Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4193

Appeal MA19-00476

Conseil scolaire Viamonde

April 28, 2022

Summary: The Conseil scolaire Viamonde (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to a matter that involved the requester's children. The board granted partial access to the responsive information, relying on section 38(b) (personal privacy) to deny access to the portion they withheld. In this order the adjudicator finds that although the appellant can rely on section 54(c) of the *Act* and is entitled to have the same access to the personal information of his children as they would have, he cannot rely on section 14(1)(d) of the *Act* (disclosure expressly authorized by another Act) to obtain it. The adjudicator finds that the information at issue qualifies for exemption under section 38(b) and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2(1) (definition of *personal information*), 4(2), 14(1)(d), 14(2)(a), 14(2)(d), 14(2)(f), 14(2)(h), 38(b) and 54(c); *Children's Law Reform Act*, R.S.O. 1990, c C.12, section 20(5); *Divorce Act*, RSC 1985, c 3 (2nd Supp), section 16(5).

Orders Considered: MO-3060, MO-3746-I, MO-4002-I, PO-3599 and PO-3822.

OVERVIEW:

[1] The Conseil scolaire Viamonde (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

> All records pertaining to my children, [the requester's children], who are enrolled in the CS Viamonde:
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> > email correspondence; letters, faxes or other communication; and notes, memoranda, any other documentation
> >
> > that was:
> >
> > generated by any member of the staff of or anyone else connected to the CS Viamonde, or
> >
> > exchanged, received or sent by any member of staff or anyone else connected to the CS Viamonde, or any other person, including but not limited to myself and the children's mother.

[2] The board then contacted the requester to clarify the request. In its access decision, the board confirmed that the request was for:

> [Translation]
> A copy of any communication discussing [the requester's] right of access to his children, including emails with attachments or any other form of documents exchanged between [specified date] and [specified date], between the following persons:
>
> > The chair of the board, the member of the board who represents the area where the schools [identified schools] are located, the principal and vice-principal of his children's schools, the superintendent responsible for those schools, and any other board executive, as well as the secretary of these two schools.

[3] The board identified responsive records and granted partial access to them, relying on sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*, to deny access to the portion it withheld.

[4] The requester (now the appellant) appealed the decision.

[5] During mediation, the appellant indicated that he was not seeking access to any email attachments or to the information that the board asserted was subject to section 12 of the *Act*. As a result, only access to the withheld information in the body of the emails identified as Records 1, 2 and 13 in the board's Index of Records remained at issue. Also during mediation, because she was of the view that Records 1, 2 and 13 may contain the personal information of the appellant, the mediator added the possible application of section 38(b) (personal privacy) of the *Act* as an issue in the appeal.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[7] Representations were exchanged between the parties in accordance with this office's Practice Direction 7.

[8] In this order I find that although the appellant can rely on section 54(c) of the *Act* and is entitled to have the same access to the personal information of his children as they would have, he cannot rely on section 14(1)(d) of the *Act* (disclosure expressly authorized by another Act) to obtain it. The adjudicator finds that the information at issue qualifies for exemption under section 38(b) and dismisses the appeal.

RECORDS:

[9] Remaining at issue is the withheld information in the emails identified as Records 1, 2 and 13 in the board's Index of Records.

ISSUES:

A. Do records at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

C. Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue - section 54(c) of the *Act*

[10] Under section 54(c) of the *Act*, a requester can exercise another individual's right of access under the *Act* if the individual is less than sixteen years of age, and the requester has lawful custody of the individual.

[11] Section 54(c) of the *Act* reads as follows:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

[12] If a requester meets the requirements of this section, then he or she is entitled to have the same access to the personal information of the child as the child would have. The request for access to the personal information of the child will be treated as

though the request came from the child him or herself.[1]

[13] The appellant asserts that he can rely on section 54(c) in the circumstances of the appeal, thereby obtaining the personal information of his children. The board says he cannot, submitting, amongst other things, that the request was made in his own name rather than his children and that he is seeking the information for his own purposes rather than in the best interests of his children. In that regard, the board refers to Order PO-3599 where, in the circumstances of that appeal, the adjudicator found that it was not appropriate to allow an appellant to rely on the provincial equivalent of section 54(c).

[14] I have considered the submissions on the possible application of section 54(c) and I have reviewed the information at issue in this appeal. Based on the evidence before me I am satisfied that the appellant is a custodial parent through a shared custody arrangement. Furthermore, I am not satisfied that form should govern substance in the matter before me and just because the request was made in the appellant's name does not detract from his ability to rely on section 54(c) of the *Act* provided that all the other conditions are met. Finally, the facts of this appeal differ substantially from those at issue in Order PO-3599 where the requester was not permitted to rely on section 54(c). In my view, while there is evidence of an acrimonious relationship between the appellant and his ex-wife, the nature of the circumstances in this appeal are markedly different. Accordingly, I am satisfied that the appellant can rely on section 54(c).

Issue A: Do records at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[15] Only personal information can be exempt under section 38(b). Therefore, I must decide whether the information withheld is personal information, as defined under the *Act* and, if so, to whom it relates. For the reasons set out below, having reviewed the records at issue in their entirety, I find that the records contain the personal information of several identifiable individuals, including the appellant.

What is "personal information"?

[16] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[17] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[2]

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[1] Order MO-1535.
[2] See the definition of "record" in section 2(1).

About

[18] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[3] See also sections 2(2.1) and (2.2), which state:

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

[19] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[4]

Identifiable individual

[20] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[5]

What are some examples of "personal information"?

[21] Section 2(1) of the *Act* gives a list of examples of personal information:

> "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,

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

> (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.

[22] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[6]

Statutory exclusions from the definition of "personal information"

[23] Sections 2(2), (2.1) and (2.2) of the *Act* exclude some information from the definition of personal information. Sections 2(2.1) and (2.2) are described above.

Whose personal information is in the record?

[24] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[7] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[8]

The representations

[25] The board submits that the withheld information qualifies as personal information under paragraphs (d), (f) and (h) of the definition of personal information. It submits that the personal information in the records includes the name and email

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[6] Order 11.

[7] Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

[8] See sections 14(1) and 38(b).

address of an identifiable individual, on confidential correspondence, that in the case of records 1 and 2, is marked confidential and in the case of record 13, by virtue of its content and the context in which it was provided, is of a highly confidential nature.

[26] The board submits that the name, email address and content of Records 1, 2 and 13 would make it easy to determine the identity of the individual who provided the information and:

> . . . that to the extent that an individual's name appears among other personal information about the individual or if its disclosure would reveal other personal information about the individual, the name constitutes personal information within the meaning of section 2(1) of the *MFIPPA*.
>
> The board points out that the exception provided for in section 2(2.1) of the *MFIPPA*, which does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity of the definition of personal information does not apply.

[27] The appellant submits that the name of an individual is by itself not personal information. He adds that a person's email address is not considered personal information as it is not listed in paragraph (d) of the definition of personal information in section 2(1). He further submits that just because a communication contains the word confidential "does not make it confidential."

Analysis and finding

[28] I find that the records at issue contain the personal information of the appellant and his children in accordance with section 2(1) of the *Act*.

[29] In addition, as the board submits, based on the content of the information in the records and the context in which they were provided, I accept that the records themselves constitute the personal information of the individual who provided the information under paragraph (f) of the definition of that term in section 2(1) of the *Act*. I am also satisfied that, in the circumstances of this case, especially in light of the information that has already been disclosed to the appellant, disclosing this individual's name, email address and/or other identifying information would reveal something of a personal nature about the individual who provided the information. Accordingly, the information qualifies as the personal information of this individual.

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

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

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

[32] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.[9]

[33] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.[10]

[34] Sections 14(1) to (4) provide guidance in deciding whether the information is exempt under section 38(b).

Section 14(1)(d) – disclosure expressly authorized by another Act

[35] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Of particular relevance here is section 14(1)(d) which provides as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

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

- a specific authorization in another act of Ontario or Canada that allows for the disclosure of the type of personal information at issue, or
- a general reference in the other act to the possibility of disclosure together with a specific reference in a regulation to the type of personal information at issue.[11]

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[9] However, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.

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

[11] Orders M-292, MO-2030, MO-2344 and PO-2641.

[37] Section 20(5) of Ontario's *Children's Law Reform Act*[12] (CLRA) and section 16(5) of Canada's *Divorce Act*[13] are relevant in this context. I discuss those provisions later in the reasons.

Unjustified invasion of personal privacy: sections 14(2), (3) and (4)

[38] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Section 14(2) lists other factors that help in deciding whether disclosure would be an unjustified invasion of personal privacy, and section 14(4) lists situations where disclosure would **not** be an unjustified invasion of personal privacy. If any of the section 14(4) situations is present, then sections 14(2) and (3) need not be considered.

[39] If the personal information at issue does not fit within any presumptions in section 14(3), the decision-maker[14] considers the factors set out in section 14(2) to determine whether disclosure of the personal information would be an unjustified invasion of personal privacy. If no factors favouring disclosure in section 14(2) are present, the section 14(1) exemption applies because the section 14(1)(f) exception has not been proven.[15]

[40] For records claimed to be exempt under section 38(b) (that is, records that contain the appellant's personal information), the decision-maker must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in deciding whether the disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.[16] In the present appeal, the board has not identified any of the presumptions in section 14(3) as weighing in favour of non-disclosure of the personal information in the records at issue.

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[41] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[17] Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[42] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[18] Each of the first four factors, found in sections 14(2)(a)

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[12] RSO 1990, c C.12.
[13] RSC 1985, c 3 (2nd Supp).
[14] The institution or, on appeal, the IPC.
[15] Orders PO-2267 and PO-2733.
[16] Order MO-2954.
[17] Order P-239.
[18] Order P-99.

to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[43] In this appeal the appellant relies on the factors that tend to support disclosure at sections 14(2)(a) and 14(2)(d) of the *Act*. The board argues that the factors tending to support non-disclosure at sections 14(2)(f) and 14(2)(h) apply. Those sections read:

> 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 institution to public scrutiny;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The board's representations

[44] The board submits generally that "as the appellant himself admitted (expressly and by inference) in his written submissions, the very purpose of the access to information request is to support his own position in the context of an ongoing and long-standing dispute with his ex-spouse over custody and access to his children."[19] In support of its assertion, the board provided an excerpt from a reported decision where the board says that in the course of a custody proceeding "the appellant behaved in a particularly hostile manner towards his ex-spouse."[20]

[45] The board takes the position that the factor tending to support disclosure at section 14(2)(a) of the *Act* does not apply in the circumstances that underlie this appeal. The board submits that:

> [Translation]
> In light of the factual context of this case, the board emphasizes in particular that the disclosure contemplated by the appeal would in no way allow the public to closely monitor the board's activities, but would allow the appellant to monitor the board's activities. The board asserts that this is not the purpose of section 14(2)(a) of the *MFIPPA*. The Board argues

[19] Translation.
[20] Translation.

> and relies on the CIPVPO decision in *Toronto Catholic District School Board (Re)*, 2021 CanLII 7021 (ON IPC) [Order MO-4002-I], at paragraph 35.

[46] The board submits that his own representations demonstrate that the appellant seeks the information for his own personal reasons and that the request is of a purely personal nature.

[47] In addition, the board submits that the discussion between the individual who provided the information and the board identified in documents 1, 2, and 13 relate to personal information of a very sensitive nature within the meaning of section 14(2)(f), insofar as it could reasonably be expected, in light of the factual framework, that its disclosure would be likely to cause significant personal distress to the individual who provided the information.

[48] In its representations on the exercise of discretion, addressed below, the board submitted that:

> [Translation]
> . . . the board notes that it has considered the objects and interests that are intended to be protected by the exceptions stipulated in the *MFIPPA*, as well as the relationship between the requester and the individuals concerned - namely the two (2) students and the third party. Along the same lines, the board has weighed the nature of the information and the extent to which it is important and sensitive for the institution and any individual concerned, in particular the third party. . . .

[49] The board also asserts that the information at issue was provided to the board in confidence within the meaning of section 14(2)(h). In support of its position it submits that, "Records 1 and 3 expressly state that communications are confidential; the subject line of such emails expressly uses the following term: 'Confidential'."[21]

[50] The board submits that in Order MO-3060[22], the adjudicator noted the relevance of a confidentiality notation with respect to the application of section 14(2)(h):

> On my review of this record, I note that there is, in fact, an explicit assertion of confidentiality on the fax cover sheet that accompanied the letter to the shelter's management team. In my view, it is also reasonable to conclude from the circumstances that the affected party expected some level of confidentiality or discretion regarding, at least, the use of his own personal information.

[51] The board adds that an objective assessment of the content and subject matter

[21] Translation.
[22] At paragraph 36.

of Records 1, 2 and 13 leads to the conclusion that confidentiality was expected and that this expectation of confidentiality was reasonable in the circumstances. It says that the very subject of the exchange between the individual who provided the information and the board leads to the conclusion that the personal information of the individual who provided the information and the content of the exchange were provided to the board for confidential purposes.

[52] The board submits that in addition, it is important to preserve the public trust in the board and its ability to ensure the confidentiality of personal and confidential information shared with it by parents, guardians and students.

The appellant's representations

[53] The appellant submits that he does not have an "ongoing and longstanding" dispute with the mother of the children over custody and access. He adds the following as context:

> The Access Request was made in [specified date], long after all issues had been settled by a court order. The appellant's motivation is to hold the school board accountable for its actions. That is what the school board – and its lawyers who advised the school board employees on how to act in the fall of [specified date] – would like to distract from. And yet that is at the heart of this Access Request.
>
> That the school board quotes – "by way of context" – an excerpt from a family law decision from [specified years] ago is quite extraordinary. How that is relevant to the question of applicability of Section 54(c) *MFIPPA* remains utterly unclear, of course.

[54] He submits that such conduct is unprofessional and he adds:

> [It] makes one wonder whether the school board – or more likely: its lawyers - colluded with the children's mother in preparing its representations. And it only furthers the argument that the appellant's interests in holding the school board accountable far outweigh any privacy concerns that the children's mother may have over the information that she shared with the children's schools in [specified date].

[55] With respect to the possible application of the factor at section 14(2)(a) of the *Act*, the appellant submits that it is important to consider the circumstances giving rise to his request for access to information:

> The appellant has been living in an extremely acrimonious parenting situation with his ex-wife. She had been trying to limit his access to the children since separation in [specified date], in other words for nearly [specified number] years.

> The appellant had to go to court three times [specified years] to obtain more time with the children, ultimately leading to equal parenting time as by an Order [identified judicial order]. That Order, as well as the two prior orders, can be made available upon request.
>
> Less than two weeks after this final court victory for the appellant, his ex-wife alleged to police that the appellant assaulted her; a criminal proceeding was commenced which was withdrawn in [specified year] with no finding of fault by the appellant.
>
> The ex-wife continued to try to limit the appellant's ability to parent his children in the aftermath of her allegation until a court forced her to do so in early [specified year]. This decision can also be made available upon request.
>
> The appellant therefore has reason to believe that his ex-wife provided false information to the school board in late June [specified year] as a means to continue to restrict his access to the children. However, the appellant was at first unaware of this as it was close to the summer holidays.
>
> The appellant contacted the children's schools shortly after the school year [specified period] commenced. He was informed by the school board, through the principal at his younger child's school, that he was being refused access to information about the children.
>
> The appellant indicated to the school board that this action was inappropriate and not in line with its responsibilities towards him as a parent.
>
> The appellant further asked the school board to release information which formed the basis of its decision to deny him access to the children's information. The appellant provided significant detail for the school board to reverse its position.
>
> However, the school board refused to provide any information and maintained its position.

[56] In his representations on the exercise of discretion, addressed below, the appellant submitted that:

> The school board argues that the preservation of public confidence in the school board is of paramount (emphasis by the school board) importance. This, however, is a situation in which the school board chooses to not disclose information, that is obtained about children in its care, to custodial parents.

> It is the appellant's view that the public confidence would be preserved only if the school board was directed to disclose such information. Parents have a right to know what is contained in the public records of their children, maintained by the school board.
>
> A third party, who initiates information (and is not being asked by the school board to do so), should not per se lead to a denial of the parents' legitimate interest in obtaining any information about their children.
>
> This is especially the case when that third party appears to provide information which causes the school board to restrict the parents' access to the child's information or the parent's ability to exercise the rights on behalf of the child.

[57] He submits that in the result, his interest is not of a purely personal nature.

[58] With respect to the possible application of the factor tending to support disclosure at section 14(2)(d), the appellant states that he has been and is considering legal action against the board. He adds:

> The appellant believes the school board has acted unlawfully. The appellant has been and is considering legal action against the school board. A significant factor in such proceedings is whether the school board was acting on correct information (that was provided by a third party) or was acting on the basis of misinformation.

[59] The appellant also relies on Order PO-3822, and submits that section 20(5) of the *CLRA* and section 16(5) of the *Divorce Act*, are relevant considerations because the rights of the appellant are at issue here.

[60] With respect to the factor tending to support non-disclosure at section 14(2)(h), the appellant argues that "the mere fact that a communication contains in the subject line - or in any other part of the communication for that matter - the word "confidential" does not make the record confidential." He submits that the school board does not argue (at least not in the non-confidential submissions) that it has provided any assurances of confidentiality to the third party.

[61] Finally, he submits that because paragraph (f) of the section 2(1) definition of personal information addresses providing correspondence in confidence, section 14(2) must require a higher threshold "as otherwise all information that is shared in confidence is immediately precluded from disclosure without exception. Clearly, that is not the intent of the legislation."

Analysis and Findings

Section 14(1)(d) – disclosure expressly authorized by another Act

[62] Raising Order PO-3822 and referring to those sections of the *CLRA* and the *Divorce Act*, are generally done when relying on section 14(1)(d) of the *Act* in support of an access request.

[63] That section reads as follows:

> 14 (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

[64] At the time of the request, section 20(5) of Ontario's *Children's Law Reform Act*[23] (CLRA) stated as follows:

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

[65] At the time of the request, section 16(5) of Canada's *Divorce Act*[24] contained similar wording about access to a child's information:

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

[66] Although I accept that the appellant is an access parent within the meaning of the *CLRA* and the *Divorce Act*, I am not satisfied that the legislature would have intended that section 14(1)(d) apply in the circumstances of this appeal because, in my view, the right to information as to the health, education and welfare of the child does not extend to the records at issue. The records are emails between school staff and

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[23] RSO 1990, c C.12. Section 20(5) now reads: The entitlement to parenting time with respect to a child includes the right to visit with and be visited by the child, and includes the same right as a parent to make inquiries and to be given information about the child's well-being, including in relation to the child's health and education. In my view the statutory amendment does not change the result in this appeal.

[24] RSC 1985, c 3 (2nd Supp). Section 16.4 of the *Divorce Act* now reads: Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child's well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws. In my view the statutory amendment does not change the result in this appeal.

another individual, where that individual provides their subjective views about a particular matter. While the emails relate to the children, these subjective views, in my view, are not the sort of information that the above-noted sections 20(5) of the *CLRA* and 16(5) of the *Divorce Act* are intended to address or that section 14(1)(d) was meant to include. In coming to my conclusion, I have also taken into account that these subjective views relate to a particular matter of which there is other, objective, evidence. The appellant would already be aware of that objective evidence. For these reasons, I find that section 14(1)(d) does not apply.

14(2)(a): disclosure is desirable for public scrutiny

[67] This section supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[25] It promotes transparency of government actions. Institutions should consider the broader interests of public accountability when considering whether disclosure is "desirable" or appropriate to allow for public scrutiny of its activities.[26]

[68] In Order P-1014, an order dealing with the provincial equivalent of section 14(2)(a), Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, the adjudicator concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Adjudicator Higgins found that the provincial equivalent of section 14(2)(a) did not apply.

[69] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature to satisfy him that the conduct of the board in relation to him and its investigation of the matters involving him were appropriate. In my view, the disclosure of the withheld information at issue would not result in greater scrutiny of the board. As in Order P-1014, this is a private interest, and I therefore find that section 14(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 14(2)(a) does not apply to the information in the records that remains at issue.

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[25] Order P-1134.
[26] Order P-256.

14(2)(d): the personal information is relevant to the fair determination of requester's rights

[70] This section weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?

2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?

3. Is the personal information significant to the determination of the right in question?

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?[27]

[71] I am satisfied, that the factor at section 14(2)(d) applies. Although there is no existing proceeding the appellant provides sufficient argument to establish that the information, if disclosed, may form some part of litigation he is contemplating, although some period of time has elapsed since the circumstances have occurred. Accordingly, while I am satisfied that the factor at section 14(2)(d) applies, I would give it moderate weight.

14(2)(f): the personal information is highly sensitive

[72] This section is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[28] For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.[29]

[73] Given the nature of the circumstances that triggered the provision of information, I am satisfied that it is reasonable to expect that the individual who provided the information would experience significant personal distress if their personal information is disclosed to the appellant.

[74] I find that the factor in section 14(2)(f) applies and this factor is therefore

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[27] See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[28] Orders MO-2262, MO-2344, PO-2518 and PO-2617.
[29] Order MO-2980

relevant in determining whether disclosing the personal information would constitute an unjustified invasion of their personal privacy under section 38(b). In my view, this factor weighs in favour of privacy protection and should be given considerable weight.

14(2)(h): the personal information was supplied in confidence

[75] For section 14(2)(h) to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[30] In the all the circumstances of this case, including the notations and the context within which the information was provided, I find that the personal information at issue was supplied in confidence to the board. Accordingly, I find that section 14(2)(h) applies, and weighs in favour of privacy protection.

Considering and weighing the section 14(2) factors

[76] Since the records contain the personal information of the appellant and an identifiable individual other than his children, the factors at sections 14(2) must be considered and weighed. The purpose of that exercise is to determine whether disclosing the information withheld would be an unjustified invasion of the personal privacy of the identifiable individual (other than the appellant and his children) to whom the record relates. I have found that the section 14(2)(d) factor tending to support disclosure applies, and that the factors weighing against disclosure at sections 14(2)(f) and 14(2)(h) apply. Taking these facts into consideration, and weighing the interests of the appellant and his children and the individual who provided the information, I find that the personal information at issue is exempt under section 38(b). That is, disclosing the record would be an unjustified invasion of the personal privacy of the individual who provided the information.

Absurd result

[77] Where the appellant is otherwise aware of the information, the information may not be exempt under section 38(b), because to withhold the information would be absurd.[31] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[32] In my view, the appellant has not provided sufficient evidence to establish that he is aware of the withheld information. In any event, I am satisfied that in the circumstances of this appeal, withholding the information would not be absurd or inconsistent with the purpose of the section 38(b) exemption. For this reason, I find that the absurd result principle does not apply.

[78] In short, subject to my assessment below as to whether the board exercised its

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[30] Order PO-1670.
[31] Orders M-444 and MO-1323.
[32] Orders M-757, MO-1323 and MO-1378.

discretion appropriately, I find that all of the personal information in the records is exempt from disclosure under section 38(b), because disclosing it to the appellant would constitute an unjustified invasion of the personal privacy of the individual who provided the information.

Issue C: Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

[79] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[80] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[81] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[33] The IPC cannot, however, substitute its own discretion for that of the institution.[34]

The representations

[82] The board submits that it did not exercise its discretion in bad faith or for improper purposes, take into account irrelevant considerations, or fail to take into account relevant considerations.

[83] The appellant submits that he has reason to believe that the school board did not exercise its discretion properly and fairly and that by not disclosing the withheld information "it was and is attempting to hide its unlawful actions vis-à-vis the appellant."

[84] The appellant submits that:

> It is important to note that the third party who chooses to provide any information does so in full knowledge of (a) the information being about the appellant's children and (b) the appellant being a custodial parent who can exercise the disclosure rights in question. The threshold to withhold information from a parent of a minor has to be a very high one and the

[33] Order MO-1573.
[34] Section 43(2).

> third party, whose personal information may be disclosed, must appear to have an especially serious reason for this information to be withheld.

[85] Finally, referencing Order MO-3746-I, the appellant submits the name and email address of the individual who provided the information can be severed with the balance of the withheld information being disclosed.

Analysis and finding

[86] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[35] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[36]

[87] I am satisfied overall that the board properly exercised its discretion under section 38(b).

[88] I am satisfied that the board was aware of the reasons for the request and why the appellant wished to obtain the information. I am also satisfied that in proceeding as it did, and based on all the circumstances the board properly considered why the appellant sought access to the information and the nature of the information he sought. I have no evidence of bad faith, aside from the appellant's speculation, to support his allegation that the board exercised its discretion in an unlawful or improper manner. In all the circumstances and for the reasons set out above, I uphold the board's exercise of discretion.

[89] Finally, section 4(2) of the Act requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Consequently, I have considered whether the records can be severed in a manner that provides the appellant with his own personal information, or the personal information of his children, without disclosing the personal information of the individual who provided the information. However, the personal information of all of these individuals is closely intertwined in these parts of the records, and I find that it cannot be reasonably severed.

ORDER:

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

Original Signed by: April 28, 2022
Steven Faughnan

[35] Order MO-1287-I.
[36] Order P-58.

Adjudicator