Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4038

Appeal MA17-319-2

Dufferin-Peel Catholic District School Board

April 14, 2021

Summary: The appellants submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Dufferin Peel Catholic District School Board (the board) for access to records relating to their daughter, a student. The board granted partial access to the records and ultimately withheld, in full, records it claims are exempt under section 38(a) in conjunction with section 12 (solicitor-client privilege) and also partially withheld information it claimed exempt under section 38(b) (personal privacy). The appellants appealed the board's decision and claimed that the board's search was not reasonable and further responsive records should exist. In this order, the adjudicator upholds the board's decision with regard to sections 38(a) and 38(b), in part, and finds that the search was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 14(1), 17, 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders MO-2467, PO-3819.

Cases Considered: *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner),* 2013 FCA 104.

OVERVIEW:

[1] The appellants submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Dufferin Peel Catholic District School Board (the board) for access to all records related to their daughter, including records related to instances of sexual harassment and bullying as of a specified date. The

appellants specified that they sought access to all records, including electronic communications, sound recordings, supervisory officer notes, assessment notes and behaviour observation notes.

[2] The board issued an access decision granting the appellants partial access to the records responsive to their request. The board relied on the discretionary solicitor-client privilege exemption in section 12, and the mandatory personal privacy exemption in section 14(1) to deny access to some records and information.

[3] The appellants advised the board they believed the records of the director, the associate director and three teachers should have been included in the board's access decision. The board agreed to conduct a further search for records relating to these five individuals.

[4] The appellants were not satisfied with the board's decision and appealed it to this office. The board then issued a supplementary decision advising that it had completed its further search and located additional records. The board granted the appellants partial access to the additional records and cited section 14(1) as the basis for withholding the remainder. The appellants were not satisfied with the board's supplementary decision. They also advised that the safe schools incident report and summary report of incidents and staff action were missing from the responsive records. The board agreed to conduct a further search for these two records and after doing so, issued a second supplementary access decision advising that it located a draft summary report by the principal but had no record relating to the safe schools incident report. The board granted the appellants partial access to the draft summary report, relying on sections 38(a) in conjunction with 12, 38(b) and 14(1) to withhold some information.

[5] During mediation of the appeal, the board clarified that it claims section 38(a) in conjunction with section 12 and section 38(b) with reference to section 14(1). It also clarified that it claims sections 38(b) and 14(1) for certain records for which it had previously claimed section 12. The appellants confirmed that they wished to pursue access to all of the records for which the board claimed sections 38(a) and 12, and certain records for which the board claimed section 38(b). The appellants also stated that additional records should exist and provided details of these, thereby raising the issue of whether the board conducted a reasonable search to locate records.

[6] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. The IPC adjudicator originally assigned to the appeal sought and received representations from the board and the appellants. These representations were shared in accordance with the IPC's *Code of Procedure* (the *Code*). The appeal was then assigned to me to continue with the inquiry and issue the decision.

[7] In this order I uphold the board's decision to withhold the records under section 38(a) in conjunction with section 12. I uphold the board's decision to withhold records under section 38(b), in part. I also find that the board's search is reasonable.

RECORDS:

[8] At issue, include the following records that were withheld in full under section 38(a) in conjunction with section 12:

> Supervisory officer notes and communications: December 2016 pages 14-20, 44-63, 76-84, 88-112, 128-135, 138, 139, 152-172, 179, 180, 183-188
>
> Supervisory officer notes and communications: January 2017 pages 15-18, 23-25, 28-39, 61-67, 70-76, 78-82, 88-96, 101-103, 130, 131, 159-171
>
> Principal's notes and communications: pages 93-95, 99, 100.

[9] In addition, the following records were partially withheld under section 38(b) and were identified by the appellants at mediation as records they sought access to:

> Supervisor officer note December 2016: page 176
>
> Supervisor officer emails January 2017: pages 4 and 184
>
> Principal notes and emails: pages 1-4, 6, 9, 21-24, 28-30, and 33-47
>
> Vice Principal notes: pages 16-25.

ISSUES:

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

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information withheld under these sections?

C. Does the discretionary exemption at section 38(b) apply to the information withheld under this section?

D. Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

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

[10] Under the *Act*, different exemptions may apply depending on whether a record

at issue contains or does not contain the personal information of the requester.[1] Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

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

> "personal information" means recorded information about an identifiable individual, including,
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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,
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> (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (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,
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> (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

[1] Order M-352.

> (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;

[12] 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]

[13] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

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

[14] 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.[3]

[15] 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.[4]

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

Representations

[17] In its representations, the board submits that the records contain the personal information of a variety of students and parents of the school where the appellant's daughter attended. The board included an "identifier chart" with its representations where it set out the names of the parties referenced in the records. The board submits

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

that it was unable to identify all of the individuals in the notes given the passage of time and the fading memories of individuals who created the records.

[18] The board notes that it has also identified board officials (teachers, principals, social workers, trustees etc.) and submits that it has not claimed that the records contain the personal information of these individuals. The board submits that the IPC has indicated on numerous occasions that is it not necessary for a person to be identified by name in order for them to be identifiable and refers specifically to Order MO-2291.

[19] The board submits that the records contain the information that qualifies as the personal information of the affected individuals. Specifically, it submits that it is clear from the records that the affected individuals are identified through the surrounding information and context as either students or parents of students. The board submits that in each case, this information, at a minimum, is personal information of the affected parties and in many cases the records provide additional personal information about the affected student or parent.

[20] In their representations, the appellants do not dispute that the withheld information contains the personal information of their daughter as well as other individuals.

Finding

[21] Under section 2(1) of the *Act*, "personal information" is defined recorded information about an identifiable individual. This includes, in paragraph (h) of the definition, the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.

[22] I have reviewed the records provided by the board and confirm that they are mostly comprised of information relating to a specified incident and contain the personal information of the appellants, their daughter and other identifiable individuals. I agree with the board's submission that the affected individuals are identifiable from the surrounding information in the records even if they are not explicitly named in certain instances. Further, in my review of the withheld information, I find that the records contain the personal information of these affected individuals who are identified through the surrounding information and context as either students or parents of students.

[23] However, I find that records 28, 29 and 30, which consist of emails from the principal, only contain information which constitutes the personal information of the appellants and their daughter. As disclosure of this personal information cannot be an unjustified invasion of the appellants' personal privacy, I will order this information disclosed.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information withheld under these sections?

[24] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[25] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[26] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[6]

[27] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[28] In this case, the board relies on section 38(a) in conjunction with section 12.

[29] 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.

[30] 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 board must establish that one or the other (or both) branches apply. Here, the board relies on the common law solicitor-client communication privilege.

Branch 1: common law privilege

[31] At common law, solicitor-client privilege encompasses two types of privilege: (i)

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[6] Order M-352.

solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[32] 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.[7] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[8] 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.[9]

[33] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

[34] 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.[11] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[12]

Representations

[35] The board referred to the decision in *Balabel v. Air India*[13] (*Balabel*) to support its position that the solicitor-client privilege can be extended to non-litigious business. The board submits that *Balabel* makes clear that privilege is not simply confined to communicating the law but also includes practical advice as to what actions may be prudently and sensibly taken in a given legal context.

[36] The board submits that the records constitute a continuum of communications between its internal legal counsel and its staff involved in the matters related to the appellant's daughter. The board also submits that a number of the records contain requests for input from its counsel.

[37] The board has not provided the IPC with a copy of the records that it has withheld under this exemption. It provided an updated index with its representations, an affidavit of its legal counsel along with a representative sample of the withheld

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[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[12] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[13] [1988] 2 W.L.R. 1036 (Eng.C.A.). See also *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

information.

[38] In her affidavit, general counsel for the board confirmed that she was employed during the relevant period and therefore had knowledge of the matter. The general counsel confirms that she was involved in providing legal advice with respect to the specified incident. She submits that she assisted in investigating the matter to communicate with the involved parties and address the potential responses by the board as well as to address any potential legal action.

[39] The board's general counsel confirmed that she was provided with notes and communications to allow her to keep apprised of developments in the matter and to seek her legal guidance during the process. The board's general counsel confirmed that she reviewed the records that the board has claimed exempt under section 12 and affirms that they fall within the category of notes and communication prepared and provided in order to seek legal advice.

[40] The board submits that it has not waived its privilege in the records.

[41] In their representations, the appellants do not address the issue of solicitor-client privilege specifically. The appellants submit that the board acknowledges that records claimed exempt under sections 38(a) or 38(b) contain the personal information of the appellants and/or their child and therefore these records should be disclosed to them.

Analysis and finding

[42] Based on my review of the evidence provided by the board, and for the reasons set out below, I accept its claim that section 38(a), read in conjunction with section 12, applies to all of the information the board withheld under this exemption.

[43] Although the board has not provided the IPC with a copy of the records that were withheld based on solicitor-client privilege, it has provided a sample of the type of records it is claiming are exempt. In addition, the board provided an affidavit sworn by its legal counsel who was directly involved in the matter.

[44] As set out above, 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.[14] I find that the information in the records claimed to be subject to section 12, falls within the scope of the exemption because disclosure of this information would reveal the nature of confidential communications provided in the context of a solicitor-client relationship or reveal the substance of the confidential communication or legal opinion provided.

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[14] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[45] In my review of the sample provided by the board and considering the affidavit of its legal counsel, I find that the withheld information qualifies for exemption under Branch 1, solicitor-client communication privilege and should be withheld under section 38(a) in conjunction with section 12. I accept the evidence provided by the board's legal counsel that she reviewed and confirmed that these records fall within the category of solicitor-client privilege as information provided for and by herself in relation to the specified incident. Further, from my review of the sample provided by the board it is clear that the information the board is seeking to withhold falls squarely into the category of information subject to solicitor-client privilege as described in *Balabel v. Air India* as submitted by the board. After my review of this information, I find that the withheld information constitutes a continuum of communications between legal counsel and board officials concerning the specified incident, made for the purpose of giving and receiving legal advice, including information informing its counsel about the incident and developments as well as input from its counsel as her role as counsel for the board.

[46] Lastly, in my review of the information before me there is no evidence that the board has waived this privilege. As a result, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue and I find that section 38(a) in conjunction with section 12 applies, subject to my finding on the board's exercise of discretion under Issue D below.

Issue C: Does the discretionary exemption at section 38(b) apply to the information withheld under this section?

[47] Since I found that the record contains the personal information of both the appellants and affected parties, section 36(1) applies to this appeal. Section 38(b) is another exemption from the general right of access in section 36(1).

[48] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[15]

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

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[15] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

[50] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[16] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[51] 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.[17] Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[18]

Representations

[52] In this appeal, the board submits that it has already disclosed as much of the appellants' personal information and that of their daughter from the records as possible without disclosing the personal information of other affected parties.

[53] The board submits that the remaining personal information contained in the records relates to students or parents of students. It submits that in the instances where the appellants' personal information is involved it relies on the presumption at section 14(3)(d) and, in particular, educational history as a consideration against disclosure of the personal information relating to other individuals.

[54] The board submits that the IPC has found that in order for the section 14(3)(d) presumption to apply it is not necessary for the record to include extensive information about educational history. It refers to Order MO-2467 where it submits the information about the time period an individual attended the educational institution was sufficient.

[55] The board submits that the information it withheld in the records would be more than sufficient to identify the time period in which the affected parties attended the educational institution. Further, the board submits that this can be reasonably surmised from the references to individual students or their respective family members.

[56] While the board submits that this information, in and of itself is sufficient to apply the section 14(3)(d) presumption, it further submits that in many cases the withheld information goes beyond simply identifying individuals as students in a

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[16] Order MO-2954
[17] Order P-239.
[18] Order P-99.

particular time period and includes details from the board's investigation into the appellants' harassment complaint which also falls within the presumption at section 14(3)(d).

[57] The board also submits that there are factors enumerated in section 14(2) that support non-disclosure. The board submits that the records relate to an investigation of claims of sexual harassment, harassment and bullying. The board submits that the factors at section 14(2)(e) (exposure of others to harm), 14(2)(f) (information highly sensitive), 14(2)(h) (information supplied in confidence) and 14(2)(i) (disclosure may unfairly damage reputation) all apply.

[58] The board submits that there are no factors that would support disclosing the withheld information. It submits that details of investigations of inter-pupil claims of harassment and bullying should not be released to the public. The board submits specifically that the factor at section 14(2)(a) does not apply in this appeal as while it is important to address such matters, and, to take appropriate corrective action, no public policy objective is met by disclosing the details of such activities to the public at large.

[59] The board submits that granting access to this information is granting access "to the world." It submits that it has considered that individuals, closer to the information contained in the records, may have enough background knowledge to be able to use the information contained in the records to identify the individuals involved.

[60] In their representations, the appellants address the factors that support disclosure of the withheld personal information. The appellants submit that the board acknowledges that records claimed exempt under section 38(b) contain the personal information of the appellants and/or their child and therefore these records should be made available. The appellants submit that although the records may contain the personal information of other school children who are relatively young, the victim in this incident is also young. The appellants agree that the information in the records is sensitive as students had admitted to an incident occurring.

[61] The appellants submit that redacting the personal information of affected parties is unnecessary since they are already aware of their identities. They submit that some information in the records has already been disclosed to them by the Ontario College of Teachers' response to their complaint.

[62] Finally, the appellants submits that a further factor supporting disclosure includes that a complaint remains active at the Office of the Ombudsman of Ontario.

Analysis and findings

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

[63] The board submits that the presumption at section 14(3)(d) is relevant in this appeal. Section 14(3)(d) states that:

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

[64] Past orders of this office have addressed the application of the presumption against disclosure in section 14(3)(d) and have determined that, to qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.[19]

[65] More specifically, past orders have considered records held by institutions that contain information about students. In Order PO-3819, for example, the adjudicator found that the records before her qualified as students' educational history because they included information about, among other things, the students' course enrolment and academic performance. In Order MO-2467, referred to by the board, the adjudicator found that attendance registers of students attending a particular school within a particular timeframe qualified as educational history falling within the section 14(3)(d) presumption because they included the students' grade, as well as their marks and attendance records.

[66] Having reviewed the records that board has claimed exempt under section 38(b) in this appeal, I agree that the presumption at section 14(3)(d) applies to the withheld information as disclosure would reveal the grades, classes, and schedules along with other educational information concerning affected parties who are students. I will now consider the application of the considerations listed in section 14(2) and whether there are any factors weighing for or against disclosure.

Section 14(2) factors

[67] 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.[20] Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[21]

[68] While the board pointed to specific factors in its representations that might apply, the appellants do not refer specifically to section 14(2). However, in their submission they refer to a complaint with the Office of the Ombudsman which would

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[19] Order M-609, MO-1343.
[20] Order P-239.
[21] Order P-99.

reference section 14(2)(d) (fair determination of rights). The appellants also refer to possible unlisted factors that might apply, including:

- The information relates to their daughter who is a minor
- The information relates to harassment and bullying
- That other similar information has already been released and therefore they are already aware of the withheld information.

[69] The parties' representations raise the possible application of paragraphs 14(2)(d), (e), (f), (h) and (i). The factor at section 14(2)(d), if it applies, would weigh in favour of disclosure, while the factors at section 14(2)(e), (f), (h) and (i) would weigh in favour of non-disclosure. These sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Factors that weigh in favour of disclosure

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

[70] In their representations the appellants refer to a complaint that remains active with the Office of the Ombudsman of Ontario. Presumably, the appellants are suggesting that obtaining the withheld information will assist them in representing their daughter at this or any proceeding. However, I give this factor little weight. The board has already disclosed much of the personal information of the appellants and their daughter and the appellants have failed to demonstrate how disclosing the personal information of affected parties will assist with their complaint with the Office of the Ombudsman.

Unlisted factors

[71] As noted that appellants refer to several unlisted factors. They submit that the information relates to their daughter who is a minor. However, I do not give this factor any weight as many of the affected parties are also minors. The appellants themselves acknowledge the sensitivity of the information involving young children.

[72] The appellants submit that the information relates to bullying and sexual harassment, suggesting that this is a factor that should weigh in favour of disclosure. However, I agree with the board that investigations into bullying and sexual harassment should not be released given the sensitivity of the information and I give this unlisted factor no weight.

[73] Finally the appellants submit that since other information has already been released to them, they are already aware of the withheld information. The fact that the appellants received information from anther source that relates to the matter of the request in this appeal does not support, in my view, an automatic right to similar type information. Given the sensitivity of this information, I give this unlisted factor no weight. I will also consider this unlisted factor under "absurd result" below.

Factors that weigh in favour of non-disclosure

[74] The board only refers to the factors that weigh in favour of non-disclosure without giving further explanation. Each listed factor is dealt with below.

Section 14(2)(e) (exposure to other harms)

[75] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[76] Since the board only referred to this factor, I have no evidence before me that this factor applies and, therefore, I give it no weight.

Section 14(2)(f) (highly sensitive)

[77] This office has established that, for information to be considered highly sensitive under section 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[22]

[78] Even though the board did not specifically address this factor, the appellants acknowledge the sensitivity of this information involving minors. Also, in my review of

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

the information, it is apparent that the information is highly sensitive and I find that this factor weighs heavily in favour of non-disclosure.

Section 14(2)(h) (supplied in confidence)

[79] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[23]

[80] Although I have no specific submission on this factor I find that it applies. In my view, it is reasonable to believe when speaking to board employees about one's child that information shared will be treated confidentially. I give this factor significant weight.

Section 14(2)(i) (unfair damage to reputation)

[81] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.[24]

[82] The parties agree that the information in the records is sensitive. Since this factor is not dependent on the damage or harm being present or foreseeable but whether the damage would be unfair to the individual involved, I give this factor significant weight.

Absurd result

[83] I also considered whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the appellant originally supplied the information, or the appellant is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[25] One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the appellant's knowledge.[26]

[84] As noted, in their representations, the appellants submit that since other information has already been released to them, they are already aware of the withheld

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[23] Order PO-1670.
[24] Order P-256.
[25] Orders M-444 and MO-1323.
[26] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

information. However, I find that the absurd result principle does not apply in the circumstances of this appeal. Although the appellants have received some information, including most of their personal information and that of their daughter, it is not apparent from my review of their representations or the records that they either supplied the withheld information in the records or that they are aware of its contents.

Conclusion

[85] In conclusion, I have found that the presumption at section 14(3)(d) applies to the withheld personal information. I also find that the factors section 14(2)(f), (h) and (i) apply and that they all weigh significantly in favour of non-disclosure. The only factor that I find that weighs in favour of disclosure is section 14(2)(d), however, as discussed, I give this factor little weight. I also considered the unlisted factors argued by the appellant, however, I gave them no weight, given that the appellants' have already had most of their (and their daughter's) personal information disclosed to them. Therefore, I find that the factors weighing against disclosure outweigh the factors favouring disclosure. As a result, I find that the withheld information in the records at issue qualify for exemption as their disclosure would constitute an unjustified invasion of personal privacy under section 38(b).

Issue D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[86] The section 38(a) and 38(b) exemptions are discretionary, and permit 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.

[87] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations;
- it fails to take into account relevant considerations.

[88] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] This office may not, however, substitute its own discretion for that of the institution.[28]

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[27] Order MO-1573
[28] Section 54(2).

Representations

[89] The board submits that it properly exercised its discretion in deciding to withhold the information. The board submits that while the IPC has highlighted a number of potential considerations in prior decisions for consideration, there are some that are particularly salient in this case. The board acknowledges considerations which support disclosure including that, as a general rule, records should be available to the public and exemptions limited and specific. Moreover, it submits this applies where sections 38(a) and/or 38(b) apply to records that involve the personal information of the appellants and/or their child.

[90] However, the board submits that there is no evidence that has been presented that disclosure of the records are necessary for the purpose of increasing public confidence or that, indeed, the matters contained in the records have attained any form of public profile. Rather, it submits, the request is made in the context of an ongoing individual claim of student misconduct raised by the appellants and investigated and addressed by the board.

[91] In addition, the board submits that the records related to section 38(b) also involve the personal information of other school children who are relatively young. It submits that the information involved is, in many instances, very sensitive and involves investigations into the alleged harassment and bullying.

[92] The board submits that although the records are not immediately contemporaneous with the appeal they are within the relatively recent past. It submits that the affected children whose personal information is at issue are still young.

[93] Finally, with respect to the solicitor-client privileged information, the board submits that it has taken into account the significant policy purposes for preserving the rights of parties and their respective legal counsel (whether internal or external) to be able to communicate freely and candidly for the purposes of obtaining advice. It submits that such protections should not be casually dispensed and that while the import of such privilege may diminish with time, the records in question are still relatively recent in nature.

[94] The board submits that on balance it was reasonable to exercise its discretion not to grant disclosure in this instance.

[95] The appellants submit that the board acknowledges that as a general rule records should be available to the public and exemptions applied should be limited and specific. The appellants submit that they should have access to all records, no matter the format, related to the specified incidents concerning their daughter. The appellants submit that further redacting of affected parties' personal information should be considered to ensure that exemptions are extremely limited and very specific. The appellants submit that individuals should have a right to access any information relating to situations of bullying and sexual harassment.

Finding

[96] Since I did not uphold the board's decision in full with respect to the application of section 38(b) and I have ordered it to release portions of the records at issue, I will only be addressing whether the board properly exercised its discretion with respect to the remaining information that I have found to be exempt under these exemptions.

[97] I have considered the circumstances surrounding this appeal and the board's representations and I am satisfied that the board has properly exercised its discretion with respect to section 38(a) and 38(b) of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The board considered the purposes of the *Act* and have given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal and I have upheld its decision with respect to this information it has claimed is exempt. Accordingly, I find that the board took relevant factors into account and I uphold its exercise of discretion in this appeal.

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

[98] Because the appellants claim that additional records exist beyond those identified by the board, I must also decide whether the university conducted a reasonable search for records as required by section 17.[29] To satisfy me that the search carried out was reasonable in the circumstances, the board must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[30] To be responsive, a record must be "reasonably related" to the request.[31] This office has consistently found that 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.[32]

[99] This office has also consistently found that although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist.[33]

Representations

[100] To support that its search for responsive records is reasonable, the board relied on an affidavit of its manager, records management, access and privacy (the manager). In her affidavit, the manager affirms that she was responsible for coordinating the

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[29] Orders P-85, P-221 and PO-1954-I.
[30] Orders P-624 and PO-2559.
[31] Order PO-2554.
[32] Orders M-909, PO-2469 and PO-2592.
[33] Order MO-2246.

search for responsive records.

[101] The manager notes that the request resulted in four separate decision letters and ultimately involved three separate searches. In addition, the manager affirms that following the last supplementary record search, she conducted a review of the records prompted by questions from the appellants during mediation and determined that several pages had not been photocopied which were then provided along with the fourth decision letter.

[102] The manager submits that in follow-up conversations with the appellants, it was clarified that they were seeking all records relating to instances of harassment and bullying with respect to their daughter for a certain period. The manger submits that the search was confined to all records related to those matters including investigations, meetings and any other communications related directly or indirectly to the matters.

[103] The manager set out a list of the individuals who were approached to search for records. She submits that the list was determined in consultation with the appellants and the identified individuals reasonably believed to have been involved in some part of the process at or after the specified incident.

[104] With regard to the first search, the manager submits that subsequent to issuing the decision, the appellants indicated that they believed records were missing based on their previous communications with the director and associate director of the board and also related to three teachers at the board. The manager confirmed that she approached the one teacher of the three teachers who did not complete a search and a search was completed which located records by the director and associate director. In addition, the manager submits that she confirmed with the other teachers that no other records were located.

[105] The manager submits that the appellants continued to be of the view that further records existed including a "safe schools incident report," and a summary report of incidents and actions taken by staff. The manager submits that she made inquiries of the school principal who confirmed that no safe schools incident report had been prepared. The manager also submits that the principal confirmed that she had prepared a summary following the incident which was released as part of the board's first access decision.

[106] The manager submits that during mediation, the appellants raised issues about the records that they received (specifically, a missing page, and three blank pages). The manager submits that after reviewing the referenced pages, she determined that pages were not copied, inadvertently, and made copies which were provided to the appellants in a third access decision letter.

[107] The manager submits that she is aware that the appellants have indicated that their belief that additional records should exist in the following categories:

a. More records for a specified time period

b. More records for a specified period regarding communications between the principal the director and the supervisor officer

c. Drawings of the appellant's child that were shown to the principal and a seating plan

d. Records regarding three teachers and the associate director

e. Safe schools incident report referenced in the principal's notes.

[108] The manager submits that with regard to items a, b, and d, the appellants have provided no further grounds or details to suggest an additional search is necessary. She submits that each of the individuals identified in items b and d were requested to conduct a search and have advised that they have either provided the responsive records or that no responsive records were located. The manager submits that with regard to item c, the referenced seating plan is located on a specified page of the vice principal's notes and confirmed that a redacted copy was provided to the appellants with regard to the drawing. The manager submits that she believes the appellants are referring to a digital drawing that was created by another student. The manager submits that she has spoken with the principal who confirmed that no copy of the drawing was provided to the school and that the principal believes it was never saved. Finally, with respect to item e, the manager again submits that she was advised that this report was not generated.

[109] In their representations, the appellants submit that the board's search was not reasonable because a number of records were not located that they believe should exist. The appellants set out various emails and incidents that they believe should be reflected in records, including a list of emails that were set out in a matter before the Ontario College of Teachers. The appellants also suggest that more records should exist regarding communications between board employees which should appear in the supervisory officer's records along with multiple hand-written notes of the principal from specified dates which they submit have also not been provided.

[110] The appellants submit that a drawing of their daughter, which was completed by a specified student, was shown to the principal. The appellants also submit that there should exist a seating plan with a specific date and submit that the one already provided to them in the vice principal's notes is not labelled and is not dated.

[111] Finally, the appellants continue to submit that a safe schools incident report should exist. They submit that in the matter before the Ontario College of Teachers, two incident reports were noted. The appellants also submit that a Ministry of Education's bullying prevention policy (Memorandum No. 144), "is not specific to the teacher being aware of the incident at the time it occurred and failure to complete a report appears questionable when documents of incident reports have been noted by

the Board."

Finding

[112] 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 search, they must, nevertheless, provide a reasonable basis for concluding that such records exist.[34]

[113] At mediation, the appellants indicated the page numbers of the records that they were interested in pursuing access to at adjudication. The mediator's report sets out that in addition to all of the records withheld under sections 38(a) and 12 the appellants advised that they were seeking access to the following records which were withheld under section 38(b)/14(1):

- Item No. 1 - SO Records Dec 2016
  Page 176

- Item No. 2 - SO Records Jan 2017
  Page 4, 184

- Item No. 3 – Principal Notes
  Pages 1-4, 6, 9, 21-24, 28-30, 33-47.

- Item No. 4 - VP Notes
  Pages 16-25

[114] However, in their representations, the appellants refer to documents that were removed from the scope of the appeal at mediation or have been claimed exempt by the board. Although the appellants are suggesting that records exist that they were not provided with, it appears that all of the actual items they refer to in their representations were located and claimed exempt by the board and were not pursued beyond mediation and therefore removed from the scope of the appeal. Since all of the records claimed to exist but not located have actually been located, I do not consider this a sufficient reason to order a further search for responsive records.

[115] I find the board's search for records to be reasonable. I accept the board's explanations for why records do not exist, and its evidence that it conducted searches for the responsive records in a reasonable manner. The appellants have been provided with the board's explanations and appear to not accept them.

[116] The appellants continue to submit that a safe school schools incident report has not been located which is evidence, in their view, that the board's search was not

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[34] Orders P-624 and PO-2559.

reasonable. However, I note that in the board's affidavit, the manager confirms that the second supplemental search was conducted when the appellants requested this record (amongst others). According to the manager, she contacted the principal and was informed that no such report had been prepared. The manager affirms that she made inquiries and the principal informed her that she had prepared a summary following the incident which was released to the appellants in an earlier decision letter. Despite the appellants' view that this report should exist, I accept the evidence of the board that it confirmed that this report was not generated and, I therefore find that this is not a reasonable basis to order a further search.

[117] The appellants also submit that further records should exist involving several named individuals including records from the supervisory officer's office. However, in the manager's affidavit, she swore that each of the named individuals were requested to conduct a search (either in the initial or first supplementary search) and she was advised that they had provided the responsive records or that they did not have any additional responsive records.

[118] The appellants also submit that another copy of a seating plan should exist along with a drawing of their daughter. The manager also addresses these items specifically in her affidavit by affirming that a seating plan was located in the vice principal's notes and a redacted copy was provided to the appellants. The manager also affirms that the referenced drawing was shown to the principal and after speaking with her confirmed that no copy of the drawing was provided to the school and that the principal did not save the drawing. Despite the appellants' view that more records should exist involving the named individuals or that another copy of a seating plan and the drawing of their daughter should exist, I accept the evidence of the board that it confirmed that all responsive records have been identified by the named parties, that there is not another copy of the seating plan and that the digital drawing of the appellant's daughter was not saved by the principal. As a result, I find that this is not a reasonable basis to order a further search.

[119] Further, I find that the search was completed by an experienced employee knowledgeable in the subject matter of the request who expended a reasonable effort to locate records which are reasonably related to the request. In her affidavit, the manager, records management, access to privacy, explained that three separate searches were undertaken, one initial search and two supplementary searches after the appellants indicated that they believed responsive records were missing.

[120] Accordingly, I uphold the board's search for responsive records.

ORDER:

1. I uphold the board's decision regarding section 38(a) in conjunction with section 12 of the *Act*.

2. I uphold the board's decision regarding section 38(b) of the *Act*, in part and order it to disclose the information that is highlighted in records 28, 29 and 30 which is provided with the board's copy of this order. To be clear, the information that is highlighted on records 28, 29 and 30 **should be** disclosed to the appellants by **May 19, 2021** but not before **May 14, 2021**.

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

4. In order to verify compliance with this order, I reserve the right to require the board to provide me with a copy of its correspondence to the appellant, disclosing the records in accordance with provision 2.

5. The timeline noted in order provision 2 may be extended if the board is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such extension requests.

Original Signed by: April 14, 2021

Alec Fadel
Adjudicator