Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3253-I

Appeal MA14-159

Limestone District School Board

October 21, 2015

Summary: The board received a request under the *Act* for records relating to trustee conflict of interest, including legal opinions and legal billing information. It denied access to the records on the basis of the discretionary exemption for solicitor-client communications found at section 12 of the *Act* and the discretionary exemption for advice and recommendations at section 7(1). The appellant appealed the board's decision, arguing that the exemptions do not apply and that, in any event, there is a public interest in disclosure of the records, triggering the public interest override at section 16 of the *Act*. In this order, the adjudicator partially upholds the board's decision to withhold records pursuant to sections 7(1) and 12 of the *Act*, and defers consideration of the applicability of section 7(1) to one record, pending receipt of further representations. She also finds that the public interest override at section 16 does not apply to the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 7(2)(j), 12 and 16.

Orders and Investigation Reports Considered: Orders PO-2484, PO-3154, MO-1678, PO-3167, P-726, PO-1709 and PO-2681.

Cases Considered: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31; *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

OVERVIEW:

[1] The Limestone District School Board (the board) adopted a plan to close two schools and consolidate them in a new school, contingent on funding. The plan was controversial and many individuals, including the appellant, opposed it.

[2] The appellant made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- Letters, emails, reports, opinions other correspondence related to legal opinions regarding Trustee actual, perceived or possible conflict of interest between June 2011 and Feb 2014

- Invoices, statement of account, record of payment of legal fees related to the above matters

[3] The board located records responsive to the request and issued a decision letter in which it provided the following general description of the responsive records:

1. Legal opinions and/or recommendations from board staff;

2. Correspondence between the board and its solicitors in support of or as a result of the legal opinion;

3. Legal invoices from legal counsel retained by the board;

4. In-camera meetings of the board.

[4] The board denied access to the records on the basis of the discretionary exemption for solicitor-client communications found at section 12 of the *Act* and the discretionary exemption for advice and recommendations at section 7(1). The board also claimed the application of two additional exemptions (the third party information exemption at section 10(1) and the exemption at section 6(1)(b) for records relating to a closed meeting) but, as will be seen below, it later abandoned its reliance on those exemptions.

[5] The appellant appealed the board's decision to this office. As a mediated resolution of the appeal was not reached, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. As one of the records at issue appears to contain the personal information of an individual other than the appellant, I added the definition of personal information as an issue in this appeal, as well as the application of the mandatory personal privacy exemption at section 14(1) of the *Act.*

[6] I sought and received representations from the board. I also provided notice of

this appeal to the individual whose personal information appears in a record as an affected party and invited representations on the application of section 14(1) to the records.

[7] In addition, I provided notice of the appeal to the Ontario Public School Boards' Association and two lawyers who had prepared the legal opinions and legal invoices, and invited submissions on the mandatory exemption for third party information found in section 10(1) of the *Act,* as well as the discretionary exemption for solicitor-client privilege at section 12. These affected parties provided representations on section 12, but none of them provided representations on section 10(1).

[8] In its representations, the board made submissions on the exemptions at sections 14 (personal privacy), 7(1) (advice and recommendations) and 12 (solicitor-client privilege). The board withdrew its reliance on the exemptions at sections 6(1)(b) (closed meeting) and 10 (third party information). Those exemptions are, therefore, no longer at issue.

[9] In accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*, I shared severed copies of the representations of the board and the affected parties with the appellant, with information that would reveal the substance of the records at issue removed, and I invited representations from the appellant.

[10] The appellant provided representations in which she raised the applicability of the public interest override at section 16 of the *Act*. I invited and received further representations from the parties on that issue.

[11] In this order, I partially uphold the board's decision to withhold records pursuant to sections 7(1) and 12 of the *Act*. I order the disclosure of one record in full, and other records in part. I defer my consideration of the applicability of section 7(1) to one record, pending receipt of further representations. Finally, I find that there is no compelling public interest in disclosure of the records that are exempt under section 7(1) that outweighs the purpose of that exemption. Therefore, the public interest override at section 16 does not apply to those records.

RECORDS:

[12] The records at issue in this appeal are correspondence, legal invoices and records relating to meetings. They are numbered 1, 2, 2A through 2F, and 3 through 12.

ISSUES:

A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to any of the records at issue?

B. Does the discretionary exemption for advice and recommendations at section 7(1) apply to any of the records at issue?

C. Did the board exercise its discretion under sections 12 and 7(1) of the *Act*? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 7(1) exemption?

DISCUSSION:

Preliminary issue: Personal information

[13] As noted above, since one of the records in issue appears to contain the personal information of an individual other than the appellant, I added the definition of personal information as an issue in this appeal, as well as the potential application of the mandatory personal privacy exemption at section 14(1) of the *Act.* In its representations, the board argues that record 4 contains the personal information of a board trustee and that the mandatory personal privacy exemption in section 14 of the *Act* applies to this information.

[14] However, given my finding below that record 4 is exempt from disclosure pursuant to section 12 (solicitor-client privilege), it has not been necessary for me to consider whether the personal privacy exemption at section 14(1) also applies to it.

A: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to any of the records at issue?

[15] The board submits that records 1, 2B, 2C, 2E, 3, 4, 5, 6, 7, and 8 through 12 are exempt from disclosure pursuant to section 12 of the *Act*, which states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[16] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, the board argues that both

the common law and statutory privileges apply.

Branch 1: common law privilege

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The board claims that the communication privilege applies to the records at issue.

Solicitor-client communication privilege

[18] Solicitor-client communication privilege protects communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[1] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[2] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[3]

[19] The privilege may also apply to the legal advisor's working papers related to seeking, formulating or giving legal advice.[4]

[20] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[5] For example, the privilege does not cover communications between a solicitor and a party on the other side of a transaction.[6]

Loss of privilege

Waiver

[21] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[7]

[22] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a

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[1] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[2] Orders PO-2441, MO-2166 and MO-1925.
[3] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[4] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[5] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[6] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[7] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

finding of an implied or objective intention to waive it.[8]

[23] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[9] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[10]

Branch 2: statutory privilege

[24] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons. Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice. The board submits that the statutory communication privilege applies to the records at issue.

Records 2B, 2C, 2E, 3, 4, 5 and 7

Representations

[25] Records 2B, 2C, 2E, 3 and 4 are correspondence from the board's counsel to the board. The board submits:

> In respect of each record, the Board sought legal advice and legal counsel responded, in writing to that request. The records fall squarely within the common-law and statutory privilege in s. 12.
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> The Board sought the opinions in order to obtain legal advice regarding [particular matters]. In this context, the Board would expect that the opinions received and information provided to and from legal counsel would be done so in confidence. In addition, the Board has done nothing to waive that privilege and has asserted privilege over the records from the outset of this request.

[26] Record 5 is an email from the board to its counsel. The board submits:

> [T]he Board is communicating with counsel for the purpose of seeking legal advice. The communication was made privately and was intended to be made in confidence. Both the common law and statutory solicitor-client privilege applies. The email was sent as part of the "continuum of communication" between client and solicitor.

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[8] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[9] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[10] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

[27] Record 7 is an internal board email. The board submits:

> [Record 7 confirms] the advice received from legal counsel to the Board on a specific issue. Once an organization receives legal advice it would not be unusual for that organization to then disseminate the advice within the organization…. Communicating the advice received from legal counsel to others in the organization is not a waiver of privilege as it is not being disclosed to those outside the organization.

[28] The counsel named in these records was given notice of the appeal and adopted the board's submissions pertaining to solicitor-client privilege.

[29] The appellant's representations do not contain any submissions with respect to the application of section 12 to these records.

Analysis and findings

[30] I find that records 2B, 2C, 2E, 3 and 4 are clearly communications to which the common law solicitor-client communication privilege applies. Solicitor-client communication privilege protects communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[11] Having reviewed these records, I find that all of them contain confidential communications made from counsel to the board for the purpose of giving legal advice. The communications are directed to only the board's Director of Education and not any third party, are marked "confidential" and contain legal advice.

[31] From my review of Record 5, an email from the board's Director of Education to the board's counsel, I find that this communication was made for the purpose of obtaining legal advice. This is clear from a review of the subject line, which involves a legal matter. I also infer that that communication was intended to be confidential, as it was sent only to the board's counsel.

[32] Record 7 is an exchange of emails between the board's Director of Education and a trustee. The communications in the email refer to legal advice received from the board's counsel. I am satisfied that disclosure of this record would reveal the legal advice given to the board by its counsel. I agree with the reasoning found in Order PO-2087-I, where former Adjudicator Cropley found that if disclosure of records prepared by non-legal staff in an institution would reveal legal advice that was provided to the institution, those records are exempt under section 12.

[33] I conclude that records 2B, 2C, 2E, 3, 4, 5 and 7 all qualify for an exemption pursuant to section 12 of the *Act*.

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

Records 8-12

[34] Records 8-12 are five legal invoices prepared by the board's counsel and addressed to the board. Each invoice lists various legal services performed by counsel during the billing period and then sets out the total fees and disbursements for the aggregate of the services.

Representations

[35] The board submits that the invoices at issue include detailed privileged information. It submits that the invoices do not contain merely dollar amounts for services rendered. Rather, the board submits that each invoice includes detailed docketing information about the advice sought, the type of advice given, whom at the board counsel spoke or met with, and whom the board engaged as counsel. The board further submits that the invoices are dated and may, based on the timing of events, lead an observer to conclude, based on dates that legal advice was sought, that the invoices related to a specific issue.

[36] Finally, the board submits that it is not possible to redact the privileged information because counsel was engaged on a number of matters and it is not possible to discern an amount which correlates to the appellant's request.

[37] The counsel who prepared the invoices was notified of the appeal and adopted the board's representations.

[38] The appellant submits that solicitor-client privilege does not extend to legal invoices.

Analysis and findings

[39] In *Maranda v. Richer*, the Supreme Court of Canada found that legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.[12]

[40] In Order PO-2484, Senior Adjudicator John Higgins had to determine whether the total dollar figure on nine separate legal invoices, with all other information, including the dates and number of hours severed, qualified for an exemption under section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 12 of the *Act*). He confirmed that the principles established in *Maranda* apply in the civil law context, and found that they applied to the fees at issue in the appeal before him. He found that the total dollar figure in each of the invoices

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[12] *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

was "neutral information" that ought to be disclosed, but that the other information in the invoices, including the dates of the invoices, was exempt under branch 1 of section 19. As a result, he ordered the Ministry of the Attorney General to disclose the total dollar figures contained in individual invoices.

[41] The ministry applied for judicial review of Order PO-2484 and Order PO-2548, another order with a similar analysis and result. In upholding both decisions, the Divisional Court stated:

> [B]ecause the fact of billing information arises out of the solicitor-client relationship and of what transpires within it, and is so clearly connected, the Supreme Court held that that approach to be taken is that solicitor's bills of account will be *prima facie* protected by privilege. However, the presumption of privilege can be rebutted where the disclosure of the information would not violate the confidentiality of the solicitor-client relationship by revealing directly or indirectly any communication protected by the privilege.
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> …
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> The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicators clearly considered that the Requesters and counsel were "assiduous" and "knowledgeable" and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the MAG or any other type of information that may be subject to privilege. Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation. Thus, the only information that was ordered disclosed consists of amounts with no corresponding dates or descriptive information.
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> …
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> It is clear that the IPC applied the proper legal principles as articulated by the courts in *Maranda* and *Mitchinson* and on the totality of the evidence before them, the adjudicators correctly found that the presumption of privilege was rebutted in the two cases. Thus, the s. 19 exemption did not apply. In applying the rebuttable presumption of privilege analysis and

> ordering that this information be severed from the records and disclosed to the requesters, the IPC committed no reviewable error.[13]

[42] I adopt the approach described in Order PO-2484 and upheld by the Divisional Court, and apply it to the legal billing information at issue in this appeal.

[43] The appellant has not offered any submissions to rebut the presumption that the information in the invoices is exempt. I have therefore relied on the representations of the board and my own review of the invoices to determine whether the presumption of privilege is rebutted in this case.

[44] Having reviewed the invoices, I find that the service descriptors, dates, and amounts appearing in each of the five invoices is presumptively privileged information. Furthermore, I am not satisfied that the presumption of privilege which applies to the descriptors and dates has been rebutted. Each invoice contains detailed information about the nature of the advice sought, which is privileged information. I also accept the board's submission that the dates themselves convey privileged information since, based on the timing of events, they may lead an observer to conclude, based on dates, that legal advice was sought related to a specific issue.

[45] I find, however, that the presumption has been rebutted with respect to the amounts of each invoice. From my examination of the invoices, I find that disclosing the amounts would not reveal any solicitor-client privileged information. Each invoice contains a list and description of each of the matters in respect of which the board is being billed, without the amount related to each matter. The amount invoiced is presented as a global amount in respect of all matters for which legal services were rendered. As noted in the board's representations, counsel was engaged on a number of matters and it is not possible to discern an amount which correlates to the appellant's request. Given that disclosing the total amount of each invoice would not reveal the amount related to conflict of interest matters, I find that the total amount of each invoice is "neutral" information which ought to be disclosed.

[46] I acknowledge the board's submission that, if privileged information is attempted to be redacted, there is no way to discern an amount which is responsive to the appellant's request. However, the appellant's request was for legal billing information "related to" the first part of her request ("letters, emails, reports, opinions other correspondence related to legal opinions regarding Trustee actual, perceived or possible conflict of interest between June 2011 and Feb 2014"). While the total amounts of the invoices do not correlate only to the conflict of interest matters, they include the amount paid for such matters and therefore "relate" to them. On that basis, I will order that they be disclosed.

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[13] *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.) at paras 19, 25 and 27.

[47] Accordingly, I find that the total dollar amounts (that is, the fees, disbursements and totals) contained in records 8-12 do not qualify for exemption under section 12, but that the other information in those records is solicitor-client privileged information that qualifies for exemption under section 12 of the *Act*.

Records 1 and 6

[48] Record 6 consists of a legal opinion and an email. The legal opinion was prepared for the Ontario Public School Boards' Association (the OPSBA), who then forwarded it via email to Ontario school board trustees, directors of education and senior Human Resources officials. The board was one of the recipients of the opinion and email. The email contains a summary of the legal opinion.

[49] Record 1 is an email from the OPSBA to Ontario school boards including the board. The email contains references to the legal opinion provided to the OPSBA in record 6.

Representations

[50] The board submits that the OPSBA works on behalf of school boards and is entitled to seek confidential legal advice regarding matters of importance to the board and other organizations. It submits that the OPSBA seeks legal advice for the purpose of providing advice and recommendations to its member school boards, and that the legal opinion was passed on by the OPSBA to school boards in Ontario to assist the latter in understanding their legal obligations.

[51] The board further submits that since the mandate of the OPSBA is to provide assistance to school boards, there is no waiver of solicitor-client privilege by the OPSBA providing the legal opinion to the board. It submits that when the OPSBA seeks a legal opinion, it does so on behalf of Ontario school boards, and that solicitor-client privilege rests with the school boards and not just with the OPSBA.

[52] In the alternative, the board submits that the opinion was sought so that the OPSBA could appropriately advise its member school boards. The board submits that since the school boards share a common interest with the OPSBA, and with each other, the OPSBA did not waive privilege by sending the opinion to school boards.

[53] The OPSBA also provided representations, including the following representations descriptive of its function:

> [The] OPSBA is an organization that represents public district school boards and public school authorities across Ontario, which together serve more than 1.2 million public elementary and secondary students….
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> OPSBA advocates on behalf of the best interests and needs of the public school system in Ontario. OPSBA is seen as the credible voice of public

> education in Ontario and is routinely called on by the provincial government for input and advice on legislation and the impact of government policy directions. From time to time, the government has modified legislation based on input provided by OPSBA, including, for example, the recent amendments to the *Education Act*, R.S.O. 1990, c. E.2, regarding the duties of school boards and trustees, as effected by Bill 177, the *Student Achievement and School Board Governance Act*, 2009, S.O. 2009, c. 25.

[54] The OPSBA submits that it retained counsel to provide legal advice to it and its member school boards on a specific topic, and that the legal opinion was sent directly to the OPSBA. The OPSBA submits that the opinion is a communication of a confidential nature between solicitor and client, made for the purpose of giving legal advice and is, therefore, subject to solicitor-client privilege.

[55] With respect to waiver, the OPBSA submits that its counsel was advised at the time of the retainer that the legal opinion would be shared with the OPSBA's member school boards. As such, there was "prior consent", before the opinion was sent to the client (the OPSBA), that it would be shared with the member school boards.

[56] Alternatively, the OPSBA argues that the reasoning found in Orders MO-1172 and MO-1991 is applicable here. In those orders, it was found that a minimal degree of public disclosure by a public body, to ensure the proper discharge of its function, does not constitute waiver of solicitor-client communication privilege. The OPSBA argues that its purpose is to serve the interests of the public education system and advocate for its public school board members.

[57] In the further alternative, the OPSBA, like the board, argues that if the board is considered a third party with respect to the solicitor-client relationship between the OPSBA and its lawyer, there exists a common interest between the OPSBA and the board, and so disclosure to the board did not constitute a waiver of solicitor-client privilege.[14] The OPSBA submits that the topic of the opinion (which is mentioned in the confidential portion of the OPSBA's representations) is a matter of interest to both the OPSBA, as an organization advocating for public school boards, and the board. The legal opinion sought by the OPSBA was a result of earlier litigation and was intended to give greater clarity to school boards to address similar situations. The OPSBA submits that as a voice for public school boards, it almost always shares a common interest with those boards.

[58] The appellant's representations do not address whether records 1 and 6 are exempt under section 12.

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[14] The OPSBA cites *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Analysis and findings

Communication with a third party

[59] I begin by addressing the board's argument that the OPSBA sought the legal opinion on behalf of its member school boards. In essence, the board appears to submit that the school boards were the clients for whom the legal opinion was prepared and that the OPSBA was either a co-client or a third party whose role was to obtain and convey the legal opinion to its member boards.

[60] With respect to communication between a client and a third party or between a solicitor and a third party, in *General Accident Assurance Co. v. Chrusz*,[15] Doherty J., writing for the majority on this point, observed that the authorities establish two principles:

1. not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and

2. where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as they meet the criteria for the existence of the privilege.

[61] With respect to the second principle, Doherty J. stated:

> The second principle described above extends client-solicitor privilege to communications by or to a third party who serves as a line of communication between the client and solicitor. Thus, where a third party serves as a messenger, translator or amanuensis, communications to or from the party by the client or solicitor will be protected. In these cases the third party simply carries information from the client to the lawyer or the lawyer to the client.
>
> The privilege also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor. In doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought. For example, in *Susan Hosiery Ltd. v. M.N.R.*, *supra*, the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They were also instructed to

[15] Ibid.

> discuss possible arrangements of those affairs presumably to minimize tax consequences. In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.
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> …
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> I agree with the Divisional Court that the applicability of client-solicitor privilege to communications involving a third party should not be determined by deciding whether Mr. Bourret is properly described as an agent under the general law of agency. I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
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> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
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> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[62] From my review of record 6, however, I find that there was no solicitor-client relationship between the OPSBA's counsel and the school boards. The OPSBA was not a third party; it was the client. The solicitor-client relationship was between the author of the legal opinion and the OPSBA.

[63] Nothing in the record indicates to me that the legal opinion was solicited by the OPSBA's member school boards. I accept that a major reason, perhaps the only reason

the OPSBA obtained the opinion was to enable it to effectively advise its member school boards on the matter discussed in the opinion. However, the opinion is addressed only to the OPSBA. I acknowledge that, as submitted by the board, the OPSBA advised its counsel at the time of the retainer that the legal opinion would be shared with the OPSBA's member school boards. However, a review of the entire opinion makes it clear that although the OPSBA contemplated sharing the opinion with its member boards, the opinion was prepared for the OPSBA. I cannot be more specific in this regard without divulging the content of the record.

[64] My review of the email from the OPSBA to its member school boards forwarding the opinion further supports my conclusion that the OPSBA sought the opinion on its own behalf. Again, however, I cannot be specific because to do so would require me to refer to the content of the email.

[65] I conclude that the OPSBA's member school boards were not clients of counsel for the OPSBA and there was, therefore, no solicitor-client relationship between the school boards and the OPSBA's counsel. The client was the OPSBA and any privilege rests with the OPSBA, and not with the board.

[66] The OPSBA is not an "institution" as that term is defined under the *Act* or the regulations. As a result, Branch 2 of section 12 ("prepared by or for counsel employed or retained by an institution for use in giving legal advice") cannot apply to the information in Records 1 and 6.

[67] Accordingly, I will now consider whether the opinion is a solicitor-client communication that is privileged under Branch 1 and if so, whether that privilege was waived by the OPSBA when it forwarded the opinion to its member school boards. The board submits (as an alternative to its primary submission that privilege rests with the board) that the opinion was a privileged solicitor-client communication to the OPSBA, and that disclosure of the opinion by the OPSBA to its member school boards did not waive that privilege because the OPSBA and the board share a common interest in the matters addressed in the opinion.

Common interest privilege

[68] In Order PO-3154, Adjudicator Steven Faughnan reviewed the case law pertaining to a determination of whether the common interest exception to waiver of privilege exists in the context of a commercial transaction. He reviewed *Pritchard v. Ontario (Human Rights Commission)*,[16] where Major J., for the Supreme Court of Canada stated:

> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame

[16] [2004] 1 S.C.R. 809, 2004 SCC 31.

> interest" as Lord Denning, M.R. described it in *Buttes Gas & Oil Co. v. Hammer (No. 3),* [1980] 3 All E.R. 475 (C.A.) at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations…

[69] Adjudicator Faughnan went on to state:

> Although the doctrine of common interest privilege is characterized in a number of ways in the jurisprudence cited by the parties, in the absence of a fiduciary or like duty, including trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue in the appeal before me, my view is that the argument is better framed as to whether there is a common interest that is sufficient to withstand waiver of any solicitor-client privilege that might have existed in the information…

[70] He also referred to Order MO-1678, in which Adjudicator Donald Hale reviewed the authorities as they existed then and stated:

> In the present appeal, it is clear that although the Municipality and the plaintiffs are all concerned about the noise created by the Dragway, they do not have the "selfsame" interest. For example, the plaintiffs would share in any award of damages, while it appears that the Municipality would not. However in my view, the fact that the interests are not identical is not a bar to the existence of a common interest in the context of the Canadian authorities. …
>
> Other Canadian authorities also indicate a broader basis for common interest, which may exist outside the context of litigation privilege and encompass situations involving solicitor-client communication privilege. For example, in *Canadian Pacific Ltd. v. CNADA (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), Farley J. found that common interest privilege could apply to communication by a bank's outside counsel with a third party in the context of a commercial transaction. He formulated the following test for common interest (at para. 27):
>
> > It would also seem to be that a useful test might be whether for there to be a common interest, would it be reasonably possible for the same counsel to represent both…

And in *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties need legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):

> As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost – through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations as, in that sense, the opinions are for the benefits of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.

[71] Adjudicator Faughnan went on to articulate the following test:

> … the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> > (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of section 19(a)[17] of the *Act*, and
> >
> > (b) the parties who share that information must have a "common interest", but not necessarily [an] identical interest.

[72] As noted in *Pitney Bowes*, cited above, the determination of the existence of a common interest is highly fact-dependent. In Order PO-3167, Adjudicator Donald Hale had to determine whether a legal memorandum prepared by the Assistant Deputy Attorney General for the Assistant Deputy Minister of the Ministry of Community Safety and Correctional Services and Ontario Crown Attorneys was exempt under section 19 of the provincial *Act* despite the fact that the Assistant Deputy Minister had subsequently distributed it to "All Chiefs of Police".

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[17] Section 19 is the provincial counterpart to section 12 of the *Act*.

[73] Adjudicator Hale found, firstly, that there was a solicitor-client relationship between the Assistant Deputy Attorney General and the ministry's Assistant Deputy Minister in connection with the memorandum, and that the privilege extended to the ministry personnel it was shared with.

[74] Adjudicator Hale then considered whether the common interest exception to waiver of privilege applied to the subsequent sharing of the memorandum with all Chiefs of Police. After reviewing the authorities, including *Pitney Bowes*, cited above, Adjudicator Hale concluded that the common interest exception to waiver of privilege applied:

> In my view, these principles apply equally in the circumstances of this appeal. The interest of Crown Attorneys, the ministry, the OPP Commissioner and municipal chiefs of police are not identical, and they each play different roles in the administration of criminal justice as it pertains to the subject matter of the memorandum. However, they all share a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration as evidenced by the content of the memorandum itself. The words "privileged and confidential" appearing on the face of the memorandum indicate that it is to remain confidential as against others who are not its intended recipients or beneficiaries. The common interest shared by the recipients of the memorandum thus negates any waiver of the privilege that would otherwise have occurred by its disclosure to persons or entities outside the solicitor-client relationship.
>
> In summary, I find that the memorandum had its origin as a privileged communication passing from the Assistant Deputy Attorney General on the one hand, to MAG Crown Attorneys and the ministry's Assistant Deputy Minister on the other. As such, it was a document which was subject to solicitor-client communication privilege for the purposes of section 19(a) from its inception.
>
> Further, based on the context in which the document was provided to the Chiefs of Police by the ministry's Assistant Deputy Minister, there existed a common interest in the confidential subject matter of the memorandum. I find that they share a common interest in matters relating to law enforcement and in the administration of justice generally. The memorandum at issue in this appeal describes a confidential opinion which was only shared with the Chiefs because of their common interest with MAG and the ministry in law enforcement concerns. I find further support for this finding in the fact that the memorandum itself states that it may be shared with the police, but is otherwise privileged and confidential, although this alone would not be determinative.

> As a result of this finding of a common interest in the subject matter of the record, I find that its disclosure to the Chiefs did not constitute a waiver of the privilege that existed in the document. Accordingly, I conclude that it remains subject to solicitor-client communication privilege and is exempt from disclosure under section 19(a), on that basis.

[75] I agree with the two-step approach articulated in Order PO-3154 and applied in Order PO-3167, and will apply it to the legal opinion before me.

1) Is the legal opinion privileged under Branch 1?

[76] I find that the legal opinion is subject to solicitor-client communication privilege under Branch 1. The opinion is a communication from the OPSBA's counsel to the OPSBA made for the purpose of providing legal advice on a particular topic. I also find that the communication was confidential. I make this finding notwithstanding the fact that the opinion itself makes reference to the possibility of it being shared with the OPSBA's member school boards. Since, as I find below, the OPSBA and its member school boards share a common interest in the subject matter of the opinion, the opinion is no less confidential for being subject to sharing with those boards. Although the opinion is not marked "privileged", this is not determinative. The opinion was addressed to one party, the OPSBA, and contains a detailed formal legal opinion. Although the opinion contemplates the possibility of it being shared with the OPSBA's member school boards, it does not make reference to the possibility of it being shared with any other party. Under the circumstances, I infer that the communication was intended to be confidential.

2) Do the OPSBA and its member school boards have a common interest in the information contained in the opinion?

[77] I have considered the parties' representations and have reviewed the legal opinion. I accept the OPSBA's submission that it is a body that represents Ontario public school boards, and advocates on behalf of the best interests and needs of the public school system in Ontario. I also accept the board's submission that:

> OPSBA is an organization which provides information and advice to Public School Boards throughout Ontario and advocates for public education. The Board, along with other Boards in Ontario [pays] a fee to OPSBA in exchange for the services and advice OPSBA provides.

[78] Given the role of the OPSBA, I find that it shares a common interest with its member school boards in having a common understanding of the state of the law on the particular matter discussed in the legal opinion. The only reason that the opinion was shared with the member school boards was because of their common interest with the OPSBA in the subject matter of the legal opinion. The opinion expressly contemplates that it might be shared with the school boards to further their

understanding of the subject matter explored in the opinion. To borrow the language of *Pitney Bowes*, the opinion was for the benefit of multiple parties, even though it was prepared for a single client.

[79] I find, therefore, that the board and the OPSBA have established that a common interest existed that allows the OPSBA to maintain privilege over the legal opinion that it shared with its member school boards. As a result of this finding of a common interest in the subject matter of the record, I find that its disclosure to the member school boards did not constitute a waiver of the privilege that existed in the document. Accordingly, I conclude that it remains subject to solicitor-client communication privilege and is exempt from disclosure under section 12, Branch 1, on that basis.

Conclusion on Records 1 and 6

[80] I conclude that the legal opinion in Record 6 was a privileged communication between the OPSBA's counsel and the OPSBA. I find, further, that this privilege was not waived when the OPSBA forwarded the opinion to its member school boards.

[81] As a result, the legal opinion in record 6 qualifies for exemption from disclosure under section 12 of the *Act*. The email from the OPSBA to its member boards, which is also part of record 6, is also exempt because it repeats the summary of the legal opinion.

[82] Record 1 is an email from the OPSBA to its member school boards, including the board. The email contains references to the legal advice provided to the OPSBA in record 6. Those references are, therefore, exempt from disclosure under section 12 of the *Act*.

Summary of findings on section 12

[83] To summarize, I find that, subject to my finding on the board's exercise of discretion, records 2B, 2C, 2E, 3, 4, 5, 6, and 7 are exempt from disclosure pursuant to section 12 of the *Act.* Further, records 1 and 8 through 12 are exempt from disclosure, in part, pursuant to section 12 of the *Act*.

Issue B: Does the discretionary exemption for advice and recommendations at section 7(1) apply to any of the records at issue?

[84] The board submits that the discretionary exemption for advice and recommendations at section 7(1) applies to the information in records 1, 2, 2A-F and 6. Given my conclusion above that records 1 (in part), 2B, 2C, 2E, and 6 are exempt from disclosure under section 12, I will now consider whether the section 7(1) exemption applies to the remainder of record 1, and to records 2, 2A, 2D, and 2F.

[85] Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[86] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[18]

[87] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[88] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [19]

[89] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[90] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[20]

[91] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[21]

[92] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information,[22] and

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[18] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[19] See above at paras. 26 and 47.
[20] Order P-1054.
[21] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[22] Order PO-3315.

information prepared for public dissemination.[23]

[93] Section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Section 7(2) states, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

[94] The exceptions in section 7(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.[24] Factual information, as set out in paragraph (a), is an example of objective information. It does not contain a public servant's opinion pertaining to a decision that is to be made but rather provides factual information.

[95] The information described in paragraph (j) does not always contain advice or recommendations but when it does, section 7(2) ensures that it is not protected from disclosure by section 7(1).[25]

[96] I refer in more detail to the exceptions at section 7(2)(a) and (j) below.

Representations

[97] Record 2 consists of a Trustee Report (the report) prepared by the Director of Education and addressed to the board's trustees, along with a covering email. Records 2A through F are appendices A through F to the report, and record 1 is appendix G to the report.

[98] The board submits that the report was prepared by the Director of Education, the most senior employee of the board, at the request of the trustees, to assist them in their discussions and decision-making related the creation of a particular board document. It submits that the report and appendices provided the trustees with a range of policy issues to consider and made recommendations that they were free to accept or reject.

[99] The board also submits that as the appendices form a substantial portion of the

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[23] Order PO-2677.
[24] *John Doe v. Ontario (Finance)*, cited above, at para. 30.
[25] *Ibid*.

report, they are covered by the section 7(1) exemption and should not be reviewed in isolation to determine whether an exemption applies to any specific appendix. It submits that each of the appendices is referred to in the report and together with the report they form the advice and recommendations that the Director of Education provided to the trustees for their consideration.

[100] The board further submits that none of the exceptions found in section 7(2) apply to the report or its appendices. Specifically, it submits that while the report contains some factual information, that information is not separate or distinct from the advice and recommendations.

[101] The board also made representations on some of the individual appendices, in the event that I determine I need to assess them independently of the report. I will refer to those representations as necessary below.

[102] The appellant's representations do not address whether any of the records are exempt pursuant to section 7(1).

Analysis and findings

Record 2

[103] I begin with record 2, which is comprised of the report itself and an accompanying email. Having reviewed the report and the board's submissions, I am satisfied that the report contains both advice and recommendations. The advice is in the form of various options that the Director of Education presents to the board's trustees and the recommendation takes the form of a specific course of action proposed by her. This record was clearly created as part of a deliberative process of local government decision-making and policy-making.

[104] Although the report does contain some factual information, "factual material" for the purposes of the exception to the exemption in section 7(2)(a) refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[26] Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.[27] Based on my independent review of record 2, I find that the factual information in it is inextricably intertwined with the advice and recommendations. Attempting to sever and disclose non-exempt information would result in the disclosure of information that is worthless, meaningless or misleading. The brief covering email contains references to the advice in the report, and severing out that information would again result in the disclosure of meaningless information. On that basis, I will not order the non-exempt material in record 2

[26] Order 24.
[27] Order PO-2097.

disclosed.[28]

Records 2A, 2D, 2F and 1

[105] I turn now to the four appendices remaining at issue, records 2A, 2D, 2F and 1. The board suggests that I ought not to consider these separately from record 2, as they form part of the advice and recommendations found in record 2. However, in the circumstances of this appeal, I find that I should consider the appendices individually. Although the appendices all relate to the same general matter as the report, many of them were created by individuals other than the Director of Education, were created at different times from the report and from each other and, apart from records 2D and 2F (discussed in more detail below), appear to have been prepared independently of the report that constitutes record 2.

[106] Even if I were to adopt the board's submissions, however, it would make no practical difference for the purposes of this appeal, since under section 4(2) of the *Act*, an institution is required to sever any information that can reasonably be disclosed without disclosing material which is exempt.[29]

[107] That being said, however, in determining whether any of the appendices qualifies for an exemption under section 7(1), the fact that each of these documents was appended to the Director of Education's report may be a relevant factor. As noted above, advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[30]

[108] Therefore, if any particular appendix does not contain advice or recommendations, but disclosure of the appendix would permit the drawing of accurate inferences as to the nature of the advice or recommendations contained in the report, then that appendix is exempt from disclosure pursuant to section 7(1) of the *Act*.

Record 2A

[109] Record 2A is an excerpt from minutes of a meeting of a Committee of the Whole Board. The minutes are a public document. The board did not provide representations

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[28] See Orders PO-2922 and 3502-I.

[29] In cases where a requester seeks his or her own personal information, the question of whether a "record" is in fact one record or many takes on more significance. This is because this office generally considers on a record-by-record basis whether the record is one that contains a requester's personal information, and is therefore subject to different exemptions under the *Act* (see sections 36(1) and 38(a) of the *Act*).

[30] Order P-1054.

specific to this record.

[110] I find that section 7(1) does not apply to record 2A. This record is a public document, and does not reveal any advice or recommendations beyond what is contained in the record itself. Record 2A appears to have been appended to the Director of Education's report as background information only.[31]

[111] I find, therefore, that record 2A is not exempt from disclosure under section 7(1). Since no other exemption has been claimed for this record, I will order it to be disclosed to the appellant.

Record 2D

[112] Record 2D is a collection of excerpts of language taken from identified documents of various school boards. I cannot be more specific about the nature of those documents, because to do so would disclose the confidential portion of the board's representations, and the substance of the record at issue.

[113] The board submits that the information in record 2D might be considered factual information, but was referred to by the Director of Education in her report, in which she stated that the trustees may wish to adopt or adapt the information contained in record 2D. In this respect, the board argues, the information in record 2D is inextricably linked to the advice and recommendations in the report, and is exempt from disclosure on that basis.

[114] Based on the board's representations and my independent review of record 2D, I find that the information in record 2D consists of policy options presented to the trustees by the Director of Education. While the record consists of excerpts of pre-existing language found in documents created by other boards, the information was clearly chosen and assembled in such a way as to form part of the advice found in record 2. Disclosure of record 2D would permit the drawing of accurate inferences as to the advice contained in the report. The information in record 2D is not a coherent body of facts separate and distinct from the advice and recommendations contained in the report.[32] Rather, it is inextricably intertwined with the report's advice and recommendations and on that basis, I find that section 7(2)(a) does not apply.[33]

[115] I find, therefore, that record 2D qualifies for an exemption pursuant to section 7(1) of the *Act.*

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[31] See Order PO-2677.
[32] Order 24.
[33] Order PO-2097.

Record 2F

[116] Record 2F is a draft document. The board submits that this record was prepared by the Director of Education for the trustees and contains a recommendation to the trustees with respect to the language to be used for that particular document. The board submits that the trustees were free to adopt, reject or modify this recommended language. I cannot be more specific without revealing the substance of the document and the confidential portions of the board's representations.

[117] Based on my review of record 2F and the board's representations, I am satisfied that record 2F consists of the Director of Education's recommendation to the trustees with respect to the language the board should adopt for the document in question. Record 2F, therefore, qualifies for an exemption pursuant to section 7(1).

Record 1

[118] Record 1 is an email from the OPSBA to Ontario school boards including the board, with an attached draft document prepared by the OPSBA. The draft document prepared by the OPSBA is not in its original form; it contains notations made by the board's Director of Education. Record 1 was an appendix to the Director of Education's report to the trustees.

[119] The board submits that the OPSBA is an organization that provides information and advice to public school boards throughout Ontario and that school boards, including the board, pay a fee to the OPSBA in exchange for the services and advice the OPSBA provides. The board submits that the OPSBA is an effective way for the board to obtain advice regarding options and best practices, and that the OPSBA provides advice to school boards throughout Ontario and, therefore, has special expertise.

[120] The board further submits that the OPSBA sent the draft document to the board in order to obtain feedback on it. The board submits that it could have accepted the draft, rejected it or modified it for its own use. It submits that the OPSBA sought feedback on its advice in order to formulate a recommended course of action.

[121] Having reviewed record 1 and the board's representations, I find that it reveals advice and recommendations. However, I make my finding on a somewhat different basis from that argued by the board. From my review of the records, I find that record 1 contains one of the policy options presented to the trustees by the Director of Education. Disclosure of record 1, therefore, would permit the drawing of accurate inferences as to the nature of the advice contained in record 2. Record 1, in fact, forms part of the advice provided in record 2.

[122] Given my finding, I do not need to consider whether advice from the OPSBA to a member school board would qualify for exemption under section 7(1). In particular, I do not need to consider whether the OPSBA is a "consultant retained by an institution" for the purposes of section 7(1). To reiterate, I find that disclosure of the draft

document that forms part of record 1 would reveal the advice of the Director of Education to the trustees. Some of the advice reflected in the draft document is repeated in the email, and disclosure of those portions of the email, too, would reveal the advice of the Director of Education. Accordingly, subject to the consideration of the exceptions to the exemption found at section 7(2), and particularly the exception at section 7(2)(j), I find that record 1 meets the requirements for exemption under section 7(1) of the *Act*.

[123] However, section 7(2) contains exceptions to the section 7(1) exemption. Pursuant to section 7(2)(j), a "report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution" is not exempt from disclosure under section 7(1).

[124] Section 7(2)(j) has three essential requirements:

1. the record must be a "report" of a "committee, council or other body";

2. This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[34]

3. the committee, council or other body must be "attached to" an institution;

4. A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution.[35]

5. the committee, council or other body must have been established "for the purpose of undertaking inquiries and making reports or recommendations to the institution".[36]

[125] In my Notice of Inquiry, I set out the exception at section 7(2)(j) and invited representations on its applicability to the records at issue. No party, however, made representations on section 7(2)(j).

[126] In Order P-726, Former Assistant Commissioner Irwin Glasberg stated the following with respect to the exceptions at paragraphs (f) and (g) of section 13(2) of the provincial *Act*, the counterpart to section 7(2) of the *Act*:

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[34] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[35] Order PO-2681; PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, cited above; and Order PO-1823.
[36] Order PO-2681.

> Sections 13(2)(f) and (g) are unusual in the context of the Act in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the Ministry must still disclose the **entire** document if the record falls into one of the section 13(2) categories.

[127] The exception found in section 13(2)(k) of the provincial *Act*, which is the counterpart to section 7(2)(j) of the *Act*, has been considered in previous orders of this office. In Order PO-1709, Senior Adjudicator Goodis stated:

> Although Order P-726 did not consider section 13(2)(k), in my view, former Assistant Commissioner Glasberg's statements are equally applicable here since each of sections 13(2)(f), (g) and (k) refer to discrete documents, whether they be "reports" or "studies". As a result, if I find that section 13(2)(k) applies, the entire record cannot qualify for exemption under section 13(1), despite the fact that I have already found that it contains "advice" and "recommendations".

[128] In Order PO-1709, Senior Adjudicator Goodis had to decide whether a report prepared by the Health Professions Regulatory Advisory Council (HPRAC) for the Ministry of Health and Long-Term Care was exempt under section 13(1) of the provincial *Act*.

[129] Having found that the report contained advice and recommendations, Senior Adjudicator Goodis went on to consider whether the mandatory exception at section 13(2)(k) of the provincial *Act* applied to the report. He stated:

> The word "attached" is defined as follows:
>
> > A term describing the physical union of two otherwise independent structures or objects, or the relation between two parts of a single structure, each having its own function ... [emphasis added]
>
> Black's Law Dictionary, 6th ed. (St. Paul: West, 1990), p. 125
>
> In my view, the above definition indicates that two entities may be "attached" or joined in a "union", while still remaining "otherwise independent". Had the Legislature intended that section 13(2)(k) exclude bodies with some degree of independence, it could have used language to suggest this, such as referring to the body as a "department", "branch" or "part" of the institution (see, for example, section 2(3) of the Act's municipal counterpart).

There are a number of factors which indicate that the Advisory Council is "attached" to the Ministry, although it maintains some degree of independence. These factors are listed below:

- the RHPA, the Advisory Council's enabling legislation, is administered by the Ministry [RHPA, section 1(1)];

- the Advisory Council's members are appointed by the Lieutenant Governor in Council on the Minister's recommendation [RHPA, section 7(2)];

- the Advisory Council reports directly to the Minister [RHPA, section 11; Advisory Council's World Wide Web site <www.hprac.org>];

- the Minister has a duty to notify the Councils of every health profession College where the Minister suggests an amendment to the RHPA, a health profession Act or a regulation under any of those Acts or a suggested regulation under any of those Acts; submissions in response to a suggestion are then made to the Advisory Council, as opposed to the Minister [RHPA, section 13];

- the Advisory Council appoints a Secretary, who carries out functions and duties assigned by the Minister or the Advisory Council [RHPA, section 17];

- the Advisory Council is a listed institution under the Act, whose designated head is the Minister [Ontario Regulation 460, Schedule item 84.1];

- the Government of Ontario Telephone Directory 1999, the Ontario Government's KWIC Index to Services 1999 and Management Board Secretariat's Directory of Records under the *Act* all list the Advisory Council under the main heading "Ministry of Health";

- the Advisory Council is listed as a "Schedule I" agency under the Ministry of Health by the Ontario Government's Public Appointments Secretariat; Schedule I agencies are "most closely associated with the government" and play a direct role in achieving the government's policies and programs [A Guide to Agencies, Boards and Commissions 1992/19993; Secretariat's World Wide Web site <http://pas.mnr.gov.on.ca>];

- the Advisory Council is funded directly by the Consolidated Revenue Fund (Ministry's representations);

> • the Advisory Council's employees are employed under the Public Service Act and paid by the Ministry [RHPA, section 16(1); Ministry's representations];
>
> • the Advisory Council refers to itself as "an agency of the Ministry of Health" [Advisory Council's World Wide Web site <www.hprac.org>].
>
> Thus, the above factors support the view that the Advisory Council, while it may maintain some degree of independence, is "attached" to the Ministry for the purpose of section 13(2)(k) of the Act.

[130] Senior Adjudicator Goodis concluded that the section 13(2)(k) exception applied, with the result that the entire report was not exempt under section 13(1).

[131] In Order PO-2681, Senior Adjudicator John Higgins, in finding that the Ontario Heritage Trust was "attached" to the Ministry of Culture, stated:

> Senior Adjudicator Goodis [in Order PO-1709] went on to find that HPRAC, an advisory body to the Ministry of Health (as it was then called), was "attached" to the Ministry despite having some degree of independence. He considered a variety of factors that tended to show attachment, and weighed them against factors indicating independence. These same conclusions were reiterated in Order PO-1823. I agree with this approach and will apply it here.
>
> I acknowledge that the Trust was created as a corporation without share capital and operates as an agent of the Crown pursuant to section 11(1) of the *OHA*. Even though the Trust possesses a level of independence, I have concluded, for the reasons that follow, that the Trust is "attached" to the Ministry for the purposes of subsection 13(2)(k).
>
> In this regard, I note that the first object of the Trust, enumerated in section 7(a) of the *OHA*, is "to advise and make recommendations to the Minister on any matter relating to the conservation, protection and preservation of the heritage of Ontario". In addition, and significantly, section 9 of the *OHA* provides further details concerning the manner in which this object is to be achieved. It states:
>
> > The Trust may advise and make recommendations to the Minister on any matter relating to property of historical, architectural, archaeological, recreational, aesthetic, natural or scenic interest and to *advise and assist the Minister in all matters to which this Act refers and in all matters as are assigned to it by or under any Act or regulation thereunder*. [Emphasis added.]

> It is also noteworthy that the *OHA*, which continues the Trust as a corporation without share capital, is administered by the Ministry (section 2).
>
> As well, the further powers of the Trust, enumerated at section 10(1) and (2), must be exercised in accordance with the policies and priorities determined by the Minister. Moreover, those further powers may be exercised by the Minister herself if, in the Minister's opinion, it is necessary to ensure carrying out the intent and purpose of the *OHA* (section 10(3)).
>
> Further, I note that the Minister is designated as the "head" of the trust for the purposes of the *Act* in Regulation 460.
>
> While the Trust can receive funding from a variety of sources, some funding may come from the Ministry in the forms of grants under section 17. Also, before the Trust can secure a guarantee on a loan from the Lieutenant Governor in Council, the Minister must recommend the Trust (section 18). Therefore, while the Trust can direct its funds as it sees fit, some funding is controlled by the Ministry. Directors of the Trust are appointed by the Lieutenant Governor in Council; however the creation of by-laws to establish officers must be approved by the Minister.
>
> Finally, the Trust's affairs must be set out in an annual report provided directly to the Minister, and the Trust is also required to make any other reports the Minister requires (section 21).
>
> Similar to the findings in Order PO-1709, where a number of the same factors tending to show "attachment" were cited, I find that the Trust, while it may maintain some degree of independence, is "attached" to the Ministry for the purpose of section 13(2)(k) of the Act. As also stipulated under requirement 2, it is clear that the Ministry is an institution under the *Act*.

Deferral of findings on record 1

[132] As noted above in my discussion of the common interest exception to waiver of privilege, the OPSBA provided the following representations on its function:

> OPSBA is an organization that represents public district school boards and public school authorities across Ontario, which together serve more than 1.2 million public elementary and secondary students….
>
> OPSBA advocates on behalf of the best interests and needs of the public school system in Ontario. OPSBA is seen as the credible voice of public education in Ontario and is routinely called on by the provincial

> government for input and advice on legislation and the impact of government policy directions. From time to time, the government has modified legislation based on input provided by OPSBA, including, for example, the recent amendments to the *Education Act*, R.S.O. 1990, c. E.2, regarding the duties of school boards and trustees, as effected by Bill 177, the *Student Achievement and School Board Governance Act*, 2009, S.O. 2009, c. 25.

[133] The board's representations provide the following submissions in respect of the OPSBA:

> OPSBA is an organization which provides information and advice to Public School Boards throughout Ontario and advocates for public education. The Board, along with other Boards in Ontario [pays] a fee to OPSBA in exchange for the services and advice OPSBA provides.

[134] I am not satisfied that I have enough information before me to determine whether the OPSBA is "attached" to the board for the purposes of section 7(2)(j). I note that in the decisions discussed above, the adjudicators had before them considerable evidence and submissions regarding the relationship between the institution and the body in question. In the appeal before me, there is very little evidence about the OPSBA's structure or its composition. Although I was provided with enough information about its function and relationship to its member boards to conclude that it shared a common interest with the board regarding the information contained in record 6, I do not have enough information about the relationship between the board and the OPSBA to make a determination under the three-part test under the section 7(2)(j) exception.

[135] For this reason, I will defer my final consideration of the applicability of the section 7(1) exemption to record 1, including the possible application of the section 7(2)(j) exception, until I have received representations from the parties specifically on the section 7(2)(j) issue.

Summary of findings on section 7(1)

[136] To summarize, I find that, subject to my findings on the board's exercise of discretion, records 2, 2D, and 2F are exempt from disclosure pursuant to section 7(1) of the *Act*. Record 2A is not exempt from disclosure under section 7(1) and since no other exemption was claimed for this record, I will order it to be disclosed.

[137] Consideration of the applicability of section 7(1) to record 1 is deferred on the terms set out in the order provisions below.

Issue C: Did the institution exercise its discretion under sections 7(1) and 12 of the *Act*? If so, should this office uphold the exercise of discretion?

General principles

[138] The sections 7(1) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[140] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38]

Relevant considerations

[141] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

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[37] Order MO-1573.
[38] Section 43(2).
[39] Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations and findings

[142] The board submits that it exercised its discretion in good faith and did not take into account any irrelevant considerations in deciding to withhold the records at issue. It states that it made its determination based on legitimate concerns and the need to safeguard its ability to confidentially seek advice and recommendations from employees and third parties, as well as legal advice.

[143] The board submits that it took into account the following considerations in exercising its discretion in favour of non-disclosure of the records at issue:

- The records relate to recent information provided to the board by third parties and solicitors
- The records do not contain the appellant's personal information
- The records relate to the operation of the board and to a specific named trustee
- The board is not aware of any compelling need for the appellant to receive the information
- Disclosure of the advice received by the board may disrupt the ability of the board to receive frank advice
- Despite being a public body, the board has a right to seek legal advice which is protected by solicitor client privilege
- The request itself was for the legal advice received. The legal advice was not merely ancillary to an otherwise permissible request for records. Disclosure in

> these circumstances would certainly have a chill on the board's ability to freely seek advice from counsel.

[144] The appellant did not provide representations on the board's exercise of discretion. She did, however, make submissions on the public interest in disclosure of the records and I have considered those arguments (which are more fully reproduced under Issue D below) in my assessment of the board's exercise of discretion.

[145] I see no basis upon which to interfere with the board's discretion. The board took into account relevant considerations and there is no evidence that it acted in bad faith or for an improper purpose. The board expressly considered the fact that it is a public body, but it was also legitimate for it to also consider the age of the information, the fact that the records do not contain any of the appellant's personal information and the importance of maintaining solicitor-client privilege. I see no error in its implicit assessment that these factors outweigh any potential public interest in disclosure of the records.

[146] Therefore, I uphold the board's exercise of discretion.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 7(1) exemption?

General principles

[147] Section 16 of the *Act* states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[148] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[149] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[40]

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[40] Order P-244.

Compelling public interest

[150] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[41] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[42]

[151] A public interest does not exist where the interests being advanced are essentially private in nature.[43] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[44] In addition, a public interest is not automatically established where the requester is a member of the media.[45]

[152] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[46]

[153] Any public interest in *non*-disclosure that may exist also must be considered.[47] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[48]

[154] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[49]
- the integrity of the criminal justice system has been called into question[50]
- public safety issues relating to the operation of nuclear facilities have been raised[51]

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[41] Orders P-984 and PO-2607.
[42] Orders P-984 and PO-2556.
[43] Orders P-12, P-347 and P-1439.
[44] Order MO-1564.
[45] Orders M-773 and M-1074.
[46] Order P-984.
[47] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[48] Orders PO-2072-F, PO-2098-R and PO-3197.
[49] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[50] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[52] or the province's ability to prepare for a nuclear emergency[53]

- the records contain information about contributions to municipal election campaigns[54]

[155] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[55]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[56]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[57]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[58]

- the records do not respond to the applicable public interest raised by the appellant[59]

Purpose of the exemption

[156] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[157] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[60]

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[51] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[52] Order P-1175.
[53] Order P-901.
[54] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[55] Orders P-123/124, P-391 and M-539.
[56] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[57] Orders M-249 and M-317.
[58] Order P-613.
[59] Orders MO-1994 and PO-2607.
[60] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

Records to which section 16 can apply

[158] According to the terms of section 16, the public interest override is available in respect of records which are exempt from disclosure pursuant to section 7(1), but not in respect of records which are exempt from disclosure pursuant to section 12.

[159] The Supreme Court of Canada addressed the issue of the absence of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[61] In upholding the constitutional validity of this statutory scheme, the Supreme Court noted that consideration of the public interest is already incorporated in the discretionary language of the section 12 exemption.

[160] I have found above that records 2B, 2C, 2E, 3, 4, 5, 6, and 7 are exempt in full, and records 1 and 8-12 are exempt in part, pursuant to section 12. The public interest override cannot apply to this information.

[161] I have found that records 2, 2D, and 2F are exempt from disclosure pursuant to section 7(1). Accordingly, I must determine whether the public interest override at section 16 applies to these records.

Representations

Appellant's representations

[162] As noted at the outset of this decision, the backdrop to the appellant's access request is a controversial plan to close two of the board's schools, a plan to which the appellant is opposed.

[163] The appellant has provided representations and several attachments in support of her contention that section 16 applies to the records. While I have read and considered all of the appellant's material, I will refer in this order only to the main points of her arguments.

[164] The appellant submits:

> This is a matter of tremendous importance to the public who place our trust in public organizations adhering to their own policies regarding conduct and avoidance of conflict of interest.
>
> Since 2011, [the board] has been engaged in a contentious school closure process in Kingston. The Program and Accommodation Committee (PARC) was chaired by [a named trustee] who demonstrated a clear preference for the senior board staff's advised school closures – at one point she

[61] 2010 SCC 23.

> advocated for the closure of 3 high schools in favour of the construction of one mega-complex to accommodate the 2000+ students under consideration.

[165] The appellant goes on to state:

> Is [the named trustee] in conflict of interest in her actions not just as Chair of the PARC but overall, as a member of the elected public school board and (variously) Chair/Vice-Chair of the Board, Chair of the Budget and Audit committees? I don't know, but there is most certainly a perception in the community that more information is required and that … this matter has not been handled openly and transparently. She has been a key influencer in a protracted and divisive school closure procedure and appears to be strongly aligned with the recommendations of the school board staff…

[166] The appellant here makes an assertion (which, for confidentiality reasons, I will not repeat) that implies that she believes the trustee is in a conflict of interest. She then continues:

> If there is no conflict of interest then transparency should help put the matter to rest and restore public confidence in our elected officials. If there is actual or perceived conflict of interest then… a board must inquire into this matter. Given the significant impact of the decision led by [a named trustee] on the Kingston Community, I feel that in the public interest it is both essential and compelling that any information that you believe is permissible to release be made public.

[167] The attachments appended to the appellant's representations include correspondence to and from her relating to her concerns about the named trustee's alleged conflict of interest, links to several media stories and letters to the editor regarding the school closures, and letters from concerned individuals and organizations about the closures. The appellant has also appended minutes of board meetings in which the named trustee has participated. The appellant submits that the trustee should have declared a conflict of interest at these meetings.

The board's representations

[168] The board also made representations on the public interest issue. It submits that in 2011, to address the impact of increasing student enrollment in schools, the board conducted a program and accommodation review. As part of this process, the board established a Program and Accommodation Review Committee (PARC), whose role was to study, report on and make representations to the board about accommodation options respecting the school(s) under consideration. The PARC held its first meeting on November 1, 2011 and another 14 working committee meetings over 8 months, all of

which were open to the public. The named trustee, then the Vice-Chair of the board, chaired the PARC.

[169] The appellant was on the PARC as a representative of one of the schools under review, and was an opponent of the PARC's recommendations and the board's adoption of those recommendations. Specifically, the PARC proposed and the board adopted a plan to close two schools and consolidate them in a new school, contingent on funding.

[170] A judicial review application was brought in respect of the board's decision to adopt the PARC's recommendations. The judicial review application was dismissed by the Divisional Court in a decision issued on December 12, 2014.

[171] The board submits that the judicial review application was the appropriate opportunity to fully challenge all aspects of the PARC process and the board's ultimate decision. Any allegations of conflict of interest could have been raised then. It submits, further, that the records at issue are not in any way related to the PARC process.

[172] The board also submits that the *Municipal Conflict of Interest Act (MCIA)* applies to trustees in relation to conflicts of interest. It submits that the appellant appears to possess all the relevant information available to her to assess whether a conflict of interest exists and has chosen not to pursue the issue in accordance with the *MCIA.* The requested records, the board submits, would not shed any further light on the matter. While the PARC process and the board's decision regarding school closure were of interest to the public, the requested records are not related to that process.

[173] The board argues in the alternative that if there is a compelling public interest in the requested records, it does not clearly outweigh the purpose of the section 7 exemption.

Analysis and findings

[174] Before addressing the parties' arguments, it is important to clarify the nature of records in question. As noted above, record 2 is a report that was prepared by the Director of Education for the trustees, to assist them in their discussions and decision-making related to a particular matter. Record 2D is a collection of excerpts of language taken from particular documents of various school boards. Record 2F is a record prepared by the Director of Education for the trustees containing recommended language to be used for a particular document.

[175] Due to confidentially concerns, I cannot be specific about the nature of the matters addressed in these records. However, none of these records contain any reference to the named trustee or any information about whether she was or was not in a conflict of interest as Chair of PARC or in any other capacity.

Is there a compelling public interest in the disclosure of records 2, 2D and 2F?

[176] I accept that there is a public interest in knowing whether decisions that will lead to school closures have been undertaken in a procedurally fair manner, including whether the decision makers are in a conflict of interest. As noted above, the appellant argues that disclosure is desirable in the public interest because on the one hand, if there is no conflict of interest, then transparency should help put the matter to rest and restore public confidence in our elected officials. She argues that if, on the other hand, there is actual or perceived conflict of interest then there is a public interest in disclosure of this fact.

[177] I find, however, that records 2, 2D and 2F do not respond to the applicable public interest raised by the appellant.[62] Disclosure of these records would not shed any light whatsoever on whether the named trustee was or was not in a conflict of interest as the Chair of PARC or in any other capacity. None of them contain any reference to the trustee or any information about whether she was in a conflict of interest.

[178] I find, therefore, that there is no public interest, compelling or otherwise, in the disclosure of these records.

[179] Given the basis for my conclusion, I do not need to address the board's arguments that allegations of conflict of interest could have been raised in the course of the judicial review application.

[180] Since I have found that there is no compelling public interest in disclosure of these records, I also do not need to consider whether any public interest in their disclosure outweighs the purpose of the section 7(1) exemption.

ORDER:

1. I uphold the board's decision to withhold records 2, 2B, 2C, 2D, 2E, 2F, 3, 4, 5, 6 and 7, in full, and record 1, in part.

2. I order the board to disclose the total dollar amounts contained in records 8-12 to the appellant, by sending a copy of redacted versions of those records to her, by **November 19, 2015**.

3. I order the board to disclose record 2A to the appellant by sending a copy of it to her, by **November 19, 2015.**

4. I defer my findings on the application of section 7(1) to the remainder of record 1. Further directions will be provided with a Notice of Inquiry.

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[62] See Orders MO-1994 and PO-2607.

5. In order to verify compliance with provisions 2 and 3 of this Order, I reserve the right to require the board to provide me with a copy of the records provided to the appellant.

Original Signed by: October 21, 2015

Gillian Shaw
Adjudicator