Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3903

Appeal MA19-00099

Windsor-Essex Catholic District School Board

February 13, 2020

Summary: The Windsor-Essex Catholic District School Board (the board) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for specified records related to the requester's sons, including a letter provided to the board by the children's mother. The only record at issue is that letter. The board withheld the letter in its entirety, relying on the mandatory personal privacy exemption at section 14(1) of the Act. The requester appealed that decision. At mediation, it was determined that the discretionary personal privacy exemption at section 38(b) should be considered. In this order, the adjudicator upholds the board's decision and dismisses the appeal.

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"), 14(2), 38(b), 54(c); *Children's Law Reform Act*, R.S.O. 1990, c.12, sections 19(a) and 20(5); and *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), sections 16(5) and 16(8).

Orders Considered: Orders PO-3599, M-878, MO-1480, and MO-3026.

OVERVIEW:

[1] The Windsor-Essex Catholic District School Board (the board) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*), one for each of the requester's sons. Each request was for:

- All copies of my son [name of child]'s Ontario School Records (OSR).
- A copy of the letter provided to your office, from my son's biological mother, where her and her lawyer have instructed your office to deny me my parental

rights pertaining to access to my son's (OSR), as per my discussion with your Superintendent, [named individual].

- A copy of my son's student identification number for the purpose of ordering school photographs.

[2] The board located responsive records consisting of the OSRs and a letter, and issued one access decision in response to the requests.

[3] In its decision, the board stated that it was prepared to provide the requester with the OSRs of his sons. In addition, the board advised the requester that it did not have custody or control of a record containing the sons' student identification numbers relating to school photographs. Regarding the letter requested, the board stated that a third party whose interests may be affected was being notified[1] and a decision on whether or not that record will be disclosed will be made. The board later issued an access decision, withholding the letter in full, under the mandatory personal privacy exemption at section 14(1) of the *Act*.

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

[5] During mediation, the issues were narrowed and clarified: the only record at issue became the letter, and the board confirmed that it relied on the discretionary personal privacy exemption at section 38(b) to withhold the letter (not the mandatory exemption at section 14(1) because the record contains personal information of both the appellant and other identifiable individuals).

[6] The appellant advised the mediator that he wished to proceed to adjudication. Accordingly, this file moved to adjudication, where an adjudicator may conduct a written inquiry.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, first to the board, then to the appellant. I sought and received written representations from the parties in response to the Notice of Inquiry. The parties also provided further representations in reply. I shared the non-confidential portions of the representations amongst the parties in accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

[8] For the reasons that follow, I uphold the board's decision and dismiss the appeal.

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[1] Under section 21 of the *Act*.

RECORDS:

[9] The record at issue is a one-page letter written by the children's mother, withheld in its entirety.

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?

DISCUSSION:

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

[10] To begin, I note that section 54(c) of the *Act* is of no application here because the appellant is not a custodial parent.

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

[12] 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:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

. . . .

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[13] 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.[2]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[15] The parties agree, and I find, that the record contains the personal information of the appellant, including his name, the views and opinions of others about him, and the fact that his name appears in a letter provided to the school principal. This is the appellant's personal information under paragraphs (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[16] In addition, as the board submits, the record itself constitutes the personal information of the author of the letter (the children's mother) under paragraph (f) of the definition of that term in section 2(1) of the *Act*. Based on my review of the record, I find that it also contains the personal information of a number of identifiable individuals (affected parties), including the author of the letter, within the meaning of paragraphs (a) and (h) of the definition of that term in section 2(1) of the *Act*.

[17] Since the record at issue contains both the personal information of the appellant and other identifiable individuals, I must assess any right of access that the appellant may have to it under the discretionary personal privacy exemption at section 38(b).

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[2] Order 11.

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

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

[18] For the reasons set out below, the record is exempt from disclosure under the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

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

[21] Under section 38(b), if a record contains personal information of both the appellant 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.

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

[22] 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 dispute whether sections 14(1)(a) and 14(1)(d) apply. However, they have not argued that any sections 14(1)(b), (c), or (e) are relevant in this appeal, and on my review of the record at issue, I find that they are not.

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

14(1)(a) - consent

[24] The appellant submits that the board does not need the consent of the individual who supplied the record at issue "unless it was specifically noted in the letter at the time of delivery."

[25] The board's position is that section 14(1)(a) does not apply because the author of the letter has not provided consent to disclosure.

[26] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access

request.[4]

[27] In this case, the author of the letter has not provided consent to the disclosure of their personal information in the context of the request. Therefore, I find that the exception at section 14(1)(a) does not apply.

14(1)(d) – another Act

[28] Because the appellant submits that he has access rights under another statute, I have considered whether section 14(1)(d) of *MFIPPA* is applicable in this case. I will explain below why it is not.

[29] Section 14(1)(d) says:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except under an Act of Ontario or Canada that expressly authorizes the disclosure[.]

[30] In order for section 14(1)(d) to apply, there must either be:

- specific authorization in the statute for the disclosure of the type of personal information at issue, or
- a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.[5]

[31] The appellant submits that he has access rights to the record at issue as a non-custodial parent to make inquiries and have access to information about his children's health, education, and welfare under the *Children's Law Reform* (the *CLRA*).[6] He appears to claim that another statute applies as well, but does not name it. From the circumstances, including the claim that the *CLRA* applies, I decided to examine whether a provision of the *Divorce Act*[7] applies as well.

[32] Section 20(5) of Ontario's *CLRA* says:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

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[4] Order PO-1723.
[5] Orders M-292, MO-2030, PO-2641 and MO-2344.
[6] R.S.O. 1990, c.12.
[7] R.S.C., 1985, c. 3 (2nd Supp.).

[33] Section 16(5) of Canada's *Divorce Act* has similar wording about access to a child's information:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

[34] A number of previous orders have applied section 14(1)(d)[8] on the basis of section 16(5) of the *Divorce Act* and/or section 20(5) of the *Children's Law Reform Act*.[9]

[35] However, this office has also found that it may be unreasonable or illogical to apply section 14(1)(d) on the basis of those statutes in some circumstances when a more probing consideration of the facts precludes its application, in keeping with the modern principle of statutory interpretation. In Order PO-3599, the IPC recognized that:

- both section 16(5) of the *Divorce Act* and section 20(5) of the *Children's Law Reform Act* refer to information about the welfare of children, as well as their health and education;
- an important purpose underlying these statutory provisions relating to custody and access is to promote the best interests of children;[10]
- the use of the term "information" in both these sections does not necessarily mean "any and all" information, particularly in circumstances where disclosure may not be in the children's best interests;
- the provisions of the *CLRA* and *MFIPPA* together express a policy that, in limited circumstances, the welfare of children overrides personal privacy rights, but providing personal information about children that appears in a sensitive record to some requesters may be inconsistent with the underlying principles of *MFIPPA*, *CLRA*, and the *Divorce Act*.

[36] Based on my review of the record, the parties' representations, and all the circumstances, I find that the above considerations are highly relevant in this appeal. Although I accept that the appellant is an access parent within the meaning of the *CLRA* and the *Divorce Act*, I am not satisfied that the legislature would have intended that section 14(1)(d) apply in the circumstances of this appeal, having reviewed the record. I am unable to elaborate further without revealing the information at issue itself. However, on the basis of my review of the evidence, I find that applying section

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[8] Or its provincial equivalent, section 21(1)(d) of the *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31.
[9] See, for example, Orders M-878, MO-1480, and MO-3026.
[10] See section 16(8) of the *Divorce Act* and section 19(a) of the *Children's Law Reform Act.*

14(1)(d) would be inconsistent with one of the purposes of the *Act* (the protection of personal privacy), and the above-noted principles, recognized in Order PO-3599. For these reasons, I find that section 14(1)(d) does not apply.

[37] Since none of the exceptions at section 14(1)(a) to (e) apply, I will now consider sections 14(2) and 14(3).

Sections 14(2) and 14(3)

[38] 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.

[39] 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]

Section 14(3) – presumptions against disclosure

[40] Here, the board does not rely on any paragraphs at section 14(3) to withhold the record, and based on my review, I find that none apply.

Section 14(2) – factors in favour of, and against, disclosure

[41] 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).[12] The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[13]

<u>Factors weighing in favour of disclosure</u>

[42] 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;

b. access to the personal information may promote public health and safety;

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[11] Order MO-2954.
[12] Order P-239.
[13] Order P-99.

c. access to the personal information will promote informed choice in the purchase of goods and services;

d. the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

[43] The appellant did not specifically cite any of these listed factors as being relevant in this appeal, and on my review of the record, none of these factors apply. The appellant does speculate in his representations that the record "may be" defamatory against him and damaging to his character. It is possible that he meant to raise section 14(2)(d) (fair determination of rights) by reference to possible defamation. 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

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[14]

[44] Since there is no evidence before me of a proceeding that is either existing or contemplated in relation to defamation (or any other legal right drawn from common law or statute), part two of the above test is not met, and the factor at section 14(2)(d) does not apply.

[45] I have also considered whether any other circumstances are relevant that may weigh in favour of disclosure, but have found none. The appellant submits that the record at issue was used to withhold his children's OSRs from him, for years. While I accept that the appellant found it difficult to obtain his children's OSRs, he eventually did during the process of mediation at the IPC. The fact of that disclosure negates the weight, if any, I would have given to the circumstances he described in requesting disclosure.

[46] The appellant has not established that any other factors favouring disclosure

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[14] 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.).

apply, and based on my review of the evidence before me, I find that no such factors exist in the circumstances of this case.

Factors weighing in favour of the protection of personal privacy

[47] Some factors listed under section 14(2) of the *Act* typically weigh in favour of protecting personal privacy (and against disclosure of the personal information) of individuals other than the appellant, including sections 14(2)(e), (f), and (h), which the board claimed. For the purposes of this appeal, I find that sections 14(2)(f) and 14(2)(h) are particularly relevant. These provisions say:

> 14 (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

[48] Based on my review of the record at issue, I am satisfied that sections 14(2)(f) (highly sensitive) and (h) (supplied in confidence) apply.

[49] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed,[15] and I find that such a reasonable expectation exists in the circumstances due to the nature of the personal information at issue. I cannot elaborate further without revealing the information at issue. Therefore, section 14(2)(f) applies.

[50] For section 14(2)(h) to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[16] In the circumstances of this case, I find that the personal information at issue was supplied by the author of the letter in confidence to the board. Accordingly, section 14(2)(h) applies.

Weighing the factors and interests

[51] Since the record contains the personal information of the appellant and other identifiable individuals, the factors at sections 14(2) must be considered and weighed.

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[15] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[16] Order PO-1670.

The purpose of that exercise is to determine whether disclosing the information withheld would be an unjustified invasion of the personal privacy of the identifiable individuals (other than the appellant) to whom the record relates. I have found that there are no listed or unlisted section 14(2) factors favouring disclosure that apply, and that the factors weighing against disclosure at sections 14(2)(f) and 14(2)(h) apply. Taking these facts into consideration, and weighing the interests of the appellant and the affected parties, I find that the personal information at issue is exempt under section 38(b). That is, disclosing the record would be an unjustified invasion of the personal privacy of a number of identifiable individuals. Given my findings, it is not necessary for me to consider the board's position regarding the application of the factor favouring the protection of privacy at section 14(2)(e) (unfair pecuniary or other harm).

Exercise of discretion

[52] 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. Here, the board submits, and I find, that it exercised its discretion to withhold the record.

[53] Taking into consideration the nature of the record at issue and the information within it, the purposes of the *Act*, and the wording of the exemption at section 38(b) and the interests it seeks to protect, I am satisfied that the board exercised its discretion to withhold the record appropriately in the circumstances of this case. I also find no evidence that the board failed to consider any relevant circumstances.

[54] The evidence before me appears to show a fractious relationship between the appellant and the board, and I appreciate that the requested OSRs were not released in full to the appellant until the mediation of his appeal. However, I do not find that this is evidence that the board exercised its discretion to withhold the record inappropriately, in bad faith, or for an improper purpose.

[55] For these reasons, I uphold the board's exercise of discretion under section 38(b).

ORDER:

I uphold the board's decision and dismiss the appeal.

Original Signed by:	February 13, 2020
Marian Sami Adjudicator	