Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3750-I

Appeal MA18-366

Rainbow District School Board

April 11, 2019

Summary: The Rainbow District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for the record that was read out at a specified board meeting (both the public and "in-camera" portions of the meeting), and any related records. The board located a responsive record and provided partial access to it, relying on the discretionary exemption at section 6(1)(b) (closed meeting) of the *Act* to do so. The requester appealed that decision. Through mediation, the board reconsidered its decision and disclosed additional information that it had withheld under section 6(1)(b). The board continued to withhold some portions of the record on the basis of the personal privacy exemption at section 38(b), and relied on the factors at sections 14(2)(e) (pecuniary or other harm), 14(2)(f) (highly sensitive), and 14(2)(i) (unfair damage to reputation), and the presumptions at sections 14(3)(b) (investigation into possible violation of law) and 14(2)(d) (employment or education history) to do so. The appellant also raised the issue of reasonable search. In this order, the adjudicator upholds the board's access decision, and specifically notes that the absurd result does not apply in this case. However, she does not uphold the board's search for responsive records as reasonable and orders the board to conduct a further search.

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"), 2(2), 14(1), 14(2), 14(3), 14(4), 17, and 38(b).

Orders and Investigation Reports Considered: Orders PO-2461, PO-2524, MO-1519, MO-3513-I.

Cases Considered: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* [2003] 2 SCR 624, 2003 SCC 58 (CanLII).

OVERVIEW:

[1] The Rainbow District School Board (the board) received a request for information pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*) for records relating to both the "in camera" and "public" portions of a record read out at a specified meeting of the board.

[2] In response to the request, the board located a two-page responsive record. The board released one page to the appellant in full and one page in part. The board relied on section 6(1)(b) (closed meeting) of the *Act* to withhold access to the record in part.

[3] The requester, now the appellant, appealed the decision of the board to the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] The parties engaged in mediation at the IPC. During mediation, the board indicated that it was no longer relying on section 6(1)(b) of the *Act*. Accordingly, this exemption is no longer at issue in the appeal. Following discussions with the mediator, the board issued a revised decision and released additional parts of the record to the appellant. In the decision, the board relied on the personal privacy exemptions at sections 38(b) and 14 of the *Act* to withhold access to the remainder of the record.

[5] After receiving the revised decision from the board, the appellant advised the mediator that he believed further records responsive to his request should exist, so this issue was added to the scope of the appeal. The appellant also raised the issue of conflict of interest in the processing of his request, and asked that it be added as well. The appellant advised the mediator that he wished to pursue the appeal at adjudication.

[6] During the inquiry into this appeal, I sought and received representations from the appellant and the board. Representations were shared in accordance with IPC *Practice Direction 7* and the IPC's *Code of Procedure*.

[7] For the reasons that follow, I uphold the board's decision to withhold the information at issue. However, I do not uphold the board's search for responsive records, and will order the board to conduct a further search.

RECORDS:

[8] The information at issue is contained on the second page of a two-page record. It is a statement prepared by the Director of Education.

ISSUES:

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

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

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

D. Was the director of education in a conflict of interest position with respect to the processing of the request?

E. Did the board conduct a reasonable search for records?

DISCUSSION:

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

[9] The board withheld personal information under the personal privacy exemption at section 38(b) of the *Act*. Only personal information can be exempt under section 38(b). Therefore, I must decide whether the information withheld is personal information, as defined under the *Act* and, if so, to whom it relates.

[10] For the reasons set out below, having reviewed the record at issue in its entirety, I find that it contains the personal information of several identifiable individuals, including the appellant.

[11] The term "personal information" in section 2(1) of the *Act* means "recorded information about an identifiable individual." Section 2(1) also lists examples of "personal information" (such as name,[1] age,[2] and address[3]), but the listed examples are not exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.[4]

[12] To qualify as personal information, it must be reasonable to expect that an

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[1] Section 2(1) (definition of "personal information"), paragraph (h).
[2] Ibid, paragraph (a).
[3] Ibid, paragraph (d).
[4] Order 11.

individual may be identified if the information is disclosed.[5]

[13] The appellant is named in the record, but the affected parties are not.

[14] However, even without their names, I find that it is reasonable to expect that each of the affected parties may be identified if the information withheld about them is disclosed. I conclude this based on the fact that the appellant was present at the by-law meeting when the record was read out loud, and by the level of disclosure already made of this record.

Personal information of students

[15] I have reviewed an unredacted version of the record. On the basis of my review, I find that, as the board argues, the record contains information about several identifiable individuals, including students. According to the board, some of those individuals were minors at the time that the record was prepared.

[16] I find that this information relating to these individuals falls under the introductory wording of the definition of personal information in the *Act*. I also agree with the board's submission that this information falls under paragraph (b) of the definition of personal information: *"recorded information about an identifiable individual, including . . . information relating to the education . . . of the individual."*

Information relating to individuals mentioned in a business, professional, or official capacity

[17] The record contains information about identifiable individuals (including the appellant) in a business, professional, or official capacity. However, this information is of a personal nature to the appellant and another identifiable individual, so I find that it is the personal information of these individuals, for the reasons I set out below.

[18] In addition to the definition of personal information at section 2(1) of the *Act*, sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

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

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

> dwelling and the contact information for the individual relates to that dwelling.

[19] 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.[6]

[20] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[7]

[21] This office has held that if the focus of a record is whether professional conduct was appropriate, the information takes on a more personal quality.[8] Accordingly, although the record at issue pertains to the appellant in his (now former) professional capacity, I find that it contains his personal information because it relates to allegations of misconduct on his part in the course of performing his professional role.

[22] In addition to the appellant, other identifiable individuals are mentioned in a professional, business or official capacity. The disclosed information in the record refers to an investigation into someone's professional conduct, which, again brings that information into the personal realm.[9] Another affected party's information is inextricably combined with that of a student whose personal information is in the record. While this is not personal information, it is not possible to sever and disclose this information, given the degree of integration with the personal information of the student.

[23] I find, therefore, that the record contains personal information of the appellant and another individual, as defined in the introductory wording of the definition of personal information at section 2(1), and under paragraph (b) of that definition (*"recorded information about an identifiable individual, including . . . information relating to the . . .employment . . . history of the individual."*)

[24] Since the record at issue contains both the personal information of the appellant and other identifiable individuals, I must assess any right of access under Part II of the *Act*, specifically under the discretionary personal privacy exemption at section 38(b).

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[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-2524.
[9] Ibid.

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

[25] For the reasons set out below, the information withheld in the record is exempt under the discretionary personal privacy exemption at section 38(b) of the *Act*.

[26] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution.

[27] Section 38 provides a number of exemptions from this right.

[28] Under section 38(b), if 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.[10]

Would disclosure be an unjustified invasion of privacy under section 38(b)?

[29] The first question to ask is whether any of the exceptions in paragraphs 14(1)(a) to (e) apply to the information at issue. If any of them do, disclosure is not an unjustified invasion of personal privacy and section 38(b) does not apply. The parties have not argued that any of these provisions apply in this appeal, and on my review of the record at issue, I find that none of them do.

[30] Section 14(4) also lists situations that would not be an unjustified invasion of personal privacy, but none of them apply in this appeal.

[31] In applying section 38(b), sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[32] As mentioned, section 38(b) concerns a record containing both the personal information of the requester and other identifiable individuals. When assessing such a record, 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.[11]

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[10] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[11] Order MO-2954.

Do any of the presumptions in section 14(3) apply?

[33] The board relies on the presumptions at sections 14(3)(b) and 14(3)(d). Based on my review of the parties' representations and the record itself, I find that only the presumption at section 14(3)(d) applies, for the reasons set out below.

14(3)(b): investigation into violation of law

[34] Section 14(3)(b) says:

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

[35] The presumption can apply to a variety of investigations, such those relating to criminal law, by-law enforcement[12] or occupational health and safety laws.[13] The presumption only requires that there be an investigation into a possible violation of law.[14]

[36] The board did not submit representations supporting the application of the presumption. The board reproduced the language of the presumption and asserted that it applies. This is insufficient for me to find that the personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law. Nor is the presumption clearly applicable from my review of the record itself.

14(3)(d): employment or educational history

[37] Section 14(3)(d) says:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, . . . relates to employment or educational history[.]

[38] Information contained in resumes[15] and work histories[16] falls within the scope of section 14(3)(d).

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[12] Order MO-2147.
[13] Orders PO-1706 and PO-2716.
[14] Orders P-242 and MO-2235.
[15] Orders M-7, M-319 and M-1084.
[16] Orders M-1084 and MO-1257.

[39] A person's name and professional title, without more, does not constitute "employment history."[17]

[40] In this appeal, I find that the presumption at section 14(3)(d) applies to the information at issue. As discussed, one individual was investigated in relation to their professional conduct, and another is mentioned in connection with one of a few students mentioned. I find that the context in which the students were mentioned falls within the scope of section 14(3)(d), as part of their educational history. I cannot elaborate more without revealing, in this public order, the contents of the information withheld.

[41] The fact that the presumption at section 14(3)(d) applies is a factor weighing towards finding that disclosure of the withheld personal information would be an unjustified invasion of personal privacy of the affected parties. Moreover, based on my review of the withheld information, I give this presumption significant weight.

[42] I find that no other presumption at section 14(3) applies, and the board has not claimed otherwise.

Do any of the section 14(2) factors apply?

[43] On the basis of the following, I find that several section 14(2) factors are relevant in this appeal.

[44] Section 14(2) contains a non-exhaustive list of factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b).[18] I must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[19]

[45] Some factors listed under section 14(2) typically weigh in favour of disclosure, such as whether:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
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> . . . .
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

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[17] Order P-216.
[18] Order P-239.
[19] Order P-99.

[46] Some section 14(2) factors typically weigh against disclosure, such as whether:

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
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> (f) the personal information is highly sensitive;
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> . . . .
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> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Factors favouring disclosure to the appellant

[47] The appellant's representations do not specifically cite any of the listed factors that would favour disclosure.

[48] However, the appellant's representations do refer to scrutiny of board activity, the alleged inaccuracy of the contents of the records, and the desire of the appellant to clear his name. As these concerns might fall within the factors at sections 14(2)(a) and 14(2)(d), and the unlisted factor of inherent fairness, I will discuss them, below.

14(2)(a): public scrutiny

[49] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[20]

[50] In this case, I find that the factor at section 14(2)(a) is relevant. The subject matter of the records involves the actions of various present or past public figures. The record itself alleges wrongdoing on the appellant's part, when he held his public office. The appellant alleges that the record contains false allegations that, to summarize, invite important questions for the public about how the school board is run. I accept that, in this context, disclosure is desirable for the purpose of subjecting the activities of the board to public scrutiny.

[51] Although the factor at section 14(2)(a) is relevant, I give it low weight because the appellant is aware of the record's contents, including the information withheld, having been present at the board meeting when the record was read. In addition, the board disclosed most of the record at issue to the appellant, and I find that this disclosure is sufficient to address the public scrutiny interest.

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[20] Order P-1134.

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

[52] The appellant's representations make it clear that he would like to "clear his name." This may invite a suggestion that section 14(2)(d) applies, but I will explain why it does not in this case.

[53] The appellant's desire to clear his name, by itself, does not mean that the factor at section 14(2)(d) applies, or has much weight if it does.

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

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
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> (2) **the right is related to a proceeding which is either existing or contemplated** [emphasis added], 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
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> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[21]

[55] From the evidence before me, it is not clear that Part 2 of this test has been met. The appellant has not demonstrated that there is an existing or contemplated legal action in relation to legal right that he is, or is contemplating, pursuing. The appellant's desire to clear his name is not sufficient evidence of such an existing or contemplated proceeding.

[56] Without clear evidence of an existing or contemplated proceeding that the appellant is pursuing a legal right in, I find that Part 2 of the section 14(2)(d) test has not been met. Since all four parts must be met for the factor at section 14(2)(d) to apply, I find that this factor does not apply.

Unlisted factor: inherent fairness

[57] As mentioned, the factors listed at section 14(2) are not exhaustive to the

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[21] 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.).

question of whether disclosure would be an unjustified invasion of personal privacy. The IPC has held that another consideration that may be relevant to this question is whether there is an "inherent fairness" issue.[22]

[58] The parties do not agree about the accuracy or reliability of the record's contents. The accuracy or reliability of the information at issue is outside the scope of this office to decide. So is the question of whether any actions taken against the appellant's interests were legal or otherwise warranted.

[59] Nevertheless, I find that the unlisted factor of inherent fairness is relevant because the appellant disputes the reliability and/or accuracy of the claims within it, and believes actions taken against him resulted from the contents. Fairness would, therefore, require that he be aware of the natures of the information.

[60] In this case, though, I have already found that the appellant is aware of the information at issue, having heard the record being read out loud, so I give the unlisted factor of "inherent fairness" minimal weight.

[61] In summary, two factors favour disclosure [at section 14(2)(a) and the unlisted factor of inherent fairness], but both weigh minimally in favour of disclosure because of the appellant's awareness of the information at issue, and the significant amount of the record that was already disclosed to him.

Factors favouring the protection of personal privacy of the affected parties

[62] In addition to the presumptions at sections 14(3)(b) and 14(3)(d), the board relies on the factors listed at sections 14(2)(e), (f), and (i) in support of its position that section 38(b) applies.

[63] I have considered the board's confidential and shared representations in support of its position.

[64] In addition, as I did for the appellant, I examined the record itself and the parties' representations overall to assess the possible application of the factors that the board relies on, or any others that may apply in the circumstances of this case. However, given my findings about the presumption at section 14(3)(d) and the factor at section 14(2)(f), it is not necessary for me to consider whether the factors at sections 14(2)(e) and 14(2)(i), or any other factor, also apply.

14(2)(f): highly sensitive

[65] To be considered highly sensitive, there must be a reasonable expectation of

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[22] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

significant personal distress if the information is disclosed.[23] I find this consideration applies to all the affected parties, especially the students, and in particular, those who were minors at the time the record was prepared. Given whom the information relates to, I find that there is a reasonable expectation of significant personal distress if the withheld information is disclosed. The students' personal information is so intermingled with the information (personal or otherwise) of the other affected parties, it is possible to identify the individuals in one group by disclosing information about the other group. Therefore, I find that that section 14(2)(f) applies to all of the personal information in the record, including the information that I have found is inextricably intertwined with that information.

Balancing the factors for and against disclosure

[66] In determining whether disclosure of the affected parties' personal information would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and (3) of the *Act* in the circumstances of this appeal.

[67] On the one hand, I have found that the factor at section 14(2)(a) and the unlisted factor of inherent fairness have relevance in this appeal, but weigh minimally in favour of disclosure. As discussed, this is because of the level of disclosure already made of this record, and the undisputed fact that the appellant was present when the record was read out loud.

[68] On the other hand, two factors weigh significantly against disclosure in this appeal. As mentioned, the fact that a section 14(3) presumption applies (in this case, section 14(3)(d)) counts as a factor weighing against disclosure. I have also found that section 14(2)(f) is worth significant weight as well.

[69] Weighing the factors and presumptions, and taking into account the interests of the parties, I find that disclosure of the information at issue in the record would be an unjustified invasion of personal privacy of the affected parties whose personal information is contained in the records. The presumption at section 14(3)(d) and the factor at section 14(2)(f) outweigh the factors weighing in favour of disclosure in this case. Therefore, I find that the information at issue is exempt from disclosure under the personal privacy exemption at section 38(b), subject to my consideration of the absurd result principle and my review of the board's exercise of the discretion.

Absurd result

[70] If a requester originally supplied the information, or the requester is otherwise

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

aware of it, the information may not be exempt under section 38(b) because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[24]

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

- the requester was present when the information was provided to the institution;[25] or
- the information is clearly within the requester's knowledge.[26]

[72] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[27]

[73] As mentioned, it is undisputed that the appellant is aware of the information withheld, having been at the board meeting when it was read out.

[74] Despite the appellant's knowledge of the withheld information, I find that it would not be absurd to withhold it in the circumstances of this appeal because I find that, given the highly sensitive nature of the information withheld, disclosure would be inconsistent with the purpose of the personal privacy exemption at section 38(b). I also find that there is a difference between the requester hearing the information and having access to a full written copy of it, allowing for his unrestricted use and disclosure of it, since disclosure under the *Act* is, essentially, disclosure to the world.[28]

Issue C: Did the board exercise its discretion under section38(b)? If so, should this office uphold the exercise of discretion?

[75] 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.

[76] 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

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[24] Orders M-444 and MO-1323.
[25] Orders M-444 and P-1414.
[26] Orders MO-1196, PO-1679 and MO-1755.
[27] Orders M-757, MO-1323 and MO-1378.
[28] Order PO-2461.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[77] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] This office may not, however, substitute its own discretion for that of the institution.[30]

Relevant considerations

[78] Relevant considerations include factors such as the purposes of the *Act*, the wording of the exemption and the interests it seeks to protect, the importance of the information to the requester and/or affected parties, and many others.

[79] In this case, from the nature of the information withheld and the high level of disclosure of the record made to the appellant, I can discern that the board considered the following factors:

- 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 at section 38(b) and the interests it seeks to protect
- whether the requester is seeking his own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- 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.

[80] Given the extent of the disclosure of the record by the board, I am unable to find that the board exercised its discretion improperly. The fact that the appellant and the board parted ways on bad terms is not enough for me to find that the board exercised

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[29] Order MO-1573.
[30] Section 43(2).

its discretion in bad faith, or for an improper purpose, or having taken into account irrelevant considerations. Therefore, I uphold the board's exercise of discretion.

Issue D: Was the director of education in a conflict of interest position with respect to the processing of the request?

[81] The appellant alleges that the director of education (the head under the *Act*), as the author of the partially withheld record, was in a conflict of interest in issuing an access decision in response to the appellant's request. He argues that because the record contains false allegations about him, the director had a vested personal or special interest in withholding the information within the record, and did so to protect that interest. The appellant also argues that the freedom of information co-ordinator was not impartial either because she reports to the head and has several other responsibilities at the board.

[82] I appreciate that the appellant lost his position at the board, and that he believes this loss was under manifestly unfair circumstances. That is clear to me from reading his representations.

[83] Despite this context, I do not find that there was a conflict of interest on the part of the director of education, or the freedom of information co-ordinator, in the processing of the appellant's request, for reasons I will explain below.

[84] Previous orders have considered the issue of conflict of interest or bias.[31] In determining whether there is a conflict of interest, I must consider the following questions:

a. Did the decision-maker have a personal or special interest in the records?

b. Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[85] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

[86] It is also important to note that in administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating a conflict of interest or bias lies on the

[31] See for example Orders M-640, MO-1285, MO-2605, MO-3208, MO-2867, and PO-2381.

person who alleges it, and mere suspicion is not enough.[32]

[87] In *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*,[33] the Supreme Court of Canada explained that, while all administrative decision-makers have a duty of impartiality, the content of that duty can vary depending upon the context of the decision-maker's activities and the nature of his or her functions.[34] The Supreme Court stated that the obligation of impartiality of a judge or an administrative decision-maker whose primary function is adjudication is "not equivalent" to that of a decision-maker whose primary function is not adjudication.[35]

[88] This office has applied the Supreme Court's reasoning in *Imperial Oil* to the question of whether an individual responding to a request for information under the *Act* was in a conflict of interest in processing that request.[36] For example, in Order PO-2381, the adjudicator cited *Imperial Oil* and stated that the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. The adjudicator reviewed the CEO's compliance with the obligations under the *Act* and the exercise of his discretion in good faith, taking into account relevant considerations and disregarding irrelevant considerations. He found that the decision-maker, who was CEO of the institution, was not in a conflict of interest in the processing of the appellant's request under the *Act* despite the CEO's personal involvement in the dealings with the requester that led to the requester's access request, and the fact that the parties were in litigation.

[89] With these principles in mind, and as explained below, I find that neither the director of education nor the freedom of information co-ordinator was required to be impartial in the way that would be expected of an independent adjudicator, in responding to the appellant's request under the *Act*.

[90] The fact that the director of education was the author of the record, by itself, is not sufficient for me to find that he has a personal or special interest in the record.

[91] Nor would it be reasonable to find that the freedom of information co-ordinator was partial because she reports to the head since every person at the board is, by definition, subordinate to the head. Finding a conflict of interest on the basis of the freedom of information co-ordinator's relative position to the head would lead to the absurd result of finding that no one subordinate to the head could be an impartial decision maker in processing the appellant's request, and that the head could not issue

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[32] See Blake, S., *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.
[33] [2003] 2 SCR 624, 2003 SCC 58 (CanLII).
[34] Ibid.
[35] Ibid.
[36] See, for example, Orders PO-2381 and MO-3513-I.

a decision about a record he authored either.

[92] I am also not persuaded that a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest in the processing of the appellant's request. The head disclosed most of the record at issue, including most of the personal information of the appellant. He withheld relatively few portions of the record, consisting of personal information mainly belonging to affected parties, including students (some of them then-minors). This significant level of disclosure undermines the appellant's position that information was withheld because dissemination of the record would somehow be damaging to the head. It also undermines the appellant's position that the director has a personal or special interest in the record, and I find that the director does not.

[93] Finally, I have already found that the personal privacy exemption at section 38(b) was properly applied to the information withheld. The proper application of exemptions under the *Act* is neither unlawful nor evidence of a conflict of interest (or bias).

[94] For these reasons, I do not find that the appellant has established that his request was processed a board employee with a conflict of interest in the decision.

Issue E: Did the board conduct a reasonable search for records?

[95] 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.[37] 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. That is the case here, for the reasons that follow.

[96] 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.[38] To be responsive, a record must be "reasonably related" to the request.[39]

[97] 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.[40]

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[37] Orders P-85, P-221 and PO-1954-I.
[38] Orders P-624 and PO-2559.
[39] Order PO-2554.
[40] Orders M-909, PO-2469 and PO-2592.

[98] 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.[41]

[99] The board states that the appellant raised the issue of reasonable search at the "11th hour" during mediation, and the board did not have an opportunity to respond to it. However, any prejudice to the board because of the late raising of the search issue could be remedied during the inquiry process.

[100] The board states, on the one hand, that the record at issue is the only record responsive to the appellant's request, but its representations also refer to records that the appellant is said to have created and provided to the board. The board argues that it would be "absurd" to "give them back to the appellant, in redacted format, in response to the FOI request." In addition, the board states that the records provided by the appellant are now subject to solicitor-client privilege.

[101] Although the Notice of Inquiry that I sent to the board asked it to provide a written summary of all steps taken in response to the request, in affidavit form, signed by the person or persons who did the actual search, the board did not do so. There is little information before me about who conducted the search for responsive records, what the scope of the search was, or what steps were taken to conduct that search, including any relating to clarification. The appellant rightly points this out. I find that the lack of these requested details alone would be enough for me to order a further search.

[102] In addition, given the board's representations regarding the existence of additional responsive records, I cannot uphold the board's search as reasonable. The board was required to identify all responsive records, even if the appellant provided them to the board, and even if the board believes those records are now subject to an exemption under the *Act*. If the board believes that other records that reasonably relate to the appellant's request are exempt under the *Act*, the correct approach is to identify those records as responsive, withhold access to exempt information, and claim the exemption(s) applicable in an access decision. Then, if the appellant disputes the application of an exemption, the appellant can appeal that access decision to this office.

[103] For these two reasons, I do not uphold the board's search as reasonable, and will order a further search.

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[41] Order MO-2185.

ORDER:

1. I uphold the board's access decision, and dismiss that portion of the appeal.

2. I do not uphold the board's search for records responsive to the request. I order the board to conduct a further search for responsive records, regardless of the source of the record, or the information within it. The search should be conducted by an experienced individual or individuals employed by the board who would be reasonably knowledgeable in the subject matter of the request. This would include any employees in the board's IT department. I further order the board to provide me with an affidavit sworn by an employee or employees who have direct knowledge of the search, including the following information:

    - the name(s) and position(s) of the individual(s) who conducted the search;
    - the steps taken in conducting the search;
    - the results of the search; and
    - if no records are located, a detailed explanation for why no records are located.

3. I order the board to provide representations and affidavits to the appellant and this office, within 30 days of this order, detailing the further search for records responsive to the request.

4. If the board locates further records responsive to the request as a result of the search, I order the board to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 2 and 3 of this order.

Original signed by | April 11, 2019

Marian Sami
Adjudicator