Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4101

Appeal MA17-557

Halton District School Board

August 31, 2021

Summary: This order resolves an appeal of an access decision issued by the Halton District School Board (the board) in response to six access requests made by a student, under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*). The requests were for various records related to the student's math mark in a high school course, all records involving the student and his parents and various board personnel, and records relating to an in-class chemistry experiment. The board refused all six requests, claiming that they were individually or collectively frivolous or vexatious, under section 4(1)(b) of the *Act*. The board also claimed a number of exemptions in the alternative to its section 4(1)(b) claim. The student appealed the board's decision and raised a number of issues, including a conflict of interest on the part of the board's head under the *Act*, and the application of section 5(1) (head's obligation to disclose) of the *Act*.

In this order, the adjudicator upholds the board's determination under section 4(1)(b) for the six requests on the basis that the requests were made for a purpose other than to obtain access. The adjudicator makes no findings regarding section 5(1), as that is a mandatory provision regarding duties and responsibilities belonging to the head of an institution alone. She also finds that the appellant has not established that the director of education was in a conflict of interest in the processing of the requests, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 5(1), and 20(1); R.R.O. 1990, Reg. 823, sections 5.1(a) and 5.1(b).

Orders Considered: Orders 65, PO-2381, M-850, M-1091, MO-1168-I.

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

OVERVIEW:

[1] This order resolves an appeal of an access decision issued by the Halton District School Board (the board) in response to six access requests submitted by a high school student under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*). The requests were as follows:

Request 1

> The answer keys to all quizzes, tests, assignments, projects, mid-term and final examinations – and such similar assessment tools – utilized in course [course code] Principles of Mathematics Grade 10 Academic, Semester 1, Period 2, Course Instructor [name], for the academic school year commencing [month, year], at [school name], [town name], Ontario.

Request 2

> The completed final examination and Performance Task of [the student], being the work product for [the course mentioned in request 1]

Request 3

> The full course grading key, including supporting spreadsheets – spreadsheet formulas – supporting documentation, for [the student], being a consequence of his work product in total, for [the course mentioned in request 1]

Request 4

> All meeting dates, participant notes, referenced documents and materials, related emails and review methodologies relating to [the student's] formal final grade appeal, and the final review of that grade in accordance with HDSB Procedures in relation to [the course mentioned in request 1]. For greater clarity, without limiting the generality of the foregoing or limiting the applicability of HDSB employees, these records should be in the possession of HDSB employees: Principal [name]; Superintendent [name] and Instructor [name].

Request 5

> All emails, notes, letters, documents, memorandums, minutes of meetings and other such similar documents that cite, reference, discuss or intimate reference to [the student's name], [his mother's name], [his father's name], being in the possession of Director of

> Education [name], Associate Director of Education [name], Superintendent [name], Principal [name], any and all members of the Board of Trustees, and the various administrative assistants to the foregoing.

Request 6

> Within the full scope of the HDSB, all emails, notes, letters, documents, memorandums, minutes of meetings, working documents and other such similar documents that cite, reference, discuss or intimate reference, results from, and as an on-going consequence therefrom, to the complaint filed by [the requester's father], with reference to the following incident:
>
> > The complaint as it relates to [the student's name], age [number], a grade [number] student at [school name], Halton District School Board. The substance of the complaint being [the student's] participation in a mandatory in-class chemical laboratory experiment [specified class], whereby a set of ten (10) chemicals, including lithium chloride and cobalt chloride, were subject to burning in an open flame. The date of this event being on or about [a specified date].
> >
> > Moreover, whereby this in-class experiment was at least repeated in excess of one hundred. . . (10 sets of 10) times during the class in question. And it being further established that the experiment was conducted without the benefit of utilization of the in-case hood ventilator, nor personal respirators (for each student).

[2] The board issued one access decision in response to the six requests, denying access to the responsive records under section 4(1)(b) of the *Act*, which provides that there is no right of access to records if the request is frivolous or vexatious. The board claimed that the requests were "part of a pattern of conduct that amounts to an abuse of the right of access" and "made in bad faith or for a purpose other than to obtain access" as contemplated by Regulation 823. The board also identified responsive records in response to the requests, and, in the alternative to its denial on the ground that the request were frivolous or vexatious, claimed a number of discretionary exemptions under the *Act* over many of the records. In addition, the board provided an index of records specifying which records under each request were being withheld and on what basis.

[3] The requester, now the appellant, appealed the board's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore resolution.

[4] During mediation, the mediator spoke with the parties to clarify and discuss the issues in the appeal. The appellant confirmed that he wished to pursue access to

records relating to all six requests. Some issues were narrowed or clarified at mediation with respect to certain exemptions claimed in the alternative to the frivolous or vexatious claim.

[5] The appeal could not be resolved through mediation, and accordingly proceeded to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[6] The adjudicator initially assigned to this appeal issued a Notice of Inquiry, setting out the facts and issues on appeal, to the board first. The board provided written representations in response. Portions of the board's representations were not shared with the appellant as they met the IPC's confidentiality criteria.[1] The adjudicator then sought and received written representations from the appellant in response to the Notice of Inquiry and the board's non-confidential representations. The appellant raised the application of sections 5(1) (head's obligation to disclose) and 16 (public interest override) of the *Act*, and alleged a conflict of interest on the part of the board's head under the *Act* (who is responsible for access decisions under the *Act)*. The parties exchanged further representations following that.

[7] The appeal was transferred to me to continue the inquiry. After my review of the parties' representations, I invited the appellant's parents (who are two affected parties), to provide representations on the sole issue of whether the requests were frivolous or vexatious, and in particular, on the matter of whether the requests were made for a purpose other than seeking access. The appellant's parents did not provide representations in response to this invitation, despite being provided several opportunities to do so.

[8] For the reasons that follow, I uphold the board's decision to claim section 4(1)(b) in relation to the requests, and dismiss the appeal. As a result, it is not necessary to consider any of the exemptions claimed in the alternative, or the public interest override at section 16 of the *Act*. With respect to section 5(1) of the *Act*,[2] which is a mandatory provision that requires the head to disclose records in certain circumstances,[3] it is well established that the duties and responsibilities set out in section 5(1) belong to the head alone. As a result, the IPC cannot order disclosure under section 5(1),[4] and I will not address it further in this order.

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[1] *Practice Direction 7* of the IPC's *Code of Procedure*.
[2] Section 5(1) of the *Act* says: "Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public."
[3] See, for example, Orders MO-2205 and MO-3766.
[4] Order 65.

RECORDS:

[9] The board identified the records at issue in six indices it prepared (one index corresponding to each request), as well as in correspondence to the IPC (regarding an additional record that the board states was inadvertently omitted from the index of records for request 6).

ISSUES:

A. Did the board have reasonable grounds to conclude that the requests for access were frivolous or vexatious under section 4(1)(b) of the *Act*?

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

DISCUSSION:

Issue A: Did the board have reasonable grounds to conclude that the requests for access were frivolous or vexatious under section 4(1)(b) of the *Act*?

[10] As I will explain below, I find that the board had reasonable grounds to conclude that all of the requests were frivolous or vexatious, having been made for a purpose other than to obtain access, as a bargaining chip to have the board raise the appellant's math and chemistry marks, through requests 1-5 and request 6, respectively.

[11] By way of background, as evidenced by emails attached to the principal's affidavit, the appellant's parents disputed his marks in all subjects except for Art, French, and Physical Education. This appeal arises from the fact that the appellant and his parents were unhappy with his math and chemistry grades, and the appellant's parents communicated at length with school about them, and made multi-faceted efforts to have the board raise them. After several weeks of these communications, the appellant filed six access requests. The day after doing so, his father made an "offer" to the principal relating to the math mark, which will be discussed in further detail below, as it relates to several of the requests. The board also provided evidence that the chemistry-related access request was made as part of a lobbying effort to increase the appellant's chemistry mark, as I will discuss further below.

General principles regarding section 4(1)(b)

[12] Section 4(1)(b) says:

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

> the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[13] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[14] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[5]

[15] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[6]

[16] Under the *Act* and the regulation, there are four possible grounds for finding a request to be frivolous or vexatious:

- The request is part of a pattern of conduct that amounts to an abuse of the right of access,
- The request is part of a part of a pattern of conduct that would interfere with the operations of the institution,
- The request is made in bad faith, and/or
- The request is made for a purpose other than to obtain access.

[17] While the board argued that all of these grounds apply, I will only discussing whether the ground of whether the request is made for a purpose other than to obtain access. Given my finding on that issue, it is unnecessary to consider the other grounds.

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[5] Order M-850.
[6] Order M-850.

Purpose other than to obtain access

[18] For the reasons set out below, I find that the board had reasonable grounds to conclude that the requests were made for a purpose other than to obtain access. The board made submissions on the purpose of the requests under each ground of the four grounds under section 4(1)(b), with varying degrees of detail. In assessing the purpose of the requests, I have considered the totality of the evidence before me and all of the representations relating to purpose of the requests regardless of which ground of section 4(1)(b) they may have been discussed under by the parties. As a result of my consideration of the representations before me, I uphold the board's decision.

[19] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[7] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct."

[20] Previous IPC orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious."[8] In order to qualify as a "purpose other than to obtain access," the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[9]

[21] The institution may look to all the relevant circumstances of the case in assessing whether there was a purpose other than to obtain access.[10]

[22] Below, I summarize the respective positions of the board and the appellant.

The board's position

[23] The board submits that the requests for records were made for a purpose other than to gain access to information. Specifically, it says that the requests were made as part of a series of efforts by the appellant's parents to increase the appellant's math and chemistry marks, respectively. More specifically, the board submits that the primary purpose of the requests was to pressure board staff, and especially the principal, so as "to intimidate the principal with the prospect of a time-consuming and protracted process to collect, review and disclose his records and those of his staff in order to respond to" the requests, so that an offer to withdraw the access requests could then be made in exchange for higher marks.

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[7] Order M-850.
[8] Orders MO-1168-I and MO-2390.
[9] Order MO-1924.
[10] Order MO-1782.

[24] The board explained, at length, the history of the appellant's parents' interactions with the board, including the appellant's parents' efforts to have his math and chemistry lab assignment marks raised.[11] In this order, I will only refer to that history to the extent that it is relevant to assessing the purpose of the appellant's access requests under the *Act*. As I explain below, these efforts support the board's position that the access requests were part of a longer campaign by the parents and/or the appellant to have his math and chemistry marks increased. It is also the timing of these efforts that is relevant to whether the access requests were made for a purpose other than to gain access to information, as the board submits that the timing of the requests coincides with the parents' other "lobbying" efforts toward extracting higher math and chemistry marks for their son.

[25] The appellant submitted the requests in his own name. However, the board submits that the real requester is the appellant's father, for reasons set out in the board's representations. I will not repeat those reasons here, and given my findings below, the dispute about the identity of the requester does not change my analysis of whether the requests were frivolous or vexatious within the meaning of section 4(1)(b).

[26] The board states that for weeks before the access requests were made, the appellant's parents tried through various means to have his math and chemistry marks increased. The board provided emails with the principal's affidavit evidence showing the nature of these efforts, and the parents' level of involvement. Amongst the emails provided by the board in support of its position, the board provided one from the appellant's mother sent to her son's math teacher in which the mother stated that the appellant's parents scrutinized their son's "work, test performance, quiz results, and other points of grading with the utmost scrutiny." The board provided other supporting evidence, including affidavit evidence, regarding the appellant's parents' level of involvement regarding the math and chemistry courses, and many others.

[27] Based on my review of the parties' representations and evidence provided, it is clear that the appellant (or his parents') various attempts to have his marks raised were unsuccessful.

[28] In the context of this degree of parental involvement, and the lack of success of the appellant's parents' efforts to have his math mark raised, the board points to an email sent by the appellant's father to the principal the day after the access requests were made, as evidence that requests 1-5 were part of a lobbying effort to raise the appellant's math mark. The board points to the "offer" made in this email, whereby the appellant's father and the principal could "work out" something regarding the math

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[11] The board refers to a "pattern of conduct" in relation to this history, in the sense that the appellant's parents typically took certain steps in relation to disputing marks in most of their son's courses. However, for the purpose of section 4(1)(b), "a pattern of conduct" must be in connection with the making of requests under the *Act*.

mark, "*recognizing that this would also dispense with several Freedom of Information Requests that were filed by [his son] last night with the HDSB, which target [the principal's] records and the faculty's records*. . . . [and] *that it would be less disruptive and consternating for* [the principal's] *faculty and staff*" than the other "choice" he was offering (a formal complaint and request for intervention by the Province of Ontario and Office of the Ombudsman). As a result, the board submits that the primary purpose of the requests was to intimidate the principal with the prospect of using many resources to process them, so that the appellant's father could then "sweeten the pot" by offering to withdraw the access requests in exchange for a higher math mark. The board's representations and affidavit evidence (with supporting documentation) indicate that making such an offer to withdraw from a process that would have put pressure on the board's resources was part of a general pattern of behaviour that the board experienced when the appellant's parents were unhappy with a mark, as follows:

- complain to the teacher who gave the mark;
- if the teacher refused the increase they demanded, contact the principal, in writing and/or insist on a meeting;
- upon refusal by the principal, further correspondence, phone calls and/or office visits alleging incompetence and/or professional misconduct by the teacher;
- threaten to sue for negligence, and/or contact external organizations such as the Ontario College of Teachers, the Ministry of Education, the Ombudsman of Ontario, the Auditor General of Ontario, the Region of Halton, the Ministry of Labour and the media;
- concurrent with external complaints, threaten to make, and/or make, internal complaints to the Director of Education, the Associate Director of Education, Superintendents, Trustees and the Chair or Vice Chair of the board;
- ensure that the staff subject to the complaint were copied "in the interests of fairness and transparency";
- caution the teacher that any further unsatisfactory marks would be deemed as a reprisal;
- offer to withdraw the complaint made to the College of Teachers against the relevant teacher in exchange for the higher marks sought.[12]

[29] The board also provided evidence of the other opportunities that all students had

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[12] The board provided evidence that the appellant's parents offered to withdraw complaints made to the Ontario College of Teachers in relation to English and geography, if the board increased the appellant's marks in those courses from 84% and 81% respectively, to 91% in each course.

to review their math tests as evidence that the purpose of requests 1-5 was not really to seek to verify the accuracy of the appellant's marks. The principal's affidavit states that student evaluations at secondary school are a transparent process, and are designed to ensure that all students have the information they need to succeed in achieving their educational goals. He attests that while answer keys are not distributed for final performance tasks and exams because teachers often reuse tasks and questions, the following measures were available to all students:

- a mark rubric outlining how all of the marks for the semester are allocated is distributed at the start of each class, and posted online, using "googledocs", to which all students and staff have access:
- every test and assignment is returned to the student who did the work;
- teachers post sample answers and mark keys to quizzes, tests, projects and assignments after each are marked and returned so that students could compare their work to answers that were given full marks;
- teachers are available to meet with students during and after class to discuss assigned work, the allocation of marks, or a student's general progress; and
- a full day ("Exam Take-up Day") is set aside at the end of each semester for students to attend each of their classes and review and discuss the exam and final performance task.

[30] The board's position is that the appellant and his parents had ample opportunity to review records relating to his math mark, in accordance with the above. All of the appellant's math tests and assignments were returned to appellant and were made available to his parents for their further review upon request. Furthermore, the board notes that extra help was available to all math students after school, including for the purpose of reviewing past tests and assignments, and that the principal met with the appellant's parents on numerous occasions, and exchanged emails and phone calls, in order to respond to their expressed dissatisfaction with the marks the appellant received on tests, quizzes, assignments, the final assignment and exam.

[31] With respect to the chemistry mark, the board provided detailed evidence, including affidavit evidence, about efforts of the appellant's parents to question the 4/6 mark that he received on a chemistry lab assignment, beginning shortly after the appellant received his mark on that assignment, in February 2017. The board provided evidence demonstrating that as time progressed and additional efforts were unsuccessful in changing the mark, the appellant's parents alleged in March 2017 that the lab experiment was not safe, and that various authorities were engaged to investigate these claims. Furthermore, the board provided evidence of the concerted efforts of the appellant and his parents to dispute his chemistry teacher's grading during the week that request 6 was made, in late April 2017.

The appellant's position

[32] The appellant states that he, and not either or both of his parents, is the requester. His position is that his parents' alleged interactions with the board, as described in the board's representations, are entirely separate and distinct from his interactions with the board, and are unrelated to his access requests made under *MFIPPA*.

[33] With respect to the math mark, the appellant disputes the board's position that the requests were made as a tactic or bargaining chip for the purpose of extracting a higher math mark. Rather, he states that he does not know if his math mark was accurate, understated or overstated, so he wants to determine this through disclosure of the records, and to decide whether a correction request under *MFIPPA* in relation to his math mark is needed. He states that when his efforts to conduct his own investigation into the accuracy of his math mark failed, he asked his parents for help. He goes on to explain the importance he places on all marks and his views about how they reflect a person and how his marks on his Ontario Student Record (OSR) would be used to view him. The appellant argues that I should consider that he "was treated unfairly and that since all other avenues were thwarted, [his] only viable option remaining was to file an access to information request in order to verify the correctness of the grade." He characterizes the purpose of requests 1-4 as one of meaningful access to one's records (and in particular, to records relating to a student's marks, especially in subjects like math, where he suggests there is a narrower field for discretion), and the ability to correct those records.[13]

[34] The appellant also submits that an email sent by his father to the board's Associate Director of Education (the associate director) directly contradicts the board's claim that the requests were made as a tactic or bargaining chip to increase his math mark. He states that in that email, his father notes that "the Grade [number] mathematics grade review . . . was conducted in a manner that was not complete" and that his father says, "I note that the request was not for a grade increase."

[35] In addition, the appellant argues that the timing of the requests and his transfer out of the board's jurisdiction is relevant. He asserts that when he transferred out of the board, it would be impossible for the board to change the marks on his OSR after that. He argues that this undermines the credibility of the board's claim that the purpose behind the access request was to increase his math mark.

[36] With respect to the purpose of requests 5 and 6, the appellant states that the purpose of these requests was to review, evaluate, and assess records and information

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[13] The board, for its part, submits that the authority to determine marks is governed by the *Education Act* and Regulation 298, not the IPC through appeals of correction requests made under section 36(2) of *MFIPPA*.

in the board's custody regarding the in-class chemistry experiment that occurred on a specified date in February 2017. His representations expand on that, to include claims about the safety of the experiment and specific questions that he would like answered regarding the board's handling of chemicals, and the particular experiment that he was involved in. He characterizes requests 5 and 6 as ones involving the right to know of an individual and the public regarding incidents or practices that he asserts place minors in the care of the board at a health risk from the board's actions or inactions.

[37] Finally, the appellant makes a submission that I will address directly below before my substantive analysis regarding section 4(1)(b). Referencing Order MO-1168-I, the appellant submits that as the board did not claim the request was frivolous and vexatious initially upon receiving his access request, the board should not be permitted to rely on this claim. The appellant submits that the board did not rely upon the discretionary powers respecting "frivolous and vexatious" until 148 days after first receiving notice of the requests, and that this is not in keeping with a requester being fully informed as early as possible regarding the institution's position and its reasons for advancing such a claim.

Analysis/findings

[38] For the reasons set out below, I find that there are reasonable grounds to conclude that the requests were made for a purpose other than to obtain access, and I uphold the board's decision to deny access to the records on the basis of section 4(1)(b).

[39] Before I proceed to consider the board's claim, I wish to address the appellant's argument on Order MO-1168-I. By way of background, the board initially claimed a time extension under section 20(1) of the *Act* in response to the access requests. When it later issued an access decision, the board claimed section 4(1) (frivolous or vexatious) of the *Act*. Order MO-1168-I is not helpful to the appellant because in that appeal, the institution made the frivolous or vexatious claim during mediation at the IPC, and the adjudicator did not find that the institution had waited too long to do so. Furthermore, the *Act* allows an institution to extend the time limit for responding to an access request.[14] The fact that the board availed itself of this is not evidence that it misused its discretionary power under section 4(1)(b). By making the section 4(1)(b) claim in its access decision within the time extension period,[15] I find that the board informed the appellant that it would be using this discretion in a timely way.

[40] The appellant also asks that I consider that he "was treated unfairly and that since all other avenues were thwarted, [his] only viable option remaining was to file an

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[14] Under section 20(1) of the *Act*.

[15] There was one time extension period, which was then extended again due to the board's position that it was not satisfied that it had located all of the responsive records in its custody or control and needed to consult with teachers who were absent during the summer to do so.

access to information request in order to verify the correctness of the [math] grade." However, it is not within the scope of this appeal for me to determine if the appellant was treated unfairly, or to comment on the propriety of the other avenues that he may be referring to. The parties' substantive disagreement about the safety of the chemistry experiment is also outside the scope of this appeal.

Relevant circumstances include the degree of parental involvement

[41] It is well established that an institution is not limited to considering only the purpose of the requests as expressed by the requester, nor are the relevant motives or conduct limited to the person in whose name the request is made. For example, consider the following:

- In Order M-850, Assistant Commissioner Tom Mitchinson recognized that just a *material connection to* a requester could be required to establish a "pattern of conduct" under section 4(1)(a) of the *Act*. He said: "a 'pattern of conduct' *requires* recurring incidents of related or similar requests on the part of the requester (*or with which the requester is connected in some material way*)" [emphasis added]. While this refers to a ground of a frivolous or vexatious claim (pattern of conduct) that I will not be analyzing in this order, it is still useful in demonstrating that an institution may find a request to be frivolous or vexatious based on the conduct of an individual(s) who are connected to the requester in some material way.

- The IPC has long recognized that a requester seldom admits to a purpose for an access request other than access,[16] so it is reasonable to accept that there may be circumstances that an institution may view as relevant to determining whether the purpose behind a request is something other than access.

[42] As mentioned, by way of background, the appellant's parents disputed his marks in several courses. This appeal relates to the dispute about the appellant's math and chemistry marks in a particular year. Emails attached to the principal's affidavit provide supporting evidence of the nature of the parents' efforts to have their son's math and chemistry marks increased, as did my review of the relevant records identified as responsive to the requests. The appellant later made the access requests after weeks of this disputing, and the day after they were made, his father made an "offer" to the principal, which I will discuss further below.

[43] In light of the appellant's parents' involvement with the board on the appellant's behalf, and because I find that the appellant and his parents are related in a material way to the access request and the surrounding circumstances, it is not necessary to definitively resolve the issue about who the "real" requester is because the outcome

[16] Order MO-1782.

would be the same, regardless.[17] Therefore, in view of the totality of the evidence before me, while the *MFIPPA* requests were made in the appellant's name, that fact is not determinative of the evidence that the board was entitled to consider in regards to the purpose of the requests.[18]

Requests 1-5: the appellant's father's "offer" email reflects a purpose other than to obtain access

[44] By the time the appellant made the requests, his parents had already tried to have his math mark increased through a variety of means, but were not able to do so. In taking the position that the purpose of making the requests under *MFIPPA* was to lobby the board for a higher math mark, the board highlighted the appellant's father's offer to the principal, set out in full, below. As mentioned, it was sent the day after the appellant made the requests under *MFIPPA*. Its subject line is "an offer."

> Good afternoon [first name of the principal],
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> One of the issues that is still outstanding is [my son's] *grade [number] mathematics grade*. As I am sure you know we have asked the Board to refer this matter back to you for a complete review and investigation. I am not sure if you are aware but we are of the position that the investigation that you conducted was too narrow, i.e. focusing only on the final examination/performance task (in complete) [sic], notwithstanding our concern regarding [our son's] *grading* over the entire course.
>
> From my discussions with [the appellant's mother], and from our meetings, it is very clear to me that there is no way you could have possibly completed a thorough investigation, given that [the appellant's mother] did not communicate to you all the areas of concern.
>
> *That said, I am currently left with two choices*. *Either we mutually agree to reexamine this issue together and come to an equitable solution for all concerned*, OR I proceed with a formal complaint and request for

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[17] If the appellant is considered the requester, the degree of his parents' involvement with the board over his marks would be a relevant circumstance that would draw in his parents' statements and actions in the context of the access request into the sphere of relevant evidence about the purpose of the requests. This would include his father's "offer" to have his son's *MFIPPA* requests "dispensed with" if a higher math mark could be "work[ed] out," and the many attempts made largely by the appellant's parents to dispute the chemistry teacher's grading, in favour of higher marks. If the requester is the appellant's father (or both parents, as the board's access decision was addressed to them both) then the father's "offer" and the parents' attempts at increasing their son's chemistry mark are still highly relevant to the issue of purpose of the *MFIPPA* requests.

[18] As an aside, I note that it was it was not improper for the board to address its access decision to his parents, given his age at the time, and section 54(c) of the *Act*, which allows parents to stand in the place of their children under the age of sixteen.

> intervention by the Province of Ontario, Office of the Ombudsman, which has jurisdiction in these kinds of matters. *Given our relationship and our ability to work things out I would prefer the former* over the latter, *recognizing that this would also dispense with several Freedom of Information Requests that were filed by [the appellant] last night with the HDSB, which target your records and the faculty's records*.
>
> I certainly don't want to pressure you one way or the other but I think that there is merit in us sitting down and re-examining this issue together, *given that it would be less disruptive and consternating for your faculty and staff*.
>
> Please let *me* know what you prefer. [Emphasis added.]

[45] The IPC has long recognized that in deciding whether an access request is made for a purpose other than to gain access, inferences need to be made from a requester's behaviour and the circumstances, and as mentioned, this may include the conduct of an individual(s) who are connected to the requester in some material way. This is because a requester (or an individual connected to the requester in some material way) seldom admits to a purpose other than access.

[46] Previous orders have found that an intention to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious".[19] In order to qualify as a "purpose other than to obtain access", there would need to have been an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[20]

[47] In these circumstances, if the requests had been made simply to get information about the grading, or to obtain information in order to help dispute a grade, that purpose would have been legitimate under the *Act*.[21]

[48] However, in this case, the father's email provides strong evidence that the access request was made as a "bargaining chip" in order to secure a higher math mark for his son; in other words, to burden the board so that it would be more likely to modify the grade in return for withdrawing several requests. I find that this is a reasonable conclusion to draw directly from the wording of the "offer" itself, and in light of earlier efforts made by the appellant's parents to have the mark raised (such as the appellant's mother's email to the principal, with a subject line "compromise?", seeking

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[19] Orders MO-1168-I and MO-2390.
[20] Order MO-1924.
[21] That is not to say that the appellant would have received access to the information, as the board may have been within its rights to determine that some or all of the information requested is exempt under the *Act*, or excluded from the scope of the *Act*.

to settle the issue of her son's 90% by raising it to 93%, instead of the 96% she and her husband wanted). The words of the "offer" make it clear that it relates to the appellant's math mark. In my view, considering the evidence of the appellant's parents' prior efforts to have the math mark increased and the specific wording of the "offer," it is reasonable to conclude that the appellant's father's mention of the scope of the review of the grading was towards the goal of increasing his son's math mark, and not for the purpose of arriving at a mark that was the same or lower. It is also significant that the "offer" relates to whether the access requests would remain active or not: if the appellant's father and the principal could "work out" an "equitable solution" regarding the math mark, the principal was to "recognize," in turn, "that this would also dispense with several" requests filed by the appellant the previous evening. The timing of the "offer" also lends to this conclusion, as well as the board's evidence of the other opportunities that all students had to review their tests as evidence that the purpose of requests 1-5 was not really to seek to verify the accuracy of the appellant's marks, but rather an attempt to have the board raise them. Therefore, the appellant's father's email is persuasive, direct evidence of a purpose other than to seek access, under section 4(1)(b) and Regulation 823.

[49] Given the content and timing of the appellant's father's email, I do not find the timing of the appellant's transfer outside of the board relevant. Assuming without deciding that marks cannot be changed upon a transfer, as the appellant asserts, that would not sufficiently address the timing and clear wording of the email, made just the day after the requests were made and several days before the appellant's eventual transfer.

[50] Furthermore, the appellant argues that another email that his father sent, this one to the associate director, directly contradicts the board's position on the purpose of the requests and their relationship to his math mark, but I do not accept that submission. The email to which the appellant refers was sent about three weeks *before* the requests under *MFIPPA* were even made, and the "request" referenced in it is not a request made under *MFIPPA* at all. Rather, it is a request for a grade review, which the board provided and which the father found to be incomplete. As a result, I find that the appellant's father's email to the associate director does not undermine the board's evidence with respect to the purpose of the requests, and specifically, the content of the appellant's father's email "offer."

[51] In addition, as mentioned, in order to qualify as a purpose other than to obtain access, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[22] In my view, the appellant's father's offer to the principal demonstrates such an improper objective. Given the history of the matter and the wording of the "offer", I readily infer that the access requests were designed to pressure the principal into raising the appellant's

[22] Order MO-1924.

math mark.

[52] With respect to which requests are covered by the appellant's father's offer made in relation to the math mark, I accept the board's grouping of the requests for the purposes of its frivolous or vexatious claim, and will now go on to consider request 6.[23]

Request 6: the request was made as part of a multi-faceted effort to raise the appellant's chemistry mark, reflecting a purpose other than access

[53] Based on my review of the evidence before me, I find that the board has established that request 6 was one of many efforts made to pressure the board into increasing the appellant's chemistry mark, and as such, was made for a purpose other than to obtain access.

[54] The evidence shows that shortly after the appellant received the mark of 4/6 on one part of a chemistry lab assignment in mid-February 2017, his parents engaged in various efforts to dispute that grade. At a meeting several weeks later, in March 2017, the appellant's parents raised safety concerns about the experiment, and as a result, outside authorities were engaged to investigate. Efforts to dispute the chemistry teacher's grading continued after these investigations were launched, and intensified during the week that the *MFIPPA* requests were made (all on the same day) in late April 2017. Again, the details of these efforts are not necessary to set out in a public order (because the parties exchanged representations and are aware of the board's allegations, and one particular effort made would involve disclosing personal information about two individuals, one of them deceased), apart from stating that I have reviewed the evidence of these efforts and I accept the board's position that they were made with the goal of increasing the appellant's mark. Based on the evidence before me, I am satisfied that the efforts to raise the appellant's chemistry mark included intentionally burdening the board by making an access request under the *Act*, which I find reflects a purpose other than to obtain access.

[55] I acknowledge that claims about safety were raised before request 6 was made, and that the appellant continues to make them. However, I note that the safety of the experiment was not the immediate concern expressed; what triggered engagement with the board was the appellant's 4/6 mark on the chemistry lab assignment. As claims about the safety of the experiment were made weeks after this process of disputing the mark began, in my view, the timing of these claims lends itself to characterizing the claims as an escalation of the parents' attempts at pressuring the board for a higher mark on the lab report.

[56] Since the board had experienced other instances in relation to grades in other

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[23] Request 5 is very broadly worded, encompassing many courses, including the math course referenced in requests 1-4.

courses[24] where the appellant's parents communicated a willingness to, in exchange for increased marks, withdraw professional complaints made to the Ontario College of Teachers (which would have also been potentially onerous for the board) during protracted disputes about marks, I am satisfied that the board reasonably took that history into account in considering what the purpose of request 6 was. Between the time of the experiment in mid-February and the time request 6 was made in late April, much had transpired after the appellant's parents' first interactions with the board about his lab mark, and it stands to reason that the various communications would have generated many records responsive to part 6. Therefore, it would be reasonable to expect that processing request 6 would require the board to expend significant efforts to search the record holdings of a number of staff members within the board.

[57] Taking all the circumstances into account, I find that the board has established on a balance of probabilities that it was reasonable to conclude that the purpose of request 6, as part of a multi-faceted effort to raise the appellant's chemistry mark, was for a purpose other than to obtain access under section 4(1)(b) of the *Act*. Again, I acknowledge that making an access request to obtain information in order to further a dispute with an institution is not improper. However, I am satisfied here that request 6 was made for tactical reasons in relation to a concerted effort to raise the appellant's chemistry mark, rather than as a result of a genuine desire to obtain the requested information.

Conclusion

[58] For these reasons, I uphold the board's decision and find that it was reasonable for the board to conclude that, in the circumstances, the six requests were made for a purpose other than to obtain access under section 4(1)(b) of the *Act*. As a result, there is no need to also consider any of the other grounds of section 4(1)(b) that were claimed, whether any exemptions claimed in the alternative apply, the possible application of section 16 (public interest override), or the parties' views about whether a mark can be corrected through section 36(2) of *MFIPPA*.

Remedy

[59] In certain instances, after the IPC has determined that a request is frivolous and vexatious, an adjudicator will then consider whether additional remedies are suitable considering the number of appeals and requests the appellant may have in regard to the institution. In this case, the board has not made any submissions on remedies and I find that no additional remedies are necessary in the circumstances.

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[24] These disputes do not relate to the math or chemistry marks, and it is not necessary to set out the details about them found in the representations of the board in this public order.

Issue B: Was the director of education in a conflict of interest position with respect to the processing of the access requests?

[60] The appellant alleges that the Director of Education (the director), who is the head of the board under the *Act*, was in a conflict of interest in issuing an access decision responding to the six requests. For the reasons that follow, I find that the appellant has not established that that is the case.

The appellant's initial representations

[61] In his initial representations and relying on Order M-1091, the appellant alleges that the director is in a conflict of interest with respect to the access decision, and as a result, submits that the access decision should be set aside as being "null and void."

[62] The appellant submits that an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure under the *Act*. He submits that the director has an interest in the records responsive to requests 5 and 6 not being disclosed, or having disclosure that is delayed for as long as possible, in light of the following:

- the director's awareness of the complaint that had been filed against him (before the access requests were made) with the Ontario College of Teachers (OCT) regarding the in-class chemistry experiment, carrying the potential for disciplinary action, up to the revocation of his professional licence;

- what the appellant asserts as the director's personal liability, and his concern about that, leading to the claiming of the law enforcement exemptions in sections 8(2) and 8(3) of the *Act* in the access decision;[25]

- the director's astuteness as an individual in recognizing the potential for parental and public outrage if it became known that under his directorship, students were exposed to a dangerous chemical in the classroom without the benefit of appropriate safety equipment, and in direct violation of the board's health and safety policies.

[63] The appellant also submits that claiming section 4(1)(b) (frivolous or vexatious) after 148 days from receiving notice of the requests supports his position that the director was using his position as head under the *Act* to delay any potential release of the records in order to further his private interest as described above.

[64] Accordingly, the appellant submits that a well-informed person would reasonably perceive bias on the part of the director.

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[25] These exemptions were claimed in the alternative to the board's primary position that the requests were frivolous or vexatious.

[65] Regarding requests 1 to 4, the appellant submits the following:

> . . . . given the totality of the events that have accumulated to date, . . .a 'well-informed person' would reasonably conclude that [the director] would be perceived as being bias[ed] against any matter that would involve me, that his conflict with me and my family is so deep and personal that to expect his unbiased adjudication would be unreasonable.

[66] The appellant also submits that given the director's apex position at the board, it is "impossible to delegate the consideration or re-consideration of this matter either upwards, downwards, or laterally in the [board]." He also submits that "any potential contracting-out of the reconsideration of the access-to-records request by the [board]" would be similarly tainted by the potential bias of a contractor paid by the board.

The board's representations

[67] The board objects to the appellant's timing in the raising of the conflict of interest issue (raised for the first time during the adjudication stage of this appeal).

[68] It also denies the accusation that the director had a personal conflict of interest when he responded to the access request, and specifically denies that the director had a personal or special interest in records relating to the appellant's math mark and chemistry experiment. The board states that a bias cannot reasonably have been perceived. The board submits that the director has only an "institutional interest" in the requests made under *MFIPPA*, and as "Privacy Head" of the board, "was at all times acting in the best interests of the Board as an institution."

[69] Acknowledging that a complaint was filed against the director to the OCT, the board notes that the OCT did not require access to the records requested under *MFIPPA* in order to conduct its investigation into the merits of the complaint. It points to the OCT's broad investigative powers under its governing legislation,[26] which gives the OCT the authority to order disclosure of records containing personal information for the purpose of carrying out the OCT's objects. As a result, the board states that the OCT investigation process "was not dependent on the IPC's determination with the respect to the disclosure of the records at issue, and could not reasonably be perceived to create a special interest or a bias in the director."

The appellant's representations in response to the board

[70] The appellant submits that the cover letter to the Notice of Inquiry invited him to refer to additional factors that are relevant to this appeal, and that he raised the conflict of interest allegation is accordance with this invitation. He also submits that he was under no obligation to raise the issue earlier than adjudication, and that even if he was

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[26] Under section 47(1) of the *Ontario College of Teachers Act*.

obligated to do so, the IPC's letter accompanying the Notice of Inquiry opened the door to raising the issue at adjudication.

[71] The appellant also disagrees that with the board's submission that the director only had an "institutional interest" in the access requests.

[72] He submits that the IPC should test the "veracity and reasonableness" of the board's claim in light of his initial representations, and the "intertwined" legal approach taken by the board in the OCT and the IPC proceedings. As between these two proceedings, the appellant points out the board's use of the same law firm, office of that firm, lawyer and partner, virtually identical legal arguments and statements of facts and claims, and the same affidavit pools and exhibits which include "private and personal information" about him including his grades and attendance record. He submits that he has led sufficient evidence that the board and the director, in their "defence" before the IPC and the OCT, "did not act independently but rather approached both actions as a single action, and thereby intertwined their legal approach, strategy, solicitor-clients work-product and defence to such a degree that it is no longer possible to separate the two actions [the OCT and IPC proceedings]." His representations continue at some length with respect to the establishment of a joint legal defence framework amongst the board, the director's colleagues, and the director himself.

[73] He concludes by reiterating his assertion that the director's actions and decisions as head under the *Act*, and with regard to his access to information requests, should be set aside in total, deemed null and void, and that "the IPC should substitute its decision in place of [the director's]."

Analysis/findings

[74] For the reasons set out below, I find that the appellant has not established that the director was in a conflict of interest in relation to the processing of the requests.

[75] At the outset, it is important to note that claims of conflict of interest should be raised at the earliest possible opportunity. However, since this issue goes to the integrity of the access decision under appeal, I am considering it at adjudication.

[76] Previous IPC orders have considered the issue of conflict of interest or bias.[27] In determining whether there is a conflict of interest, I must consider whether the decision-maker has a personal or special interest in the records and if a well-informed person could, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker. These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given

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

situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

[77] In administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating a conflict of interest or bias lies on the person who alleges it, and mere suspicion is not enough.[28]

[78] In *Imperial Oil Ltd. v. Quebec (Minister of the Environment),*[29] the Supreme Court of Canada explained that, while all administrative decision-makers have a duty of impartiality, the content of that duty can vary depending upon the context of the decision-maker's activities and the nature of his or her functions.[30] The Supreme Court stated that the obligation of impartiality of a judge or an administrative decision-maker whose primary function is adjudication is "not equivalent" to that of a decision-maker whose primary function is not adjudication.[31]

[79] The IPC has applied the Supreme Court's reasoning in *Imperial Oil* to the question of whether an individual responding to a request for information under the *Act* was in a conflict of interest in processing that request.[32] For example, in Order PO-2381, the adjudicator cited *Imperial Oil* and stated that the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. The adjudicator reviewed the CEO's compliance with the obligations under the *Act* and the exercise of his discretion in good faith, taking into account relevant considerations and disregarding irrelevant considerations. He found that the decision-maker, who was CEO of the institution, was not in a conflict of interest in the processing of the appellant's request despite the parties being in litigation and the CEO's personal involvement in the dealings with the requester that led to the requester's access request.

[80] Adopting the reasoning of the Supreme Court of Canada in *Imperial Oil*, which was applied in Order PO-2381, I find that the existence of the OCT complaint against the director is insufficient to establish that the director was in a conflict of interest in processing the appellant's requests. I am not persuaded that the director's knowledge of the possible consequences of an adverse OCT decision against him through that proceeding is evidence that he has a personal or special interest in the records at issue in this appeal before the IPC, especially in light of the OCT's authority to gain access to the same records. I also find that the director was not required to be impartial in the way that would be expected of an independent adjudicator at a tribunal, in responding to the appellant's requests under the *Act*.

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[28] See Blake, S., *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.
[29] [2003] 2 SCR 624, 2003 SCC 58 (CanLII).
[30] *Ibid*.
[31] *Ibid*.
[32] See, for example, Orders PO-2381 and MO-3513-I.

[81] The appellant also references a deep and personal conflict between the director, on one hand, and the appellant and his parents on the other, in arguing that the director is biased against him. It is clear from my review of the parties' representations, and the records themselves, that the parties' relationships are strained. However, this does not sufficiently establish that the director was in a conflict of interest for the purpose of processing the requests under the *Act*.

[82] With respect to the director claiming exemptions under the *Act* that relate to civil liability, the *Act* permits an institution to do so. Claiming exemptions under the *Act* is neither unlawful nor evidence of a conflict of interest or bias. I also find that the appellant's assertion and argument that the director had personal liability is insufficient to establish that he did.

[83] To the extent that there may have been the potential for backlash about the chemistry experiment, I am not persuaded that this put the director in a conflict of interest position in the circumstances.

[84] I also find that using the same counsel and same (or similar) arguments and affidavits in the both the OCT and IPC proceedings is not evidence of bias or a conflict of interest. The OCT proceeding arose out of a complaint about the same chemistry experiment that is mentioned in request 6 in this IPC appeal. It is, therefore, reasonable that the director would engage the same counsel for both proceedings, and that claims and supporting materials would be similar or even identical.

[85] Furthermore, the appellant points to the use of exhibits at the OCT that included his personal information about him, including his grades and attendance record. I note that the OCT's enabling legislation may "require" the provision of information, including "personal information" as defined under *MFIPPA* to the OCT.[33] In any event, I am not prepared to conclude that the director's provision of such information to the OCT, whether because the OCT required him to do so or not, is relevant to whether he was in a conflict of interest in processing any requests under *MFIPPA*.

[86] Finally, taken to its logical conclusion, the appellant's argument that the director's position at the board means that the board cannot fairly process his access requests is not a viable argument. Finding a conflict of interest on the basis of the director's position as head, or a subordinate's position relative to the director, would lead to the absurd result of finding that no one at the board could be an impartial decision maker in processing the appellant's requests.

[87] In conclusion, based on my review of the totality of the evidence before me, for the reasons set out above, I am not persuaded that the appellant has established that the director was in a conflict of interest, or that that was a reasonable apprehension of

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[33] *Ontario Teachers' College Act, 1996,* S.O. 1996, c. 12, at section 47(1).

bias on his part, in processing the appellant's access requests under the *Act*.

ORDER:

I uphold the board's access decision determining that the requests are frivolous or vexatious under the *Act*, and I dismiss the appeal.

Original Signed by: August 31, 2021

Marian Sami
Adjudicator