Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3884

Appeal MA16-565-2

Toronto District School Board

December 20, 2019

Summary: The appellant submitted a request to the Toronto District School Board (the board) seeking access to records relating to athletic domes/projects at specified Toronto schools. The board issued a decision granting the appellant access to most of the records responsive to the request. However, it withheld certain information on the basis that it was exempt from disclosure under the mandatory personal privacy exemption at section 14(1) or the discretionary solicitor-client privilege exemption at section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The board also claimed that some records were not in its custody or under its control as required under section 4(1) for the application of the *Act*. The board also took the position that some of the records were not responsive to the appellant's access request. At mediation, the appellant indicated that he would like access to all of the withheld information, including non-responsive information. He was also of the view that more records should exist, therefore, challenging the reasonableness of the board's search. In this order, the adjudicator upholds the personal privacy exemption and the board's claim that certain records are not responsive, in part. The adjudicator finds that some of the information the board claims is personal information should be disclosed and that some of the information it deemed as non-responsive is actually responsive and orders the board to issue an access decision with respect to it. The adjudicator upholds the board's decision with regard to the solicitor-client privilege claim and finds that the board's search was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56, as amended, sections 4(1), 2(1) (definition of "personal information"), 12, 14 and 17.

Orders and Investigation Reports Considered: Orders M-813, MO-2821, MO-3031, P-134 and P-880.

Cases Considered: *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.).

OVERVIEW:

[1] The appellant made a multi-part request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for records relating to an athletic dome built on board property, and taxes relating thereto, specifically:

1. A list of all for-profit and not-for-profit entities that operate on [board] property, including their legal names. This list should include all third parties who have leases, licenses and/or any other type of agreement with the [board].

2. As part of the list, please outline the products and/or services that each third party provides and the [board] address that the third party operates from.

3. Please also indicate on this list whether these third parties provide any direct benefit(s) to [board] students through their products and/or services.

4. A list of all [board] facility permit holders going back to January 1st, 2013 and up to February 21st, 2016 who were charged "commercial" permit fees and the dates and fees that each entity were charged with a total of all "commercial fees" that the TDSB generated during this same time period.

5. All emails sent or received by [named trustee] between the dates of November 15, 2014 and February 16, 2016 that contain any of the following words (in part or in full) in context to the [named project] and MPAC tax assessment situation: [named school], [named company], [named company], Taxes, [named individual], MPAC, [named company], taxes, [named individual], [named dome], [named individual], [named individual], [named individual].

6. All emails sent or received by [named trustee] between the dates of November 15, 2014 and February 16, 2016 that contain any of the following words (in part or in full) in context to the [named project] or [named dome], or MPAC: [named school], [named company], [named company], Taxes, [named individual], MPAC, [named company], taxes, [named individual], [named dome], [named individual], [named individual], [named individual], [named individual].

[2] The board issued an interim access decision and fee estimate of $100 and requested a 50% deposit of $50.00. Following receipt of the full fee, the board issued a subsequent interim access decision. In it, the board advised that access to the records responsive to parts 1 and 4 of the request was denied pursuant to section 11 (economic or other interests) of the *Act* and that there were no records responsive to parts 2 and 3 of the request. With regard to parts 5 and 6 of the request, the board extended its

time to respond to the request pursuant to section 20(1) of the *Act*.

[3] The board subsequently issued a final access decision granting partial access to the records with access to the withheld information denied pursuant to sections 6(1)(b) (closed meeting), 7 (advice or recommendations), 10 (third party information), 11, 12 (solicitor-client privilege) and 14 (personal privacy) of the *Act*. The board also assessed additional fees of $30 and requested payment.

[4] The appellant appealed the board's decision to this office. During mediation, the board reconsidered its decision and notified five affected parties (individuals or organizations who would be affected by disclosure of the records) of the request pursuant to section 10(1) of the *Act*. All five of the affected parties provided the board with their consent to disclose the records for which they were notified.

[5] The board subsequently issued a revised decision granting partial access to further information. The board continued to deny access to the withheld information pursuant to sections 6(1)(b), 12 and 14 of the *Act*; as well, the board identified some information as not within its custody or control. Furthermore, the board continued to identify certain information as not responsive to the request.

[6] The appellant confirmed to the mediator that he wishes to pursue access to all of the information at issue, including the information identified as not responsive. Finally, the appellant believes that further records responsive to his request should exist. Accordingly, reasonable search was added to the scope of the appeal.

[7] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to this appeal sought and received representations from the board and the appellant on the issues set out below, and shared the parties' representations in accordance with *Practice Direction 7* of the IPC's *Code of Procedure*. The appeal was then transferred to me to continue the adjudication of the appeal.

[8] The board indicated in its representations that it was no longer relying on the exemption at section 6(1)(b) and therefore this exemption was removed from the appeal.

[9] For the reasons set out below, I uphold the city's decision, in part, to deny access to records under section 14(1) (personal privacy) and records identified as not responsive. I order the board to disclose non-exempt information and to issue an access decision on the information it claimed was not responsive to the request but which I have found is responsive. I uphold the board's decision that certain records are not in its custody or under its control as required for the right of access under section 4(1) of the *Act* and that certain records are exempt from disclosure under section 12. Finally, I find that the board's search was reasonable.

RECORDS:

[10] At issue in this appeal are emails withheld in full or in part and which are contained in Record 1 which consists of 751 pages of information and Record 2 which consists of 661 pages of information.[1] The board separated the records into 4 categories which include:

- Information which the board claims is not within its custody or under its control
- Information withheld under section 14(1)
- Information withheld under section 12
- Information the board submits is not responsive to the access request.

ISSUES:

A. Are the emails of certain trustees "in the custody" or "under the control" of the institution under section 4(1)?

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

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

D. Does the discretionary exemption at section 12 apply to the records?

E. What is the scope of the request? What records are responsive to the request?

F. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Are the emails of certain trustees "in the custody" or "under the control" of the institution under section 4(1)?

[11] The board takes the position that some of the withheld information is not in the custody or control of the board. This information consists of emails between board trustees.

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[1] For the purpose of this order, I will refer to the records as the board did in its representations which is two batches of records (Records 1 and 2) with several pages for each batch numbered consecutively.

[12] Section 4(1) of the *Act* reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[13] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody *or* under the control of an institution; it need not be both.[2] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[3] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption.

[14] Previous orders and privacy complaint reports issued by this office have considered the issue of whether records held by elected municipal officials are in the "custody or control" of the municipality.[4] The definition of "institution" includes a municipality but does not specifically refer to elected offices such as a municipal councillor.

[15] In Order M-813, this office reviewed this area of the law and concluded that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[16] With respect to the second situation referred to above, previous orders as well as court decisions have set out factors relevant to the determination of "custody or control." I will discuss these factors below.

[17] Although Order M-813 concerns municipal councillors, the approach taken in this and other orders dealing with the custody or control of municipal councillors' records can be applied to the issue of custody or control of the records of board trustees, who

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[2] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] Order PO-2836.
[4] These orders generally concern records of elected municipal councillors. See, for example, Orders M-813, MO-1403, MO-2750, MO-2821, Privacy Complaint Report MC10-75 and MC11-18.

are also elected officials. As a result, I will apply the same analysis to the records at issue in this appeal to determine whether the records are in the custody or control of the board and, therefore, subject to the *Act*.

Were any of the trustees functioning as an "officer" or "employee" of the board in the circumstances of this appeal?

Representations

[18] In its representations, the board submits that it claimed that page 332 of Record 1 and pages 193 to 196 of Record 2 are not within its custody or control. These records are emails between board trustees. The board submits that the records themselves are of a similar nature to those found to be outside of the custody or control of the board in Order MO-3031, where it was found that the records were created and received by trustees and not officers or employees of the institution which the board submits is the case in the present appeal.

[19] In his representations, the appellant does not address this issue directly.

Analysis and finding

[20] After reviewing the parties' representations, the records and Order MO-3031 referenced by the board, I am satisfied that the trustees were not acting as "officers" or "employees" of the board.

[21] As pointed out by the adjudicator in MO-3031, although trustees are required to act within the board's by-laws and comply with certain legislative requirements, this does not result in them being officers or employees. Similarly, the fact that they are paid an honorarium which is treated by Revenue Canada as a salary does not mean they are employees of the board.[5]

[22] Furthermore, based on the evidence before me, I am not satisfied that the board members were discharging a special duty assigned by the board, such that they may be considered part of the "institution." The adjudicator in Order M-813 identified the "unusual circumstances" where an individual who is not an officer of an institution may be considered part of the institution for the purposes of the *Act*. She described those circumstances in the following terms:

> … [a]n example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to [the relevant section of the *Municipal Act*]. In this regard, the authorities indicate that this

[5] Municipal councillors are also ordinarily paid by the municipality.

> would be an extremely unusual situation, and where it occurs, the councillor would be considered an "officer" only for the purposes of the specific duties he or she undertakes in this capacity. In these cases, a determination that a municipal councillor is functioning as an "officer" must be based on the specific factual circumstances.

[23] Applying a similar approach in this appeal, I have not been provided with sufficient evidence to establish that the board members created the records at issue in this appeal as "officers" of the board in fulfilling their duties. I am not satisfied that it is the type of "unusual circumstance" described by the adjudicator in Order M-813, which would result in the trustees being considered "officers" while performing this duty.

[24] In conclusion, I am satisfied that the communications at issue between the identified trustees do not arise out of any exercise of duties as officers or employees of the board. To the extent the trustees hold these records, they do not hold them as part of the board or "institution."

[25] As a result, I find that the trustees were not acting as "officers" or "employees" of the board in connection with the records at issue in this appeal.

[26] I must now review whether the requested records are, nevertheless, in the custody or under the control of the board on the basis of established principles.[6]

Are the records in the "custody or control" of the board, on the basis of established principles?

[27] The courts and this office have applied a broad and liberal approach to the custody or control question.[7] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[8] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[9]
- What use did the creator intend to make of the record?[10]

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[6] See: Orders P-239 and M-813, for example.
[7] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[8] Orders P-120, MO-1251, PO-2306 and PO-2683.
[9] Order P-120.
[10] Orders P-120 and P-239.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[11]

- Is the activity in question a "core", "central" or "basic" function of the institution?[12]

- Does the content of the record relate to the institution's mandate and functions?[13]

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[14]

- If the institution does have possession of the record, is it more than "bare possession"?[15]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[16]

- Does the institution have a right to possession of the record?[17]

- Does the institution have the authority to regulate the record's content, use and disposal?[18]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[19]

- To what extent has the institution relied upon the record?[20]

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[11] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.
[12] Order P-912.
[13] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.
[14] Orders P-120 and P-239.
[15] Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[16] Orders P-120 and P-239.
[17] Orders P-120 and P-239.
[18] Orders P-120 and P-239.
[19] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[20] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

- How closely is the record integrated with other records held by the institution?[21]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[22]

[28] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[23]
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?[24]
- Who paid for the creation of the record?[25]
- What are the circumstances surrounding the creation, use and retention of the record?[26]
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[27]
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[28] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

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[21] Orders P-120 and P-239.
[22] Order MO-1251.
[23] PO-2683.
[24] Order M-315.
[25] Order M-506.
[26] PO-2386.
[27] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[28] Orders M-165 and MO-2586.

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[29]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[30]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[31]

[29] Moreover, in determining whether records are in the "custody or control" of the board, the above factors must be considered contextually in light of the purpose of the legislation.[32]

[30] In addition to the above factors, the Supreme Court of Canada[33] has articulated a two-part test to determine institutional control of a record:

1. whether the record relates to a departmental matter, and

2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[31] According to the Supreme Court, control can only be established if both parts of this test are met.

[32] To determine whether the email records listed above are in the custody or under the control of the board, I must review each record and consider the factors contextually in light of the purpose of the legislation.[34]

Representations

[33] As noted, the board submits that the records themselves are of a similar nature

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[29] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v. Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[30] Order MO-1251.
[31] Order MO-1251.
[32] See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.
[33] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].
[34] *City of Ottawa v. Ontario,* cited above.

to those found to be outside of the custody or control of the board in Order MO-3031, where it submits it was found that:

- the board did not rely on the records for board business
- none of the records was used as part of an official record of trustee business or presented in trustee meetings
- trustees communicate regularly with each other and that simply expressing one's personal views to each other on an issue whether or not it will eventually come to a vote in some form does not mean that the communication comes within the custody or control of the board
- prior IPC orders and court cases have made it clear that simple possession of records stored on an institution's computers does not give rise to a necessary finding of custody or control.

[34] The board submits that it is clear from the wording of the email at page 332 of Record 1 that it is a personal email between two trustees and it is clear on the face of the record that the matter of the email is not related to the board's business and is a personal discussion between the two trustees. The board submits that this record is similar in all material respects to those records reviewed in Order MO-3031 which were found to be outside the custody or control of the board.

[35] Similarly, for the information at page 193 to 196 of Record 2, the board submits that the information involves the sharing of personal opinions as amongst trustees. The board submits that there is no evidence on the face of the records that the trustees were proposing specific actions but merely expressing their opinions to one another, similar to the discussion in Order MO-3031.

[36] In his representations, the appellant does not address this issue directly. He does not comment on the list of factors, set out above, that was provided to him in the Notice of Inquiry. He also does not respond to the board's extensive representations on this issue, the non-confidential portions of which he received during the inquiry. The appellant does submit that one of the trustees was using a personal Gmail account to communicate with another trustee. The appellant also submits that there is evidence that before the board voted on a report that addressed their concerns with a positive staff report, private Gmail accounts were used to schedule and coordinate meetings that had significance to the board implications. The appellant submits that there is enough in the list of emails that he attached to his representations that proves that a city councillor and two specified trustees were using personal Gmail accounts to bully and blackmail his company.

Analysis and finding

[37] Having found above that the affected party trustees were not acting as officers

or employees of the board at the time they created the communications at issue, I have also considered whether any of the emails at issue may, nevertheless, be in the custody or control of the board. After considering the submissions made by the parties, I find that the records at issue are not in the custody or control of the board for the purpose of the *Act*. I make this finding for a number of reasons.

[38] To begin, I note that all of the records at issue consist of email communications exclusively between various trustees; they were not sent to the board's senior staff or employees. I also note that the information in the withheld records does not involve board business and consists of personal discussions between trustees including personal opinions. Also, I agree with the board that it is clear on the face of the records that the board did not rely on any of this information to conduct board business.

[39] With this in mind, I have considered the factors set out above in deciding whether or not the records are in the custody or control of the board, and I make the following findings.

[40] I accept the position of the board that the records were not created by an officer or employee of the board, and that the board does not regulate the content, use or disposal of these communications. Also, based on the board's representation, I am satisfied that it has not relied on the records.

[41] I also find, based on the evidence provided by the board and the records themselves, that the communications at issue have not been provided to or integrated with records held by the board, regardless of whether or not they were received or created by the trustees using their board email system or their personal email addresses.

[42] In reviewing the withheld records, I am not convinced that the content of these records relates to the board's mandate and functions. The private communications at issue in this appeal consists of trustees expressing their personal views to other trustees about an issue. However, even if the communications related to the board's mandate and functions, this does not mean that the records are within the custody or control of the board. In Order MO-2821, the adjudicator found that although the content of communications may relate broadly to matters in an institution's mandate, and elected representatives may communicate with each other about these matters, this does not mean that the records are necessarily within the institution's custody or control. The adjudicator stated:

> … it is entirely to be expected that [elected municipal officials] communicate regularly with each other and with any number of individuals and organizations about matters within the mandate of [the institution]. Presumably, the reason for many of these communications is that an individual or organization wishes to express a view to [the elected municipal officials] about an issue that may come to a vote at [a

> meeting], or [elected municipal officials] wish to persuade each other about a position on an issue.

[43] Finally, although the board did not comment in its representations on how it retrieved the emails at issue, previous orders and decisions have found that records stored on institutional computers are not necessarily in the institution's custody. In particular, I rely on the reasoning in the decision of the Divisional Court in the *City of Ottawa*.[35] Although that case dealt with records which were clearly the "personal records" of an employee of the City of Ottawa stored on a city server, the following quotation is instructive:

> … The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The City can prohibit employees from certain uses, but does not control what employees create, how or if they store it on the server, and what they choose to do with their own material after that, including the right to destroy it if they wish.

[44] As a result of the above, I find that the records that have been withheld under section 4(1) are not in the custody or under the control of the board and are, therefore, not subject to the *Act*.

[45] The appellant notes that, on the records he received, the trustees used their personal Gmail accounts to send emails regarding board matters.[36] It appears that the appellant is arguing that the board should have custody and control over the emails in the trustees' Google accounts since they use them for board business. The board's decision to disclose these emails is not before me. For the reasons set out above, I find that the withheld emails between trustees are not in the board's custody or control.

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

[46] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

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[35] *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605). This decision discussed the custody and control of both electronic and paper records, and reviewed certain factors that must be considered in conducting such a review.

[36] One of the records disclosed to the appellant is an email a trustee sent from a board account to their Gmail account.

> "personal information" means recorded information about an identifiable individual, including,
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> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[47] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[37]

[48] 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.[38]

[49] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[39]

Representations

[50] The board submits that for various records in Groups 1 and 2, it redacted the personal identifiers/contact information/identifying information of individuals involved in a petition and/or expressing opinions on the named dome and/or expressing a claim of hate mail which arose in the course of the dome discussion.

[51] The appellant did not address whether the records contained the personal

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[37] Order 11.
[38] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[39] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information of an affected party in his representations.

Finding

[52] Based on my review, I find that the records contain information relating to affected individuals that qualifies as their personal information. The records contain information relating to these individuals including their names appearing with phone numbers and email addresses (paragraph (b) of the definition of personal information). Moreover, I find that the records do not contain any information that qualifies as the personal information of the appellant.

[53] However, there is some withheld information that I find is clearly professional rather than personal information of the affected individuals. Specifically, this is the information withheld on pages 321 and 677 of Record 1 and some of the information on page 629 of Record 2. There is also a word that was severed from page 249 of Record 1 which constitutes neither personal nor professional information. As only personal information can be exempt under section 14(1), I find this information is not exempt under section 14(1). Moreover, as the board has not claimed any discretionary exemption for any of this information and no other mandatory exemptions apply, I will order this information disclosed.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue?

[54] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[55] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex and requires a consideration of additional parts of section 14.

[56] The information in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) of the *Act*.

Sections 14(2) and (3)

[57] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy. None of the section 14(4) paragraphs are relevant in this appeal.

Section 14(3) presumption

[58] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the

information is presumed to be an unjustified invasion of personal privacy under section 14.

[59] The board did not submit that any presumptions under section 14(3) might apply, nor has he raised circumstances indicating that an unlisted factor may apply.

Section 14(2) factors

[60] 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.[40] The factors listed at paragraphs 14(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 14(2)(e) though (i), if present, generally weigh in favour of non-disclosure.

[61] 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).[41]

[62] The board submits that the factor at section 14(2)(f) (highly sensitive) applies. In my review of the appellant's representations, he does not refer to any factors at section 14(2) that might apply.

[63] The relevant parts of section 14(2) state:

> A head, in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;

Representations

[64] The board submits that when it reviewed the records, it redacted the personal identifiers and contact information of individuals involved in a petition and/or expressing opinions on the specified dome and/or addressing a claim of hate mail which arose in the course of discussions concerning the dome. The board submits that this personal information is subject to section 14(1) and relies on section 14(2)(f) (highly sensitive) in particular.

[65] The board also submits that the records contain the personal contact information of trustee/board officials (either the actual address or an electronic link which could be

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[40] Order P-239.
[41] Order P-99.

used to retrieve the personal email address) including in some cases a physical address. The board refers to the factor in section 14(2)(f) (highly sensitive). The board submits that the trustee is a high profile political figure who is at reasonable risk of being subject to unwelcome and harassing communications through their personal communication channel. The board also submits that this information does not fall within any of the factors in section 14(2) that would support disclosure. The board submits that trustees and board officials all have board-issued email addresses through which they may be contacted.

[66] As noted, the appellant did not speak to the application of the mandatory exemption at section 14 in his representations.

Analysis and Finding

[67] The board submits that the factor against disclosure in section 14(2)(f) is relevant to my determination of whether disclosure of the withheld personal information would not be an unjustified invasion of an individual's personal privacy. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[42] In the present appeal, the appellant did not address the application of section 14(1) to the personal information withheld, nor did he raise any factors, listed or unlisted, favouring disclosure in section 14(2). Accordingly, I find that the mandatory personal privacy exemption in section 14(1) applies to exempt the personal information from disclosure.

Issue D: Does the discretionary exemption at section 12 apply to the records?

[68] Section 12 states as follows:

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

[69] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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[42] Orders PO-2267 and PO-2733.

Branch 1: common law privilege

[70] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the board claims the application of the common law solicitor-client communication privilege.

Solicitor-client communication privilege

[71] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[43] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[44] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[45]

[72] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[46]

[73] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[47] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[48]

[74] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[49] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[50]

Loss of privilege

Waiver

[75] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

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[43] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[44] Orders PO-2441, MO-2166 and MO-1925.
[45] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[46] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[47] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[48] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[49] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[50] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[51]

[76] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[52]

[77] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[53] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[54]

Representations

[78] The board, referring to the Court of Appeal in *Balabel v. Air India*[55], submits that the concept of solicitor-client privilege extends beyond express requests for and provision of advice and applies to the continuum of communications between legal counsel and client.

[79] The board submits that the information that was withheld under section 12 constitutes a continuum of communications between the board's internal legal counsel and elected officials and senior staff of the board involved in the specified school facility project. The board submits that these records were created in order to communicate information from its legal counsel to said officials. The board submits that the communications were necessary so that its counsel could obtain information in order to represent it in OMB mediation proceedings and in communications with representatives of the board's contractors in order to address issues of administering legal obligations under a contract between the board and its facilities contractor including issues of potential breach.

[80] The board included an affidavit sworn by its legal counsel with its representations. In that affidavit, the affiant indicated that she was advised, by the legal counsel employed by the board during the relevant time, that in conjunction with another former legal counsel for the board, they were involved in several legal matters related to the construction of the facilities at the specified school. The affiant states that the board's legal counsel were involved in both a mediation process conducted by the OMB in order to eliminate the need for litigation concerning the issues surrounding the

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[51] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[52] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[53] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[54] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[55] [1988] 2 ALL E.R. 246 (C.A.).

project and communications with the appellant.

[81] The affiant submits that legal counsel acted for the board in the mediation process with a view to negotiating minutes of settlement and in the course of acting on the board's behalf engaged in a course of confidential communications with trustees, in particular one of the specified trustees. The affiant submits that the communications were used to apprise the trustee and others involved in providing input regarding the ongoing issues and seeking input for the purpose of informing legal counsel's position at mediation. The affiant submits that this correspondence was conducted in confidence and copied only to senior staff and other board trustees as necessary.

[82] The affiant also submits that the board's legal counsel were engaged in ongoing discussions with representatives for the appellant in terms of ongoing administration issues arising from the contract between the parties. According to the affiant, the board also retained external counsel as it appeared that there were a number of legal issues which had the prospect of giving rise to litigation between the parties over the contents of a contract and adherence to same. The affiant states that in the course of these legal issues, the board's internal legal counsel continued to engage in confidential communications to apprise the trustees directly involved in the matter as well as senior staff and to obtain their input on attempting to address the issues. The affiant states that these issues included whether the contractor would comply with its legal obligations under the contract, the tax exempt status of the contractor and the board's role in obtaining tax exempt status.

[83] The appellant did not address the board's position that the discretionary exemption at section 12 applies to the withheld information.

Analysis and finding

[84] I have reviewed the records for which the board is claiming the section 12 exemption and accept that the withheld information is exempt from disclosure under Branch 1, solicitor-client communication privilege. The records contain direct communications of a confidential nature between a solicitor and board staff.

[85] After my review of the records, I find that they consist of direct communications by way of email exchanges between board staff and a staff solicitor, made for the purpose of obtaining or giving professional legal advice. As noted, the rationale for this type of privilege is to ensure that a client may freely confide in their lawyer on a legal matter. Confidentiality is an essential component of the privilege, and I am satisfied by reviewing the records and the board's representations, that the communications were made in confidence.

[86] Moreover, based on the manner in which the board applied the section 12 exemption, I find that the board did not err in its exercise of discretion. Taking into account all of the circumstances present in this appeal, including my review of the withheld information in the records, the board's representations on the exemptions and

the fact that I have upheld the severances claimed under section 12, as well as the importance of solicitor-client privilege as recognized by the Courts, I am satisfied that the board has appropriately exercised its discretion under section 12 of the *Act*. I am satisfied that the board took into account relevant considerations and did not take into account irrelevant ones. Accordingly, I uphold the board's exercise of discretion to withhold the information under section 12.

Issue E: What is the scope of the request? What records are responsive to the request?

[87] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[88] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[56]

[89] To be considered responsive to the request, records must "reasonably relate" to the request.[57]

Representations

[90] In its representations, the board submits that it claimed that certain records (emails) were not responsive to the request. It refers to the appellant's request and submits that it is clear on its face that the information it claims as non-responsive in

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[56] Orders P-134 and P-880.
[57] Orders P-880 and PO-2661.

each record or portion thereof that the subject matter does not relate to the specified matter or the building of the facility at that location and therefore falls outside of the scope of the request.

[91] The appellant did not speak to this issue in his representations.

Finding

[92] After a review of the portions of the withheld information that the board submits are not responsive to the appellant's request, I agree with the board, in part. I conclude that the information that was withheld as non-responsive is unrelated to the access request in this appeal except for the information contained on page 166 of Record 2. In my review of this information, I find that it is responsive to the access request because it reasonably relates to the appellant's request. In making this finding, I rely on Orders P-134 and P-880 where it was found that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*.

[93] Accordingly, I will order the board to provide an access decision to the appellant regarding this information.

Issue F: Did the institution conduct a reasonable search for records?

[94] 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.[58] 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.

[95] 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.[59] To be responsive, a record must be "reasonably related" to the request.[60]

[96] 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.[61]

[97] 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

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[58] Orders P-85, P-221 and PO-1954-I.
[59] Orders P-624 and PO-2559.
[60] Order PO-2554.
[61] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[62]

[98] 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.[63]

Representations

[99] The board submits that it has conducted a reasonable search for responsive records. It submits that the appellant at no time identified any basis for the claim that the search was not reasonable. The board submits that it conducted a search for records responsive to the request using the specific search terms identified by the request. The board submits that the records were provided to the appellant in whole or in part subject to the exemptions it claimed.

[100] The board provided an affidavit on its search with its representations. In the affidavit, sworn by the freedom of information and privacy analyst for the board, the affiant stated that as part of her functions she coordinates the searches for records under the *Act*. The affiant submits that she contacted the senior manager of major capital projects and building partnerships at the board, who has knowledge of records responsive to this request. The affiant submits that she was provided with a list of records responsive to (a), (b) and (c) of the request. The affiant submits that she was advised that there were no other responsive records.

[101] With regard to item (d) of the request, the affiant submits that she contacted the facility permitting coordinator at the board who has knowledge of the responsive records for this part of the request. The affiant submits that she was provided with a list of records responsive to this part of the request along with responsive fees and dates which have been provided to the appellant. The affiant submits that she was advised that there were no other responsive records.

[102] With regard to the remaining part of the appellant's request (items (e) and (f)), the affiant submits that she organized the search for any email correspondence that would be responsive to the request. In coordinating the search, she contacted the board's chief technology adviser at the board's IT department who is responsible for board databases including email databases. The affiant submits that she was advised that this department conducted a search through the board's email accounts for the two named trustees and was provided with all of the responsive records which were provided to the appellant subject to the information withheld under an exemption.

[103] Although the appellant maintained that the board's search was not reasonable,

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[62] Order MO-2185.
[63] Order MO-2246.

the appellant did not address this issue in his representations.

Finding

[104] As noted above, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. However, on my review of the appellant's representations, he does not address the board's search and does not provide a reasonable basis to conclude that further records exist.

[105] Having reviewed the representations and evidence of the parties, I am satisfied that the board conducted a reasonable search for responsive records in this appeal. I accept the affidavit evidence provided, that it has made reasonable efforts to identify and locate responsive records. I find that the appellant's position that further records exist is not supported by any evidence to establish that there is a reasonable basis to conclude that additional records should exist. Accordingly, I uphold the board's search for responsive records.

ORDER:

1. I uphold the board's decision regarding custody or control, section 12 and section 14, in part.

2. I order the board to disclose the withheld information at pages 321 and 677 of Record 1.

3. I order the board to disclose the withheld information at page 629 of Record 2 as set out in the highlighted copy of that page provided with the board's copy of this order. To be clear, highlighted portions of this record should not be disclosed.

4. I order the board to provide the appellant with a copy of the Records referenced in order provision 2 and 3 by January 29, 2020, but not before January 24, 2020.

5. I order the board to issue an access decision for the withheld information at page 166 of Record 2.

6. I uphold the board's search as reasonable.

Original Signed by: December 20, 2019

Alec Fadel
Adjudicator