

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3552-I

Appeal MA16-282

Near North District School Board

January 26, 2018

Summary: The Near North District School Board received a request for all records relating to the appellant's child over a specified time period. The board granted partial access, claiming the application of the discretionary exemptions in sections 38(b) (personal privacy) and 38(a) in conjunction with sections 7(1) (advice or recommendations), 8 (law enforcement) and 12 (solicitor-client privilege). The board also claimed that some records were not responsive to the access request. In this interim order, the adjudicator upholds the board's decision, in part, finding that some of the records are not responsive to the request and that others are exempt from disclosure under sections 38(b) or 38(a), in conjunction with sections 7(1) and 12. She also finds that portions of some of the records are not exempt, as they do not contain the personal information of other individuals, but rather that of the appellant and his family. In addition, she does not uphold the board's decision regarding the application of the discretionary exemption in section 8, based on a lack of evidence. Lastly, she finds that the board did not exercise its discretion. The board is ordered to disclose certain records to the appellant and to exercise its discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 7(1), 8, 12, 17, 38(a) and 38(b).

OVERVIEW:

[1] This interim order addresses the issues raised as a result of an appeal of an access decision made by the Near North District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for all records pertaining to the requester's child created and maintained by

ten named individuals and any other board employee during a specified time period.

[2] In response, the board issued a decision to the requester, granting partial access to the responsive records. The board withheld records, either in whole or in part, claiming the application of the discretionary exemptions in sections 7 (advice or recommendations), 8 (law enforcement) and 12 (solicitor-client privilege), as well as the mandatory exemption in section 14(1) (personal privacy).

[3] The requester, now the appellant, appealed the board's decision to this office. During the mediation of the appeal, the mediator noted that it appeared that the records contain the appellant's and his child's personal information and that, consequently, the proper exemptions to be claimed were sections 38(a), in conjunction with sections 7, 8 and 12, and 38(b). The board agreed with the mediator's assessment and subsequently issued a revised decision letter to the appellant reflecting this change. The board also provided the appellant and the mediator with a revised index of records, in which it set out which exemptions were claimed for each record. The board also indicated that some records were not responsive to the request.

[4] The appellant advised the mediator that he seeks access to all of the information at issue, including those records the board advised were not responsive to the request. As a result, the responsiveness of the records was added as an issue in the appeal.

[5] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. Representation were sought from the board and the appellant. The appellant provided representations, but the board did not. Staff of this office contacted the board, who confirmed that it would not be providing representations on the issues set out below.

[6] The file was then transferred to me to continue the inquiry. I notified 22 affected parties, seeking their representations on whether the records contain their personal information and whether it is exempt under section 38(b). Of the 22 affected parties, two responded, both of whom indicated that certain records contained their personal information and are exempt from disclosure under section 38(b). I will not set out the affected parties' representations in this order, as they met this office's confidentiality criteria, but I did take them into consideration.

[7] For the reasons that follow, I uphold the board's decision, in part. I find that some of the records are not responsive to the request and that others are exempt from disclosure under sections 38(b) or 38(a), in conjunction with sections 7(1) and 12. I also find that some of the records are not exempt under section 38(b), as they do not contain the personal information of others, but rather that of the appellant and his family. In addition, I do not uphold the board's decision regarding the application of the discretionary exemption in section 8, based on a lack of evidence. Lastly, I find that the board did not exercise its discretion. I order the board to disclose certain records to the appellant and to exercise its discretion.

RECORDS:

[8] There are approximately 378 pages of records, consisting of screen shots of text messages, emails, reports, meeting notes and other correspondence.

ISSUES:

- A. What records are responsive to the request?
- B. Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption in section 38(b) apply to the information at issue?
- D. Does the discretionary exemption in section 38(a) in conjunction with section 7(1) apply to the information at issue?
- E. Does the discretionary exemption in section 38(a) in conjunction with section 8 apply to the information at issue?
- F. Does the discretionary exemption in section 38(a) in conjunction with section 12 apply to the information at issue?
- G. Did the board exercise its discretion under sections 38(a) and/or 38(b)? If so, should this office uphold the board's exercise of discretion?

DISCUSSION:

Issue A. What records are responsive to the request?

[9] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
 - ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

assistance in reformulating the request so as to comply with subsection (1).

[10] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[11] To be considered responsive to the request, records must *reasonably relate* to the request.²

[12] The board's index of records indicates that the following records are not responsive to the appellant's request: 24 (in part), 36 (in part), 51 (in part), 90 (in part), 92 (in part), 108 (in part), 114 (in part), 127 (in part), 128 (in part), 138 (in part), 139 (in part), 149 (in part), 150 (in part), 164 (in part), 168 (in part), 191 (in part) and 200 (in part).

[13] One of the affected parties submits that records 105, 120, 121, 122³ and 134 are not responsive to the request because they post-date the range of dates indicated in the appellant's request.

[14] The appellant submits that without the benefit of having the severed information in the records, he will defer to this office on this issue.

[15] I have reviewed all of the records at issue and I find that the portions of records 24, 36, 108, 138, 139, 149, 150, 164 and 168 that the board claims are not responsive to the request are, indeed, not responsive. These portions contain information relating to other issues and do not contain any information relating to the appellant, his spouse or his child. On my review of the records, I also find that a portion of record 66 and records 105, 120, 121 and 134 are not responsive to the request. The portion of record 66 that is not responsive addresses other issues than the appellant, his spouse or his child. Records 105, 120, 121 and 134 post-date the range of dates indicated in the appellant's access request. As a result, these portions will not be disclosed to the appellant.

[16] Conversely, I find that the remaining portions of the above-referenced records are responsive to the appellant's request, as they reasonably relate to the request. In particular, these portions are contained in records 51, 90, 92, 114, 127, 128, 191 and 200. I note that the board has also claimed the application of the discretionary exemptions in 38(a) and/or 38(b) to this information, which I consider below.

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

[17] In order to determine which sections of the *Act* may apply, it is necessary to

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

³ I note that there is not a record 122.

decide whether the records contain personal information and, if so, to whom it relates.

[18] Personal information is defined in section 2(1) as follows:

Personal information means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution that is implicitly or explicitly of a private and confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(f) the views or opinions of another individual about the individual, and

(g) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[19] Section 2(3) also relates to the definition of personal information and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[20] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be about the

individual.⁴ Even if the information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁵ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[21] The board has indicated in its index of records which records contain personal information. The appellant submits that he is not seeking the personal information of board staff, but that, in any event, the records do not likely contain much of the staff's personal information.

[22] I have reviewed the records at issue, including the portions of the records that were withheld, and I find that they contain the personal information of several identifiable individuals, including the appellant, his spouse, their child, other children, board staff members and a police officer.

[23] In particular, records 13, 22, 72, 73, 89, 114, 159, 205, 212 and 227 contain the personal information of other children. This information consists of the children's names with other personal information relating to them, falling within paragraph (h) of the definition of personal information in section 2(1) of the *Act*.

[24] Other records, I find, contain the personal information of board staff members, namely records 5, 9, 10, 14, 20, 36, 37, 40, 41, 50, 53, 55, 56, 71, 74, 81, 90, 92, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 114, 116, 118, 134, 137, 144, 149, 155, 164, 165, 168, 172, 180, 182, 184, 190, 191, 192, 207, 211, 212, 215, 227 and 228.⁷ Some of the information in these records that qualifies as the staff members' personal information includes their personal email addresses and personal cellular telephone numbers, falling within paragraph (d) of the definition. Other information consists of the personal views and opinions of the staff that do not relate to another individual, falling within paragraph (e) of the definition. Some of the information consists of the name of the staff member, with other personal information relating to them, falling within paragraph (h) of the definition.

[25] In further records, I find that the information qualifies as the staff member's personal information because although this information relates to these individuals in a professional capacity, I find that it qualifies as their personal information because it reveals something of a personal nature about them. The records relate to the appellant's child's attendance at a particular school over a specified period of time, and detail incidents that took place during this time period, including discussions of the performance of staff. Past orders of this office have found that, in these types of circumstances, although the individuals were acting in their professional capacity,

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁷ The majority of these records were withheld in part.

because of the assessment of their performance, the information changes and becomes the personal information of the staff members. In addition, some of the information consists of the work schedules of staff members, which has been found to qualify as the staff member's personal information in past orders of this office. In addition, I find that record 112 contains the personal information of a police officer, who was the subject of a complaint regarding the conduct of an investigation.

[26] Conversely, I find that in some records where the board has claimed that the information qualifies as the personal information of staff members, the information is actually the personal information of the appellant, his spouse and their child. The information qualifies as their personal information because it consists of the opinions of others about them. In other words, the staff members' opinions about the appellant, his spouse and their child is not the personal information of the staff, but of the appellant, his spouse and their child. This personal information can be found in the following records:

Personal Information of the appellant, his spouse and their child

Record number	Location of the personal information
13 – observation of the child	Page 52
39 – professional opinion	Sole page
42 – opinion of parents	First page
51 – professional opinion	First page
55 – professional opinion	A portion of the first page
57 – professional capacity	First page
66 – professional opinion	Pages 5, 6 and 7
73 – recounting of incidents involving the child	Pages 12 and 14
75 – recounting of an incident involving the child	Sole page
79 – professional opinion	Pages 1 and 2
89 – professional opinion	Pages 433, 434, 482 and 498
115 – professional opinion and professional capacity	All four pages

116 –professional capacity	Portions of the first page
128 – professional capacity	Pages 1 and 5. Other exemptions being claimed for this record
138 – professional opinion	Page 726 – bottom of page
145 – professional capacity	Page 747
150 – professional capacity	Page 3 (first paragraph) and page 4. Another exemption is also being claimed for this record
152 – professional opinion	Page 1 – bottom of page
154 – professional opinion	Page 785
200 – professional opinion	Page 988
207 – personal information of the appellant	Page 1019 (severed portion at bottom of the page)
211 – professional opinion	Page 1048 (3 rd severed portion)

[27] As I have found that the information listed above is not the personal information of the board’s staff members, but is the personal information of the appellant, his spouse and their child, I will order the board to disclose the withheld portions specified above, as no other exemptions have been claimed for them. There are three exceptions, namely records 115, 128 and 150 for which the board has claimed other exemptions, which I address below.

Issue C. Does the discretionary exemption in section 38(b) apply to the information at issue?

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

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

[30] In contrast, under section 14(1), where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing

this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy is more complex, and requires a consideration of additional parts of section 14, including sections 14(2), (3) and (4).

[31] If any of the paragraphs in section 14(4) apply, disclosure of personal information is not an unjustified invasion of another's privacy and the information is not exempt under section 14(1). The appellant has not raised the possible application of any of the paragraphs in section 14(4) and I find that none of them apply in these circumstances.

[32] If any of the paragraphs in section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy unless section 14(4) or the public interest override in section 16 applies.⁸ As stated above, I find that section 14(4) has no application in this appeal.

[33] If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.¹⁰

[34] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹¹

[35] The board indicates in its index of records that the personal information at issue is exempt under section 38(b), taking the factors in sections 14(2)(f) (highly sensitive) and (h) (supplied by the individual to whom the information relates in confidence) and the presumptions in sections 14(3)(a) (relates to a medical, psychiatric or psychological history) and (d) (relates to employment or educational history) into account. The board did not provide further representations on this issue.

[36] The appellant submits that the factor in section 14(2)(f) (highly sensitive) does not apply. He states:

If, by using the term *highly sensitive* the [board] means *embarrassing* and potentially damaging to their professional and public image, then they have misjudged the intended purpose of this section.

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

⁹ Order P-239.

¹⁰ Orders PO-2267 and PO-2733.

¹¹ Order P-99.

[37] The appellant further argues that the factor in section 14(2)(h) (provided in confidence) does not apply. He questions in what context would a board employee become a confidential informant, and submits that this factor does not apply to personal information supplied by one individual about another individual.

[38] Turning to the presumptions in section 14(3), the appellant submits that they do not apply. In particular, he argues, section 14(3)(a) does not apply because the appellant provided the board with all the relevant medical and psychological information regarding his child. With regard to the presumption in section 14(3)(d), it does not exempt information produced in the normal course of one's employment-related duties.

[39] Lastly, the appellant submits that the absurd result principle applies as he has become aware of information relating to the board and his child as a result of a complaint made to the Office of the Independent Police Review Director.

[40] The personal information remaining at issue for which this exemption was claimed is that of other children and board staff members. I find that none of the presumptions in section 14(3) apply to this information, but that the factor in section 14(2)(f) which weighs against disclosure is applicable, because the personal information at issue is highly sensitive and its disclosure could reasonably be expected to cause significant personal distress to those individuals. I also find that none of the other factors in section 14(2) either weighing for or against disclosure apply in these circumstances.

[41] Consequently, subject to my findings regarding the board's exercise of discretion, I find that the personal information of other individuals contained in the records is exempt from disclosure under section 38(b).

Issue D. Does the discretionary exemption in section 38(a) in conjunction with section 7(1) apply to the information at issue?

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

[43] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[44] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to

grant requesters access to their personal information.¹²

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

[46] In this case, the board relies on section 38(a) in conjunction with section 7(1).

[47] 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.

[48] The purpose of section 7(1) 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.¹³

[49] 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.

[50] 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.¹⁴

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

[52] 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.¹⁵

¹² Order M-352.

¹³ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

¹⁴ See note 11 at para. 43.

¹⁵ Orders O-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[53] 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.¹⁶

[54] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of the draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).¹⁷

[55] Examples of the types of information that have been found not to qualify as advice or recommendations include: factual or background information;¹⁸ a supervisor's direction to staff on how to conduct an investigation;¹⁹ and information prepared for public dissemination.²⁰

[56] There are exceptions to section 7(1), which are listed in section 7(2). These exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.²¹ The first four paragraphs of section 7(2) are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[57] The remaining exceptions in section 7(2) will not always contain advice or recommendations but when they do, section 7(2) ensures that they are not protected from disclosure by section 7(1).

[58] The word *report* appears in several parts of section 7(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.²²

[59] The board indicates in its index of records that records 35 (in part), 48 (in part), 66 (in part), 116 (in part), 127 (in part), 128 (in part), 129 (in part), 133 (in part), 149 (in part), 150 (in part), 155 (in part), 156 (in part), 176 (in part), 177 (in part), 190 (in part) and 207 (in part) are exempt from disclosure under section 7(1), but provided no further representations on this exemption.

¹⁶ See note 11 at para. 51.

¹⁷ See note 11 at paras. 50-51.

¹⁸ Order PO-3315.

¹⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Div. Ct.).

²⁰ Order PO-2677.

²¹ See note 11 at para. 30.

²² Order 24.

[60] I have reviewed the records listed above and I find that some of them contain advice or recommendations made by staff to a decision maker. In particular, I find that the withheld portions of records 35, 129, 177 and 207 for which section 7(1) was claimed are exempt from disclosure, because they consist of advice or recommendations made by staff to a decision-maker.

[61] I also find that some of the withheld portions in records 149, 150, 156 and 207 contain advice or recommendations, but that other portions do not, and consist of factual information. I further find that some of the records do not contain any advice or recommendations, but consist of either factual information, opinions or directives to staff. These portions are contained in records 48, 66, 116, 127, 128, 133 and 190.

[62] I further find that the withheld portion in record 155 does not qualify as advice or recommendations, but does qualify as personal information, as it reveals something of a personal nature about staff. In keeping with my previous finding regarding the personal information of staff, I find that this portion of record 155 is exempt from disclosure under section 38(b), as it is highly sensitive.

[63] The board has claimed further exemptions with respect to records 116, 127, 128 and 149, which I consider below. With respect to the remaining records, I will order the board to disclose to the appellant those portions of the records that do not contain advice or recommendations.

[64] Lastly, with respect to record 176, in the absence of representations from the board regarding the identity of staff members and the identity of the decision makers, I am unable to conclude that the exemption in section 7(1) applies, as it is not obvious from the record itself. Consequently, I will order the board to disclose this record to the appellant.

Issue E. Does the discretionary exemption in section 38(a) in conjunction with section 8 apply to the information at issue?

[65] In its index of records, the board has claimed the application of the discretionary exemption in section 8 to records 44, 46, 50, 53, 66, 70, 115, 116, 120, 121, 134 and 207. Section 8 states:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[66] The term law enforcement is used in several parts of section 8, and is defined in section 2(1) as follows:

law enforcement means,

- (a) policing,
- (b) investigations or inspections that could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[67] The term law enforcement has been interpreted to cover a police investigation into a possible violation of the *Criminal Code*.²³ Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.²⁴

²³ Orders M-202 and PO-2085.

²⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[68] It is not enough for the board to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.²⁵ The board must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and the seriousness of the consequences.²⁶

[69] The board did not provide representations on this issue. Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions under the *Act* lies upon the institution. In addition, as stated above, the board must provide evidence of both the existence of a continuing law enforcement matter, and detailed and convincing evidence about the potential for harm, should the records be disclosed.

[70] In the circumstances of this appeal, the board has not provided evidence of a continuing law enforcement matter or that disclosure of the records demonstrated a risk of harm, as well as the type of harm that is set out in section 8. In the absence of evidence from the board, I find the records at issue are not exempt under section 8, and I will order them to be disclosed to the appellant.

[71] However, I note that the exemption in section 12 is being claimed for record 116, which I consider, below. In addition, I note that portions of records 46, 50, and 53 contain the personal information of staff, which I find is exempt under section 38(b). I further find that the entirety of record 112 qualifies as the personal information of a police officer, and that this record is exempt under section 38(b).

Issue F. Does the discretionary exemption in section 38(a) in conjunction with section 12 apply to the information at issue?

[72] Section 12 states:

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.

[73] 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.

[74] Solicitor-client communication privilege protects direct communications of a

²⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*

confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²⁷ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.²⁸ 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.²⁹ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.³⁰

[75] 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.³¹

[76] 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.³²

[77] The board indicates in its index of records that records 116 (in part), 117, 127 (in part), 128 (in part), 129 (in part), 135, 136, 148, 149 (in part) and 152 (in part) are exempt from disclosure under section 12. The board indicates on the index that disclosure was refused under section 12 as the records are subject to solicitor-client privilege and/or were prepared in contemplation of or for use in litigation.

[78] Turning to the portion of record 116 that was withheld under section 12, which consists of notes from an Executive Meeting, I find that this information sets out specifically what the Executive would be seeking legal advice on and is, therefore exempt from disclosure under section 12, as it forms the commencement of the continuum of communications between a solicitor and client. Similarly, I find that only the top portion of page 1 of 5 of record 127 and the withheld information in record 129 are exempt from disclosure, as these portions set out the legal advice that the board would be seeking. I also find that records 117, 135, 136, 148, 149 and 152 are exempt from disclosure under section 12, as they contain direct communications between a solicitor and the board in which legal advice is sought and received from legal counsel, consisting of privileged solicitor-client communications.

[79] Conversely, I find that record 128 is not exempt under section 12, as it does not relate to the seeking and receiving of legal advice, nor does it consist of communications between a solicitor and client. As a result, I will order the board to disclose this record in full to the appellant.

²⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁸ Orders PO-2441, MO-2166 and MO-1925.

²⁹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

³⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³² *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

Issue G. Did the board exercise its discretion under sections 38(a) and/or 38(b)? If so, should this office uphold the board's exercise of discretion?

[80] The sections 38(a) and 38(b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[81] In addition, this office may find that the institution erred in exercising its discretion where for example:

- It does so in bad faith;
- It takes into account irrelevant considerations; or
- It fails to take into account relevant considerations.

[82] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³³ This office may not, however, substitute its own discretion for that of an institution.³⁴

[83] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:³⁵

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

³³ Order MO-1573.

³⁴ See section 54(2).

³⁵ Orders P-244 and MO-1573.

- 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; and
- The historic practice of the institution with respect to similar information.

[84] The board did not provide representations on this issue.

[85] Given the absence of representations and, hence, any evidence from the board on its exercise of discretion, I am unable to determine whether it properly exercised its discretion under sections 38(a) and 38(b). Accordingly, I will order the board to exercise its discretion.

[86] In sum, I uphold the board's decision, in part. I find that some of the records are not responsive to the request and that others qualify for exemption from disclosure under sections 38(b) or 38(a), in conjunction with sections 7(1) and 12. I also find that some of the records are not exempt under section 38(b), as they only contain the personal information of the appellant and his family. In addition, I do not uphold the board's decision regarding the application of the discretionary exemption in section 8, based on a lack of evidence. Lastly, I find, based on a lack of evidence, that the board did not exercise its discretion.

ORDER:

1. I order the board to disclose records 44, 48, 70, 115, 128 and 176 to the appellant in their entirety by **March 5, 2018** but not before **March 1, 2018**.
2. I order the board to disclose records 13, 39, 42, 51, 55, 66, 73, 79, 89, 116, 127, 133, 138, 145, 150, 152, 154, 156, 190, 200, 207 and 211, in part to the appellant by **March 5, 2018** but not before **March 1, 2018**. I have enclosed copies of the records and have highlighted the portions that are to be disclosed to the appellant.
3. I order the board to disclose records 46, 50 and 53 in part to the appellant by **March 5, 2018** but not before **March 1, 2018**. I have enclosed copies of the records and have highlighted the portions that are not to be disclosed to the appellant. The remaining portions of these records are to be disclosed to the appellant.
4. I order the board to exercise its discretion and to provide representations on this exercise of discretion to the appellant and this office within 30 days of the date of this order.
5. I reserve the right to require the board to provide this office with copies of the records it discloses to the appellant.

6. I remain seized of this matter in order to determine whether the board exercised its discretion properly.

Original signed by _____
Cathy Hamilton
Adjudicator

_____ January 26, 2018