to the appellants would cause these individuals significant personal distress. In making my decision, I took into account that the individuals identified in the records are students who attend the same school as the appellants' son. In addition, some of them are not even aware that their information is contained in the records as they were not directly questioned by the school administrators.

[58] Having regard to the above, I find that the factor favouring privacy protection at section 14(2)(f) applies and weighs heavily in favour of non-disclosure.

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[15] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

14(2)(h): supplied in confidence

[59] This factor applies if both the individual supplying the information and the recipient had 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.[16]

[60] The board submits that the personal information at issue was supplied to it by individual(s) who had a reasonable expectation that the information would be treated confidentially. The appellants take the position that the factor at section 14(2)(h) does not apply to the circumstances of this appeal. Both parties rely on their representations in support of their position for or against the application of the factor favouring privacy protection at section 14(2)(e).

[61] I have reviewed the submissions of the parties, along with the records and find that the board failed to identify what, if any, assurances of confidentiality, were given, and who gave and received those assurances.

[62] Accordingly, I find that the factor favouring privacy protection at section 14(2)(h) does not apply.

Unlisted factors

[63] The list of factors under section 14(2) is not exhaustive. Accordingly, any circumstances that are relevant, even if they are not listed under section 14(2), must be considered.

[64] The appellants identify two unlisted factors they submit weigh in favour of disclosure:

- the board's dispute resolution process is "inherently unfair" because "the board's policy is that they will not act on anonymous complaints, but they want us to accept decisions that they made on the basis of information provided by sources that are anonymous to us"; and

- disclosure would increase public confidence in the board because "[r]equiring the board to disclose the names of individuals who provided [it] with the statements on which they based their decisions would improve the integrity of the investigative process and increase personal and institutional accountability. This will in turn increase public confidence that the board is accountable for the safety of their children while they are in school".

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[16] Order PO-1670.

[65] I have reviewed the appellants' submissions and find that the unlisted factors identified have already been addressed in my consideration of their claim that the factors favouring disclosure at sections 14(2)(a) and (b) apply. Some of the submissions in support of the appellants' claim that unlisted factors apply, also address matters outside the scope of this appeal, such as the manner in which the board conducted its investigation.

[66] Accordingly, I find that the unlisted factors identified by the appellants have no application to this appeal.

Summary

[67] I find that the factors weighing in favour of privacy protection at sections 14(2)(e), (f) and (g) apply and no factors, including the unlisted factors identified by the appellants, weighing in favour of disclosure apply. However, I considered the appellants' submissions that the absurd result principle applies to the records and find that the principle applies to the portions of the records which constitute their son's statement.

[68] The absurd result principle will apply where the requester originally supplied the information, or the requester is otherwise aware of it. In such an instance, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of this exemption.

[69] The absurd result principle has been applied where, for example:[17]

- the requester sought access to his or her own witness statement[18]
- the requester was present when the information was provided to the institution[19]
- the information is clearly within the requester's knowledge[20]

[70] 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.[21]

[71] The appellants submit that the absurd result principle applies to the withheld information contained in the records because:

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[17] Orders M-444 and MO-1323.
[18] Orders M-444, M-451.
[19] Orders M-444, P-1414.
[20] Orders MO-1196, PO-1679, MO-1755.
[21] Orders M-757, MO-1323, MO-1378.

- their son already provided "the names of his assailant and other individuals, including witnesses, who were party to the incidents" to the school administrators; and

- some of the witnesses were identified by name during meetings and discussions between the appellants and school administrators.

[72] The board submits that the absurd result principle does not apply and states:

> Although the appellants would likely be familiar in varying degrees with the children in their son's school, and although the parents have been given access to all investigative records severed only of the personal information of the children identified, it is the appellants' own position that they cannot infer who specifically made the statements within the severed notes … it is the [board's] position that these specifics should remain unknown to the appellants.

[73] The appellants responded that:

> [W]e would like to point out that there are over [specified number] students in the school. We believe we have a right to know: *a*) which individuals [the principal and/or the vice-principal] spoke to; and *b*) what those individuals said. Disclosure of this information is important because these statements would have been key factors in [the principal's and vice-principal's] decision on what took place during the incidents. We dispute the board's decision to withhold this information, which is some cases is absurd.

[74] I have reviewed the records along with the submissions of the parties and find that it would be absurd to withhold information the appellants' son provided to the principal or vice-principal. Based on my review of the records it appears that the principal spoke to the appellants' son about the alleged bullying on one occasion without any other individual being present.[22] It appears that the vice-principal also met with the appellants' son. I am satisfied that the appellants' request for notes regarding these two meetings is similar to a request for their son's witness statement as he was present when the information at issue was recorded. Accordingly, I find that disclosure of the withheld portions of these records would not constitute an unjustified invasion of personal privacy under section 38(b) and order the board to disclose these portions to the appellants.

[75] Though the records also contain the school administrators' notes regarding

[22] Based on my review of the portions of the records disclosed to the appellants, it appears that their son met with the principal on another ocassion, along with the student who was alleged to have bullied him.

meetings or discussions they had with the appellants, given the context in which the handwritten notes were taken, it is not clear which portions of the notes contain information which is clearly within the appellants' knowledge. As previously mentioned, some of the records consist of the principal's and vice-principal's rough handwritten notes taken during meetings or telephone calls with the appellants. In some instances, these portions of the notes contain notations which do not appear to have been made contemporaneously with the other notes. In addition, it is not clear whether the principal's notation of the student's name, including the spelling, was provided to them by the appellants or whether the name was recorded by the principal who is familiar with the students. Having regard to the context in which these notes were created, I am not satisfied that the withheld portions contain information that is clearly within the appellants' knowledge. Accordingly, I find that disclosure of the remaining withheld information would be inconsistent with the purpose of the exemption in section 38(b). Accordingly, subject to my assessment of whether the board properly exercised its discretion, the information is exempt under section 38(b).

C. Did the board properly exercise its discretion to withhold records under section 38(b)?

[76] 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.

[77] 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.

[78] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

[79] The information which I found qualifies for exemption under section 38(b) consists of the names of students that were not contained in the portions of the appellants' son's statements to the principal and vice-principal.

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[23] Order MO-1573.
[24] Section 43(2).

[80] The board takes the position that it properly exercised its discretion and in doing so took into consideration relevant factors. The board also submits that it exercised its discretion in good faith and did not take into account irrelevant factors. In support of its position, the board states:

> The severances applied to the rough notes under current appeal serve only to de-identify the other parties to the alleged incidents under investigation, all of whom are elementary school children at the appellants' son's school.

[81] The appellants submit that in exercising its discretion to withhold the students' names, the board placed too much emphasis on the privacy rights of individuals as opposed to their right to access information concerning their son. In support of their position, the appellants state:

> The board has argued that their redacted responsive records balance both factors. They do not, because the severed information was essential to addressing our needs. As a result of the severances, the responsive records certainly protect the privacy of the other individuals and hide the flaws in the board's investigative process at the expense of our stated interests.

[82] The appellants also submit that the board failed to consider as relevant factors that disclosure will increase public confidence and that they have a compelling need to receive the information.

[83] Finally, the appellants submit that the board acted in "bad faith and for an improper cause". In support of this position, the appellants raise concerns about the board's investigation process and unilateral decision-making processes and state that the board's decision to not exercise its discretion to disclose the information at issue is "motivated primarily by their desire to not release information that would incriminate themselves (i.e. a cover-up) rather than protecting the privacy of other individuals".

[84] Having regard to the submissions of the parties, I am satisfied that the board balanced the principle that individuals should have a right of access to their own personal information with the principle that the privacy of individuals should be protected. I also find that the board considered the sensitive nature of the information at issue and the context in which the information was provided to the principal and vice-principal by elementary school students. Finally, I find that the appellants have adduced insufficient evidence demonstrating that the board exercised its discretion to withhold the names of these students in bad faith or for an improper purpose.

[85] Accordingly, I find that the board properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

ORDER:

1. I order the board to disclose to the appellants the portions of the records containing their son's statement to the principal and vice-principal to which I found that the absurd result principle applies by **April 29, 2019** For the sake of clarity, I have provided a copy of these portions of the records with the board's copy of this order.

2. I uphold the board's decision to withhold the remaining names contained in the records under section 38(b).

3. I order the board to conduct a further search for electronic or physical records, including communications it exchanged internally or with third parties in which the appellants were not a party.

4. I order the board to issue an access decision to the appellants regarding access to any records located as a result of the search ordered in provision 3, in accordance with the *Act* and taking into consideration the notice provisions under section 21(1). The board should treat the date of this order as the date of the request.

5. I order the board to provide me with a copy of the decision sent to the appellants in accordance with order provision 4.

6. The board shall send their representations on the new search referred in provision 3 and an affidavit outlining the following, by **April 29, 2019**.

    a. the names and positions of the individuals who conducted the searches;

    b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;

    c. the results of the search; and

    d. details of whether the record could have been destroyed, including information about record maintenance polices and practices such as retention schedules.

    The board's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The board should indicate whether it consents to the sharing of their representations with the appellant.

7. I remain seized of this appeal in order to deal with any other outstanding issues arising from paragraphs 3, 4 and 6 this interim order.

Original Signed By: March 26, 2019

Jennifer James
Adjudicator