Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4161

Appeal PA18-170

Ministry of Education

July 6, 2021

Summary: Following a review of a specified school board, the Ministry of Education (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act*, (the *Act*) for all records from the review that mention a specified director of education. After locating responsive records, the ministry granted partial access to them and ultimately withheld, in full, records it claims are exempt under section 49(a) in conjunction with section 19 (solicitor-client privilege) and also partially withheld information it claimed exempt under the discretionary exemption in section 49(b) (personal privacy) and the mandatory exemption in section 21(1) (personal privacy). The requester appealed. In this order, the adjudicator upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19, 21(1), 49(a) and 49(b).

Orders and Investigation Reports Considered: MO-2467 and 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; *Descoteaux v. Mierwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).

OVERVIEW:

[1] A review of a specified district school board (the board) was initiated by the Minister of Education in response to concerns regarding the overall governance of the board and allegations of internal systemic racism. Following the review of the board, the Ministry of Education (the ministry), received a request under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) for access to the following:

> All record(s) of "The Review of the [specified district school board]" including [A] the Terms of Reference of "The Review of the [specified district school board]" including [B] handwritten notes of other notations on record, working copies and [C] drafts of all reports and letters. Include any document that mentions [name] Director of Education.

[2] The ministry located records responsive to the request and issued a decision granting the appellant partial access to them. The ministry relied on the discretionary exemption in section 19 (solicitor-client privilege) of the *Act* to withhold certain draft reports in full, and the mandatory exemption in section 21(1) (personal privacy) to withhold information in interview notes, letters and emails.

[3] The ministry then issued a supplementary decision disclosing additional records, including letters and emails responsive to item C of the request, with portions of these additional records withheld under section 21(1). In its supplementary decision letter, the ministry stated that its original decision letter continued to apply to the remaining records: notes of interviews responsive to item B of his request were withheld under section 21(1) of the *Act*, and draft reports responsive to item C were withheld in full under section 19.

[4] The appellant was not satisfied with the ministry's decisions and appealed them to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. The mediator noted that some of the records at issue appeared to contain the personal information of the appellant, raising the possible application of the discretionary exemptions in section 49(a) (discretion to refuse requester's own information) and 49(b) (personal privacy) of the *Act*. Also during mediation, the ministry disclosed the "Terms of Reference for an Expedited Review of the Performance of the [specified district school board]" to the appellant in satisfaction of item A of his reques*t.*

[5] The appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry under the *Act.* As the adjudicator, I decided to conduct an inquiry and sought representation from both the ministry and the appellant on the issues to be resolved.

[6] In this order, I uphold the decision of the ministry and dismiss the appeal.

RECORDS:

[7] At issue in this appeal are emails, letters, notes and draft reports. The ministry provided the IPC with the records electronically and has grouped them as follows:

> Part B–Interview Transcripts (181 pages), withheld in part
>
> Part C–Emails and Letters (290 pages), withheld in part

Part C–Draft of Reports (224 pages), withheld in full.

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 49(a) in conjunction with the section 19 exemption, apply to the information at issue?

C. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

D. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] In its representations, the ministry provides some background, indicating that a review of the board was conducted by it pursuant to a regulation under the *Education Act,*[1] in response to persistent and serious concerns regarding the overall governance of the board. The ministry submits that the independent reviewers met with and heard from over 350 people, including parents and community members, students, current and former staff, union, professional organizations, the trustees of the Board and the Director of Education.

[9] 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.[2] 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 49 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 21(1) may apply.

[10] 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

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[1] R.S.O. 1990, c E 2.
[2] Order M-352.

whom it relates. That term is defined in section 2(1) as follows:

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

[11] 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.[3]

[12] Section 2(2) also relates to the definition of personal information. These sections state:

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[3] Order 11.

> (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 (3) 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.

[13] 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.[4]

[14] 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.[5]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

Representations

[16] The ministry submits that section paragraphs (a), (b), (e), (f) and (h) of the definition of personal information in section 2(1) are relevant in this appeal.

[17] The ministry submits that the interview transcripts include records that contain the personal information of the participants, the appellant, and other third parties whose information was provided by the participants.

[18] The ministry submits that the records include interviews of parents with children in the board with specific details about their children's experience as well as information about the person's family status that could identify the parent and the children. The ministry also submits that the interviews detail the experiences and personal information of third parties. This includes information about their employment with third parties and personal experiences which would clearly identify these individuals.

[19] Regarding the emails and letters that were withheld (Part C of the records), the ministry submits that they also contain information that would qualify as the personal information of the participants, the appellant and third parties. The ministry submits

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

that the emails were sent by a variety of participants and often include their name, email address, personal home address, personal experience and opinions about third parties. The ministry submits that even in the absence of the participant's name, the withheld information contains the kind of detail that could clearly identify the individual to the appellant.

[20] The ministry submits that similar to the interview transcripts, the emails and letters contain a mix of information that would qualify as the personal information of participants, the appellant, and third parties. The ministry refers to examples of mixed information in these records which include: information from participants that discuss personal information related to a third party including employment information, personal experiences, and personal opinions; employment information of the participant and third parties, including opinions of the participant about third parties and personal experiences that would be sufficient to identify the participant. The ministry submits that some of the withheld information includes the appellant's personal information that would only be known by a handful of individuals and would therefore make them clearly identifiable if that information was disclosed.

[21] With regard to the draft reports that were withheld in full (Part C of the records), the ministry submits that they contain personal information and employment information relating to the appellant, third parties and participants.

[22] The appellant does not address if the records contain personal information in his representations.

Finding

[23] From my review of the withheld information in the records, I find that it all contains information that qualifies as the personal information of affected parties (the participants) and, in some cases, the third parties that they refer to. I also find that certain records contain the personal information of the appellant that is intertwined with the personal information of an affected party. The affected parties' names (in some instances) and other information about them falls within the ambit of paragraphs (a), (b), (e), (f) and (h) of the definition of personal information set out in section 2(1) of the *Act*. Some of the affected parties' personal information includes recorded personal information that together with their name reveals something personal about them or information relating to the education or employment history in which the affected party (or their minor child) was involved or contain an affected party's personal opinions or views that do not relate to another individual.

[24] With respect to the interview and emails that involve current or past employees, trustee etc., of the board, and the draft reports, I have reviewed the information relating to them and considered the representations. I agree with the ministry and find that these records contain the personal information of the appellant, affected parties and third parties. While some of this information might be considered employment information, for the following reasons, I find that the information is their personal information.

[25] As noted above, information associated with an individual in their professional capacity is not normally considered to be their personal information under the *Act.* In Order PO-2225, the adjudicator set out the following two-step test for distinguishing between personal and professional information:

> [T]he first question to ask ... is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ...
>
> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[26] This two-step test has been consistently adopted and applied in IPC jurisprudence and I agree with the test and adopt it here.[7]

[27] Starting with the first part of the test, I find that the names of these individuals together with the fact that they are employed by the specified board may be construed as professional information but because it is being given in the context of a ministry review of the board, I find that it is inherently personal. Further, I find that if this information is disclosed it would reveal something of a personal nature about the individual even if the information appears in a business context, as its disclosure would reveal the affected party's views and opinions about the topic of the review.

[28] Also, in my review of the withheld information, it is apparent that many of the affected parties are not named, which was noted by the director of the Supporting Student Potential Secretariat's affidavit submitted by the ministry. In her affidavit this director stated that the reviewers informed the participants that they would not use names and efforts would be made to remove identifying information in the report. However, despite not actually being named, I agree with the ministry that the withheld portions of the interview transcripts include interview of parents that include specific details about the experience of their children and could identify them.

[29] The appellant, through his request, has requested records that include his own personal information as well as the personal information of affected parties. With regard to the interview transcripts(Part B), emails and letters (Part C), in responding to the request, the ministry disclosed as much of the information to the appellant as possible without disclosing the personal information of affected parties. I agree with the ministry

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[7] See, for example, Orders PO-3617, PO-3960-R, and MO-3449-I. See also *Ontario Medical Association v. (Ontario) Information and Privacy Commissioner*, 2018 ONCA 673.

that the severed information is the affected parties' personal information, parts of which are intertwined with the appellant's information or that of a third party. I find that the affected parties could be identifiable to the appellant if their information is disclosed. I also find that it is not possible to further sever the appellant's remaining personal information without revealing personal information belonging to affected parties.

[30] Having found that the draft reports contain the personal information of the appellant, affected and third parties I will next address whether this information is exempt under section 49(a) in conjunction with the solicitor-client privilege exemption at section 19.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[31] The ministry claims that all of the severed information was withheld pursuant to section 21(1) and for records that contain the appellant's own personal information, pursuant to section 49(b). However, for the draft reports, the ministry also claims that the withheld information is exempt because it is subject to solicitor-client privilege. Having found that this information includes the personal information of the appellant, I will examine if the draft reports are exempt under section 49(a), in conjunction with the solicitor-client privilege exemption at section 19.

[32] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[33] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > if section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[34] Section 49(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.[8]

[35] Where access is denied under section 49(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.

[36] In this case, the board relies on section 49(a) in conjunction with section 19.

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[8] Order M-352.

[37] Section 19 of the *Act* states, in part, as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[38] Section 19 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. Here, the ministry relies on the common law solicitor-client communication privilege as well as statutory solicitor-client communication privilege.

Branch 1: common law privilege

[39] Common-law 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.[9] The rationale for this privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[10] 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.[11]

[40] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[12]

[41] 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.[13] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[14]

Representations

[42] The ministry submits that Branch 1, solicitor-client communication privilege applies to the draft reports as all of these records include communications between

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[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *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.
[12] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[13] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[14] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

ministry staff and counsel. The ministry submits that the draft reports were reviewed by counsel who provided legal advice, which is apparent when reviewing the attached comments made in Microsoft Word to the various versions of the report.

[43] The ministry submits that numerous IPC orders have found that for a record to be covered by this type of privilege, it must establish that:

1. there is a written or oral communication
2. the communication must be of a confidential nature
3. the communication must be between a client (or his agent) and a legal advisor, and
4. the communication must be directly related to seeking, formulating or giving legal advice.

[44] The ministry also sets out the following excerpt from *Descoteaux v. Mierwinski*[15] (*Descoteaux*) to describe the principles of solicitor-client privilege:

> … all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship …

[45] The ministry also submits that it has been recognized by the Divisional Court and the IPC that solicitor-client privilege is a "class-based" privilege that "protects the entire communication and not merely those specific items which involve actual advice."[16] The ministry also refers to Order MO-2198 where the adjudicator found that with the exception of any portion of a record that is "clearly unrelated to legal advice," a record that constitutes a communication to legal counsel for advice is "in its entirety" subject to privilege.

[46] Some of the draft reports contain comments between counsel for the ministry and the reviewers and ministry staff assisting in the review. The ministry refers to specified pages in the records that consist of questions and comments provided by counsel and responses from one of the reviewers. The ministry submits that this information is exempt from disclosure under section 19 based on the reasoning in *Descoteaux*.

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[15] (1982), 141 DLR (3d) 590 (SCC).
[16] *Ontario (Ministry of Finance) v Ontario (Assistant Information and Privacy Commissioner)*, [1997] OJ No 1465.

[47] The ministry refers to *Balabel v. Air India*[17] and submits that it has been recognized in many IPC orders that solicitor-client privilege applies to a "continuum of communications" between a solicitor and client. Referring to the records, the ministry submits that comments made between ministry staff and its legal counsel with regard to the contents of the report are clearly part of the continuum of communication that exists between the client and crown counsel.

[48] Finally, the ministry submits that there has been no waiver of privilege and that waiver is not an issue in this appeal.

[49] In his representations, the appellant did not specifically address the records that were withheld under section 19 and speaks to all of the records generally. He submits that the rule of law and due process were ignored by the reviewers and that he has a right to know who said what about him.

Analysis and finding

[50] Based on my review of the ministry's representations and the records (draft reports), and for the reasons set out below, I accept the claim that the discretionary exemption at section 49(a) read in conjunction with section 19, applies to the draft reports responsive to part C of the request, and which were withheld in their entirety.

[51] The ministry has provided the IPC with a copy of the records that were withheld based on solicitor-client privilege, and I agree that the records are drafts of a report that were provided to its internal legal counsel for review and advice. It is apparent when reviewing the withheld information that the ministry's legal counsel provided her opinion and advice on the various draft reports.

[52] 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.[18] I find that the information in the records claimed to be subject to section 19, 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.

[53] Based on my review of the withheld information and considering the ministry's representations, I find that the withheld information qualifies for exemption under Branch 1, solicitor-client communication privilege under section 49(a) in conjunction with section 19. From my review, it is clear that the information the ministry is seeking to withhold falls squarely into the category of information subject to solicitor-client

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[17] [1988] 2 WLR 1036 at 1046 (Eng CA).
[18] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

privilege as described in *Balabel v. Air India* and referred to by the Federal Court of Canada in *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*,.[19] I find that the withheld information constitutes a continuum of communications between legal counsel and ministry staff, made for the purpose of giving and receiving legal advice.

[54] Lastly, I find there is no evidence that the ministry 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 49(a) in conjunction with section 19 applies, subject to my finding on the ministry's exercise of discretion under Issue D below.

[55] As I have found that the draft reports are exempt under Branch 1, solicitor-client communication privilege, I will not also consider if this information is also exempt under Branch 2, statutory solicitor-client communication privilege.

Issue C: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[56] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[57] Under section 49(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 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[20] Section 49(b) reads:

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

[58] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

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[19] 2013 FCA 104.

[20] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

[59] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy. In this instance, none of section 21(1)(a) to (e) apply. Section 21(1)(f) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[60] In both section 49(b) and 21(1) situations, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the individual's personal privacy. The ministry submits that the withheld personal information of the appellant consists of an affected party's personal information that is intermingled with that of the appellant. I will consider whether those portions should otherwise be exempt under the personal privacy exemption.

[61] Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Representations

[62] The ministry submits that none of the exceptions in section 21(1)(a) to (e) apply and that, as per section 21(1)(f), it would be an unjustified invasion of affected parties' personal privacy to disclose their personal information.

[63] The ministry submits that the presumption at section 21(3)(d) (employment or educational history) applies in this appeal as the records relate to a review of issues arising at the board's workplace, as well as place for learning for students. The ministry submits that there are many records where the participants discuss employment history.

[64] The ministry also submits that the presumption at section 21(3)(h) (individual's racial or ethnic origin) applies . Due to the subject matter of the investigation, information relating to an individual's racial origin appears frequently throughout the records.

[65] Referring to the factors at section 21(2), the ministry submits that section 21(2)(h) (confidentiality) applies in this appeal. It submits that assurances were provided by the reviewers to the participants relating to the anonymization of the records, that they would not be identified unless required. The ministry also notes that

the reviewers replied to emails with assurances that no individuals would be named in the report. The ministry also submits that there are indications on the face of the records themselves that participants expected that the information would be treated confidentially, some expressing reservations regarding the possibility of being identified.

[66] The ministry submits that the expectation of confidentiality and anonymity is objectively reasonable. It submits that many of the participants specifically requested confidentiality and were provided with assurances relating to anonymity and the limited circumstances in which disclosure might occur. The ministry submits that these assurances of anonymity were necessary to ensure that individuals would contribute to the investigation without fear of reprisal. It submits that without assurances that they would not be identified, many of these individuals might have chosen not to speak with the reviewers, or would have been far less candid about their experiences at the board which would have defeated the very purpose of the review.

[67] The ministry also submits that the factor at section 21(2)(f) (highly sensitive) is relevant in this appeal. The ministry, referring to the records, submits that many of the participants refer to a "culture of fear" within the board. It refers to specific instances in the records where this concept is discussed. The ministry submits that many of the records directly link this "culture of fear" to the appellant, highlighting that many participants were fearful of the appellant. The ministry notes that this is extensively reflected in the published report which details concerns regarding a culture of fear cultivated by the appellant. The ministry submits that it can be reasonably expected that disclosure of affected parties' personal information will cause them harm by causing them significant personal distress and could open them up to reprisals from others in the school board.

[68] The ministry also submit that the factor at section 21(2)(e) (harm) applies in this appeal as disclosure of the withheld information would likely cause some of the participants emotional harm for similar reasons as submitted in 21(2)(f). The ministry also submits that the harm is present and foreseeable given the affected parties' fear of being identified and facing reprisal. The ministry submits that the harm would be unfair to the affected parties as they willingly participated in a report aimed at addressing issues in their workplace subject to assurances relating to confidentiality.

[69] The ministry further submits that disclosure of the withheld information would likely cause some affected parties professional and reputational harm. The ministry submits that these participants willingly supplied information relating to board leadership, governance issues and the conduct of trustees as requested by the reviewers. The ministry submits that the report was recent enough that it can be expected that many members of management and trustees still hold their positions. Therefore, the ministry submits that it would be unfair to jeopardize the participants' careers with disclosure of their personal information.

[70] The ministry also refers to unlisted factors that would support withholding the information. It submits that ensuring public confidence in an institution is a relevant factor. The ministry refers to the *Provincial Interest in Education* regulation[21] made under the *Education Act*, and submits that it has an interest in being able to conduct reviews properly and effectively to direct change at school boards when urgent matters of provincial interest in education are at stake. The ministry submits that the disclosure of the withheld information would have a chilling effect on the willingness of school board employees and other participants to submit letters and be interviewed when such urgent and pressing concerns with school boards arise.

[71] As noted, in his representations the appellant mostly addresses the review and the reviewers without specifically addressing the various issues and questions that were set out in the Notice of Inquiry, despite being provided with a complete copy of the ministry's representations. As noted, he begins his representations by stating that "[d]emocracy dies in darkness – malfeasance thrives in anonymity." He submits that he has the right to know who said what about him especially since the review was cited as grounds for his employment termination from the specified board. The appellant submits that Canada is founded on the rule of law and he believes that the rule of law and due process have been ignored by the reviewers. The appellant asks that the IPC "preserve democracy's future" and assist in preserving his rights to the rule of law and due process.

[72] The appellant submits that anonymous sources should not be permitted to spread disinformation and the review of the board that was conducted stems from disinformation given by anonymous sources.

[73] The appellant submits that the bias of the reviewers is evident in that they "they were beholden not to the rule of law and due process but to political expediency and political pressures." He submits that "[a]nonymity simply overwhelms [his] rights to the rule of law, due process and procedural fairness." The appellant requests access to the withheld information so that he can view who said what to the reviewers.

Analysis and findings

[74] The ministry submits that the presumptions at sections 21(3)(d) and 21(3)(h) apply in this appeal. If either of these presumptions apply to the information, then disclosure is presumed to be an unjustified invasion of personal privacy.

The section 21(3) presumptions

[75] The ministry submits that the presumption at section 21(3)(d) is relevant in this appeal. Section 21(3)(d) states that:

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[21] *Ontario Regulation 43/10*

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

[76] Past orders of this office have addressed the application of the presumption against disclosure in section 21(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.[22]

[77] 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, 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.

[78] Having reviewed the records that the ministry has claimed exempt under section 49(b) (the personal information of an affected party mixed with the personal information of the appellant) and section 21(1) (the personal information of an affected party), I agree that the presumption at section 21(3)(d) applies to much of the withheld information. As noted by the ministry, the records relate to a review of issues arising at the board's workplace and place of learning for students and therefore many records involve participants discussing their employment history including their current and previous positions and number of years working in the education sector. In addition, parents refer to their children referencing their various ages, grades and, experiences while attending school. I find that these portions of the records are exempt under section 21(1) on the basis that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(d).

[79] The ministry also submits that the presumption at section 21(3)(h) is relevant in this appeal. Section 21(3)(h) states that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[80] Past orders have found that when information relates to an affected party's own

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[22] Order M-609, MO-1343.

ethnic origin or religious beliefs that this presumption applies to exempt that information. I have reviewed the withheld information in the records at issue and agree with the ministry that the presumption at section 21(3)(h) applies to most of the information. There are numerous references to racial and ethnic origin along with religious beliefs and associations. This sort of information is found throughout portions of the records and I find that they are exempt under section 21(1) on the basis that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(h).

[81] I will now turn to the section 21(2) factors weighing for and against disclosure.

The section 21(2) factors

[82] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[23] Some of the factors listed in section 21(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[24]

[83] While the ministry pointed to specific factors in its representations that might apply, the appellant does not refer specifically to section 21(2). However, in his submission he refers to anonymity and violations of privacy as an institutional obstacle to democracy which appear to reference section 21(2)(a) (public scrutiny). The appellant also refers to preserving his right to the rule of law and due process which I will consider as an unlisted factor.

[84] Therefore, the parties' representations raise the possible application of paragraphs 21(2)(a), (e), (f) and (h). The factor at section 21(2)(a), if it applies, would weigh in favour of disclosure, while the factors at section 21(2)(e), (f) and (h) 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive;

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[23] Order P-239.
[24] Order P-99.

> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

Factors that weigh in favour of disclosure

Section 21(2)(a) (public scrutiny)

[85] In his representations, the appellant alludes to section 21(2)(a) applying to the withheld information. He refers to institutional obstacles to democracy and "the anti-democratic skew" the reviewers took by taking into account anonymous and unsubstantiated sources. He submits that malfeasance thrives in anonymity.

[86] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[25]

[87] However, in my review of the withheld information, the parties' representations and the final report that was published by the ministry, I do not agree that disclosing the withheld information would subject the activities of the ministry to public scrutiny. In the published report, the reviewers were quite candid, summarizing the personal information they received into the body of their report. In my view disclosing the withheld personal information would not have the affect of subjecting the activities of the ministry to public scrutiny and instead would subject the views and opinions of private individuals to public scrutiny. I give this factor no weight.

Unlisted factor: preserving the appellant's right to the rule of law and due process (fairness)

[88] In his representation, the appellant submits that the rule of law and due process have been ignored by the reviewers and that he has a right to know who said what about him especially since the review was cited as grounds for his termination. The appellant suggests that the reviewers "were beholden not to the rule of law and due process but to political expediency and political pressures." The process of review that resulted in the final report is set out in the *Provincial Interest in Education* regulation which recognizes the need for government oversight of schools. Given the nature of the personal information and complaints against the appellant, I find the appellant's need to know the identities of the complainants and the information they say about him is a factor favouring disclosure. However, given the public interest in ensuring that schools are safe environments for learning, I only give moderate weight to this consideration.

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[25] Order P-1134.

Factors that weigh in favour of non- disclosure

Section 21(2)(e) (harm)

[89] After my review of the withheld information and considering the ministry representations, I find that this factor is relevant in this appeal. I agree with the ministry and find that if the withheld information was disclosed to the appellant it could foreseeably emotionally harm affected parties given the fear of being identified by the appellant evidenced in the records. I also find that disclosure of some of the withheld information would likely cause some affected parties professional and reputational harm. As the ministry points out, many of these affected parties will still be employed by the board and they supplied information relating to board leadership, governance issues and the conduct of trustees. I conclude that it is foreseeable that these affected parties would experience professional or reputational harm if the withheld information is disclosed. I also find that this harm would be unfair to the affected parties because they voluntarily participated in a review being conducted by the ministry under the *Provincial Interest in Education* regulation. For all of these reasons, I give this factor significant weight.

Section 21(2)(f) (information is highly sensitive)

[90] I agree with the ministry and find that this factor is relevant in this appeal. In reviewing the withheld information, I agree that it contains information that is considered highly sensitive. The participants in the review gave candid personal interviews and I have already determined that if this information was released they could be identified despite the anonymization throughout the records. Given that the affected parties could be identified, I find that disclosure of their personal information would cause them significant personal distress and could open some to reprisals from others in the school board. Therefore, I give this factor significant weight.

Section 21(2)(h) (confidentiality)

[91] In reviewing the withheld information in the records and the ministry's representations, including the affidavit from its Director of the Supporting Student Potential Secretariat, I find that this factor is relevant in this appeal. It is apparent that the participants were given assurances that their information would be anonymized and that they would not be identified unless required. I agree that it is likely that without the assurances given to the participants that their information would be confidential, many of these individuals might have chosen not to speak with the reviewers or would be less candid. As a result, I find that the participants supplying the information had an expectation that the information they provided would be treated confidentially, and that expectation is reasonable in the circumstances. Therefore, I give this factor significant weight.

Unlisted factor: ensuring public confidence in an institution

[92] I agree with the ministry that this unlisted factor is relevant in this appeal. As per

the *Provincial Interest in Education* regulation, the ministry has an interest in conducting reviews to effect change at school boards when urgent matters of provincial interest in education are at stake. I agree with the ministry and find that disclosure of the withheld information would have a chilling effect on the willingness of other school board employees and other participants to submit letters and be interviewed when urgent and pressing issues at school boards arise. I therefore give this unlisted factor significant weight.

Conclusion

[93] In conclusion, I have found that the presumptions at section 21(3)(d) and 21(3)(h) apply to the withheld personal information. I also find that the factors at section 21(2)(e), (f) and (h) apply and they all weigh significantly in favour of non-disclosure. The only factor that I find that weighs in favour of disclosure is the unlisted factor, preserving the appellant's right to the rule of law and due process, and, as discussed, I gave this factor moderate weight. 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 49(b).

Issue D: Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[94] The section 49(a) and 49(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.

[95] 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.

[96] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

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

Representations

[97] The ministry submits that it considered all relevant factors in good faith in making its decision to withhold the information under sections 49(a) and 49(b), including,

- The purposes of the *Act*, including the principles that:
    - information should be available to the public
    - individuals should have a right to access to their own personal information
    - exemptions from the right of access should be limited and specific, and
    - the privacy of individuals should be protected
- The wording and content of the solicitor/client exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- the relationship between the requester and any affected persons
- whether disclosure will increase the public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant to the institution, the requestor or any affected person.

[98] The ministry submits that with regard to the records withheld under section 49(a), it considered whether the records should be released to the appellant because they contained his personal information. The ministry submits that although the appellant's personal information appears in these records, it has exercised its discretion to withhold the information under section 49(a). It submits that it exercised its discretion in good faith and determined that solicitor-client privilege clearly outweighed the appellant's right to access his own information.

[99] The ministry notes that the reviewers relied on legal counsel to obtain legal advice on a report that was of public interest. It submits that upholding solicitor-client privilege is essential to ensure that those tasked with conducting an investigation can openly rely on their legal counsel for advice as necessary during the drafting of a report. The ministry notes that the final version of the report was published on its website.

[100] With regard to information in the records that contain both the personal information of the appellant and other identifiable individuals, the ministry submits that disclosure of that information would constitute an unjustified invasion of affected parties' personal privacy and pursuant to section 49(b), it refused to disclose that

information to the appellant. The ministry submits that it determined that the privacy of the participants and third parties should be protected given the sensitive nature of the information and given their relationship with the appellant, it exercised its discretion in good faith to withhold the information.

[101] The ministry submits that it exercised its discretion under section 49(b) giving consideration to the appellant's right to access his own personal information. It submits that in the circumstances it was not satisfied that it should disclose the remaining personal information of the appellant as doing so would unjustifiably invade the personal privacy of affected parties whose personal information is also in the records.

[102] The appellant did not address the ministry's exercise of discretion specifically in his representations.

Finding

[103] I have considered the circumstances surrounding this appeal and the minsitry's representations and I am satisfied that it has properly exercised its discretion with respect to section 49(a) and 49(b) of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The ministry 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.

ORDER:

The appeal is dismissed.

Original Signed by: July 6, 2021

Alec Fadel
Adjudicator