Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3922

Appeal MA16-676

Ottawa Catholic School Board

April 29, 2020

Summary: The appellant made a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* to the board for access to records relating to complaints and incidents at her child's school involving her child and other students, reports made to the certain authorities involving the appellant and her child and copies of her child's practice EQAO book and the board's insurance policy. The board disclosed some records and withheld others, withholding the latter on the basis that they were not responsive, or subject to the exemptions in section 12 (solicitor-client) or section 14(1) (personal privacy). The appellant was dissatisfied with the board's decision and raised concerns about the timeliness of the board's response and its destruction of the EQAO practice book.

The following issues are addressed in this appeal: are some of the records non-responsive; does the mandatory personal privacy exemption in section 14(1) apply to some of the records; did the board properly apply the discretionary solicitor-client exemption in section 12 (in conjunction with section 38(a)) to some of the records; did the board destroy a responsive record; did the board issue a decision in accordance with the timelines in the *Act;* and, did the board conduct a reasonable search.

In this order the adjudicator upholds the board's decision to withhold records on the basis that the records were non-responsive, that they are exempt under section 14(1) or that the board properly applied section 12 in conjunction with section 38(a) of the *Act.* The adjudicator also: orders the board to issue access decisions for certain records; and, finds that the board did not destroy responsive records, responded to the appellant's request in accordance with the timelines required by the *Act* and conducted a reasonable search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56

Orders and Investigation Reports Considered: Orders MO-3331 and MO-2065.

OVERVIEW:

[1] On October 18, 2016[1], the appellant made a six-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Catholic School Board (the board) for access to the following information:

1. Complaints raised by [a specified school]'s community (parents/guardians). In particular regarding non-disclosure of incidents in which their children got injured.

2. Incidents in which [the specified school]'s students have been injured at school.

3. Complaints about [a named teacher at the specified school].

4. Reports made by [the specified school] before the Police, CAS [Children's Aid Society] etc. in which my name or my [child's] name appear. My [child's] name is [name of child].

5. My [child's] EQAO [Education Quality and Accountability Office] book from Grade 3, or at least the last pages with my highlights.

6. Copy of the Board's insurance policy contracted with OSBIE [Ontario School Boards' Insurance Exchange] or any other insurance company.

[2] The board issued a fee estimate and interim access decision on November 2, 2016. This decision included a fee estimate of $265, based on the board's estimates for searching for, preparing for disclosure and photocopying records responsive to parts 1-3 and 6 of the appellant's request. The board decided not to assess fees for part 4 of the request, as it is a request for personal information.[2]

[3] The November 2 decision also addressed access to records responsive to parts 5 and 6 of the request. The board advised that it does not have the record sought in part 5, the so called EQAQ book, because the record was disposed of in accordance with the board's record retention guidelines. The board referred the appellant to the OSBIE website for information responsive to part 6 of her request. Finally, the board requested a deposit of 50% of its fee estimate, or $132.50, before taking any further steps to

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[1] The dates of the access request and the board's responses are relevant to the appeal because of the appellant's contention that the board failed to respond to the access request in a timely manner.
[2] Although section 6.1 of Regulation 823 to the *Act* specifies that the board could not have assessed fees for searching and preparing the disclosure, it could have assessed a fee for photocopying costs.

process the request. The board stated that although it had not yet made a decision on access, it anticipated that portions of the records may be exempt from disclosure pursuant to the *Act*.

[4] The appellant asked the board to process parts 4 and 5 of her request, those relating to records involving her and her child and for which no fee had been assessed, separately from the others.

[5] On November 7, 2016, the appellant submitted a request for a fee waiver on the basis of financial hardship, and made additional comments about parts 5 and 6 of her request. On November 10, 2016, the board denied the appellant's request for a fee waiver. The board reiterated its previous response with respect to part 5 of her request (the EQAO book); however, it provided the appellant with an electronic copy of the OSBIE insurance policy, in fulfillment of part 6 of her request.

[6] On November 15, 2016, the appellant appealed the board's decisions to this office.

[7] The board issued a third decision on December 5, 2016. In this decision, the board confirmed that it had processed parts 4 and 5 of the appellant's request separately from the others, and it reported the results of its search for records responsive to parts 4 and 5. While the board reiterated that records responsive to part 5 (the EQAO book) no longer exist, it identified a number of records responsive to part 4. The board disclosed these latter records to the appellant, with severances. The board took the position that it had completed parts 4-6 of the request (with the records responsive to part 6 having previously been disclosed), and that parts 1-3 were on hold pending the appellant's appeal of its fee waiver decision.

[8] The parties attempted to address the appellant's outstanding concerns during the mediation stage of the appeal process. In the mediation, the appellant took issue with the board's destruction of the record responsive to part 5 of her request (the EQAO book). She reported that she asked the board for a copy of the book in May 2016, before making a written request under the *Act* in October 18, 2016 and that therefore the board should not have destroyed the book. She also had some concerns about the completeness and format of the records that had been disclosed to her, and about the board's search for records and its fee waiver decision.

[9] After discussions at mediation, the board conducted another search for records and issued another decision on March 1, 2017. In the March 1, 2017 decision, the board revised its fee waiver decision, granting the waiver in full, and provided another copy of the previously disclosed records to replace the earlier disclosure.

[10] The board also addressed some of the appellant's specific concerns about the board's search for records. It advised that there are no written records relating to its communications with police, as contact was made by phone. In response to the appellant's comments about her child's EQAO book (part 5 of her request), the board

stated:

> The practice book was created by the teacher. These were not "EQAO" test books. … The books were collected from all of the students by the teacher on or about May 23, 2016. The entire class set was destroyed in June 2016.

[11] The board provided a copy of its current retention schedule, as well as the previous schedule, which had been in effect in June 2016.

[12] The board also identified additional responsive records, granting access to some of these in full or in part. With its decision, the board provided an index of records describing all the records subject to its December 5, 2016 and March 1, 2017 decisions, which were identified as records 1-48, and its decision on access for each one. The board denied access to some records in full on the basis of section 52(3)3 (employment or labour relations exclusion) or section 12 (solicitor-client privilege exemption) of the *Act*. It denied access to portions of other records on the basis they are exempt under section 14(1) (personal privacy), or are "outside the scope of" (or non-responsive to) the appellant's request.

[13] During the mediation, the board identified three additional records that were not included in its index of records. These are:

- a two-page email for which the board claimed section 12;
- a three-page email, which the board withheld on the basis it is non- responsive; and
- a one-page email and attachment, which the board withheld on the basis of section 52(3)3.

[14] During the mediation, the appellant asserted that the board did not meet a 30-day timeline by which she should have received all responsive records. The board disputes this and the timeliness of the board's response is also an issue in this appeal.

[15] Certain matters were resolved during mediation. In response to the appellant's questions, the board provided her with the name of the school principal who authored some of the records disclosed to her, and the contact information for an individual to respond to her questions about the board's insurance policy.

[16] No further mediation was possible and this appeal was moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[17] The adjudicator initially assigned to the file identified a preliminary issue: the applicability of section 38 of the *Act* because certain of the records contained personal information of the appellant or her child. In its representations, the board conceded

that section 38 applies to the records that contain the appellant's personal information or that of her child.

[18] The board abandoned its claim that the exclusion in section 52(3) applies to any of the records.

[19] Representations were sought and received from the parties and shared in accordance with the IPC's *Code of Procedure and Practice Direction 7.*

[20] In this order, I find that the board did not destroy responsive records after the request was made and that it responded to the appellant's request in accordance with the timelines required by the *Act.* I uphold the board's decision to withhold parts or all of the records on the basis that they are non-responsive, that the personal privacy exemption in section 14(1) applies or that the board properly applied section 12 in conjunction with section 38(a) of the *Act.* I do not order the board to conduct further searches.

[21] I order the board to issue an access decision regarding page 24, part of page 29 and the one page email.

RECORDS:

[22] The records at issue are:

Page Number from Index or other Descriptor	**Description**
5	Part of page from principal's notebook (partially disclosed)
8	Part of page from principal's notebook (partially disclosed)
10	Part of page from principal's notebook (partially disclosed)
14	Email (partially disclosed)
15-23	OSBIE forms (partially disclosed)
24	Email (withheld in full)
25-26	Email (withheld in full)
27-41	Pages from principal's notebook (withheld in full)
42-48	Email and attachment (withheld in full)
two page email and	Email and attachment (withheld in full). The attachment is a

attachment (referred to as the "two-page email")	copy of pages 43-48.
three page email (referred to as the "three-page email")	Email (withheld in full)
one page email and attachment (referred to as the "one-page email")	Email (withheld in full)

ISSUES:

A. Did the board destroy records that were subject to the access request?

B. Did the board respond to the appellant's request in accordance with the timelines set out in the *Act?*

C. Are some or all of the following pages out of scope or not responsive to the request: pages 5, 8, 9, 10, 24-41, the three-page email and the one-page email?

D. Do the notebook entries, pages 42-48, the withheld information on pages 14-23, and the two-page email contain "personal information" as defined in section 2(1)?

E. Does the mandatory exemption at section 14(1) apply to the personal information on pages 14-23 and the notebook entries?

F. Does section 38(a) in conjunction with section 12 apply to pages 42-48 and the two-page email?

G. Did the board exercise its discretion under 38(a) in conjunction with section 12? If so, should this office uphold the exercise of discretion?

H. Did the board conduct a reasonable search for records?

DISCUSSION:

Issue A: Did the board destroy records that were subject to an access request?

[23] The appellant says that the board inappropriately destroyed a record she

describes as her child's "EQAO[3] book from Grade 3," which she sought in part 5 of her request. There is no dispute between the parties that the record sought is the one described by the board as the EQAO "practice book" and that it was destroyed.

[24] To explain why the practice book was destroyed, the board provided the appellant with copies of its current and prior records retention schedules that contemplate student records be destroyed at the end of the school year.

[25] In her representations, the appellant does not take issue with the validity of the records retention schedule, although she raises four other concerns. First, she says that she was twice "promised" a copy of the book prior to making the access request that forms the basis of this appeal – once by the principal in May 2016 and again by another employee of the board. Both of these promises occurred prior to the October 2016 request that is the subject of this appeal.

[26] Second, she says that she was provided with copies of her child's other school materials and so she is skeptical that the records retention schedule ought to have been applied to the practice book because of the board's apparent inconsistent approach. Third, she says that the practice book contained her personal information and that she should have had an opportunity to make copies of it prior to destruction in reference to section 30(1) of the *Act.* Finally, the appellant asserts that the board's decision to destroy the practice book was a deliberate attempt to thwart her other claims against the board, the nature of which I need not describe in this order.

[27] In response to this issue, the board provided affidavit evidence in addition to its representations. The board explains that the practice book is a resource that the board made available to students but it had no impact on any student's EQAO assessment. As I understand the board's representations, the practice book is a convenient copy of information otherwise available to students online. The board disputes that the practice book, or any practice book, contains any personal information other than the name of the student to whom the book belongs. The board provides additional information about the alleged promise made by the principal, which I need not reproduce or summarize in this order because it is not relevant to the issues over which this office has jurisdiction.

[28] The issue to be decided is whether the board destroyed a record that was subject to an access request. As stated by the adjudicator in Order MO-3331, "To give effect to the access provisions in the Act, a request for records requires the institution receiving that request to ensure that any responsive records are retained and not destroyed until the request has been satisfied and any subsequent proceedings before

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[3] As noted, EQAO refers to the Education Quality and Accountability Office, an agency of the government of Ontario. The EQAO administers a province-wide grade 3 assessment.

the Commissioner or the courts is completed."[4] This obligation applies whether or not a record contains personal information.[5]

[29] The evidence on this point is clear. The appellant did not make the access request[6] until after the practice book was destroyed. The board destroyed the practice book in accordance with a retention schedule, which is permitted under the *Act*.[7]

[30] In making this finding, I have considered the appellant's skepticism about the applicability of the records retention schedule to the practice book because she received copies of other records that were similar in nature. In my view, there are a myriad of possibilities that could explain this, including where the records were stored and to what they related. It is also possible that there are other reasons why the board may have, on a discretionary basis, not applied the records retention schedule to other student records that the appellant has been provided with.

[31] The narrow issue before me is whether the board destroyed a record for which it had an outstanding access request under the *Act;* I find that it did not.

Issue B: Did the board respond to the appellant's request in accordance with the timelines set out in the *Act*?

[32] The appellant asserts that the board did not meet a 30-day timeline by which she should have received all responsive records.

[33] Section 19 of the *Act* requires that institutions respond to requests for access within 30 days. Section 45 of the *Act* sets out mandatory fees for access under the *Act*.

Representations

[34] The board says that the 30 day time period in which it had to respond to the October 18, 2016 request stopped on November 4, 2016 [sic][8] when the board issued its interim decision and fee estimate. The appellant refused to pay the deposit requested and, the board asserts, therefore the timeline for the request was "frozen." The board notes that as soon as it decided to waive the fee during the mediation, it issued a new decision evidencing its timeliness. Further, the board notes that the appellant was provided with a partial response to her request – in respect of parts 4, 5

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[4] In Order MO-3331, the adjudicator cites Orders MO-2244-I, MO-1725 and MO-2809.
[5] Order M-1135 and MO-2244-I.
[6] As provided for in section 24(1), a person making an access request under the *Act* shall make the request in writing, specify that the request is being made under the *Act* and pay the requisite fee, among other obligations.
[7] See section 30(1) in conjunction with section 8(3) of Regulation 823.
[8] The decision letter dated November 2, 2016 was transmitted to the appellant via email on November 3, 2016.

and 6 in December 2016. The board says further that there is no benefit to "litigating the issue of the timeliness and the board's response, and no remedy which the IPC can impose if it disagrees…."

[35] In response, the appellant refers to certain emails she exchanged with the board's freedom of information coordinator about whether to separate the request into parts. The appellant also asserts that the delay she experienced, and continued to experience as this inquiry proceeded, impaired her ability to tender relevant evidence in legal proceedings in which the appellant is involved.

Analysis and Findings

[36] The request is dated October 18, 2016. According to the evidence, it was received by the board on that date or October 19, 2016. A fee estimate and interim access decision was rendered on November 3, 2016, well within the 30 day deadline. As noted by the appellant, there were communications in between these dates to obtain clarifications and to update the appellant. The appellant made an immediate request for a fee waiver to which the board provided an immediate response. The appeal to this office was filed on November 15, 2016.

[37] The board is entitled to charge a fee and obtain a deposit of the fee prior to acting on the request.[9] It is well established that an interim access decision and outstanding fee estimate "stops the clock" on the 30-day time period.[10]

[38] The board's November 3 decision was timely, occurring well within the 30 day deadline and this aspect of the appeal is dismissed.

Issue C: Are some or all of pages 5, 8, 9, 10, 24-41, the three-page email and the one-page email out of scope or not responsive to the request?

[39] The board claims that all or parts of pages 8, 9, 10, 24-41, the three-page email and the one-page email are "outside the of scope of," or not responsive to, the request. Based on my review of the records, I have also considered whether the withheld information on page 5 is responsive.

[40] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. 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

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[9] See *Fees, Fee Estimates and Fee Waivers*¸ Information and Privacy Commissioner of Ontario (June 2018) at p. 9 (https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee_estimates-fee_waivers-e.pdf).
[10] Orders 91, M-555 and PO-2634.

favour.[11] To be considered responsive to the request, records must "reasonably relate" to the request.[12]

[41] I will review the pages that contain information that the board claims are non-responsive.

Pages 5, 8 and 9, 10, 27-41 (pages from the principal's notebook)

[42] The pages discussed under this sub-heading are taken from the principal's notebook, which is a hand-written log of communications separated by headings that indicate the date of the communication. The notebook is similar to police notebooks that are often the subject of orders of this office.[13] A single page of the notebook could contain several entries that are entirely unrelated to each other.

[43] Pages 5, 8 and 9 were identified and partially disclosed in response to part 4 of the request, which was for reports made by the school "before the Police, CAS etc. in which [the appellant or her child's] name appear." The board has disclosed those pages that contain *entries* that relate to part 4. The board disclosed the complete pages, even if the page contained entries that did not relate to the part 4 request. For the entries that did not relate to part 4, the board redacted portions.

[44] Page 5 consists of two entries: a complete entry dated May 18, 2016 that in my view does not reasonably relate to part 4 of the appellant's request; and, part of an entry dated May 24, 2016 that in my view reasonably relates to part 4. The board has produced the entire page, but redacted the name of a person in the May 18 entry. In my view, only the May 24 entry is responsive to part 4 or any of the appellant's requests and I uphold the board's decision to withhold the withheld information on page 5 as not responsive.

[45] Page 8 consists of four entries: part of an entry from an undisclosed previous page in the notebook that is in my view unrelated to part 4; entries dated June 2 and 9, 2016 that are reasonably related to part 4; and, part of an entry dated June 9, 2016 that is in my view unrelated to part 4. The board has produced the entire page, but redacted the names of persons in the first and last entry. In my view, only the June 2 and 9, 2016 entries are reasonably related and therefore responsive to part 4 of the appellant's request or any part of the appellant's request and I accordingly uphold the board's decision to withhold the withheld information on page 8 as not responsive.

[46] Page 9 consists of two entries: the continuation of an entry produced on page

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[11] Orders P-134 and P-880.
[12] Orders P-880 and PO-2661.
[13] See for instance Order MO-2065.

3[14]; and, a separately-dated entry that is in my view unrelated to part 4 of the appellant's request. The board has withheld the entirety of the latter entry. I find that none of the information in the latter entry reasonably relates to part 4 of the request or any of the parts of the appellant's request and I therefore uphold the board's decision to withhold the information on page 9 as not responsive.

[47] Page 10 consists of two entries: a complete separately-dated entry that in my view does not relate to part 4; and, an entry dated April 12, 2016 that was produced in full as responsive to part 4. I find that the former entry on page 10 is not reasonably related to part 4 or any other part of the appellant's request and I therefore uphold the board's decision to withhold the withheld information on page 10 as not responsive.

[48] Pages 27-28, 30-41 have been withheld in full. None of the entries on these pages refer to the appellant or her child. Some of the pages contain records of communication between the guardians[15] of students in the teacher's class. Without classifying these communications as "complaints" in a formal or official sense, and mindful of the board's obligation to interpret the appellant's request liberally, I find that some of these are reasonably related to part 3 of the appellant's request. I will consider each page – and the entries on those pages – in turn.

[49] Pages 27-28, 30-41 are not consecutive pages from the principal's notebook but are, rather, excerpts. On pages 27-28, 30-41 there are two partial entries, meaning that the other portions of these partial entries have not been produced to this office, do not form part of the index and are not at issue in this appeal.

[50] The two partial entries appear at the tops of pages 27 and 35. I have reviewed these and am satisfied that they are not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold these entries as not responsive. Without further reference to the partial entries, I will now review each page. For the entries that I deem to be responsive, I will assign a label so that these can be referenced later in this order.

[51] Pages 27-28 consist of a single entry that records a communication between the principal and a guardian that is reasonably related to part 3 of the appellant's request (the page 27-28 entry).

[52] The top of page 30 consists of two complete entries. The first one is not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold it. The second one records a communication between the principal and a guardian that is reasonably related to part 3 of the appellant's request (the page

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[14] The entry on page 3 is responsive and not at issue in this appeal.
[15] I will use the term guardian in this order to refer generically to parents or other guardians.

30 entry).

[53] There is a single entry that spans the bottom of page 30 and top of page 31. This entry records communications between the principal and a guardian; and, separately, the principal and a teacher. In my view, this entry is reasonably related to part 3 of the appellant's request (the page 30-31 entry).

[54] The balance of page 31 has three complete entries. The only entry on this page that is reasonably related to part 3 is the last entry on the page; it is record of a communication between the principal and the teacher (the page 31 entry).

[55] Page 32 contains a single entry that records a communication between the principal and a guardian that is reasonably related to part 3 of the appellant's request (the page 32 entry).

[56] Page 33 contains a single entry that records a communication between the principal and the teacher that is reasonably related to part 3 of the appellant's request (the page 33 entry).

[57] Page 34 contains two complete entries. The one at the top of the page records a communication between the principal and a teacher and the principal and a student. In my view, it is not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold it as not responsive. The one at the bottom of the page records a communication between the principal and a guardian. It is reasonably related to part 3 of the appellant's request (the page 34 entry).

[58] Page 35 contains one complete entry that records a communication between the principal and various parties. This entry is not reasonably related to any parts of the appellant's request and I uphold the board's decision to withhold it as not responsive.

[59] There is a single entry that spans the bottom of page 35 to the top of page 36. This entry records a communication between the principal and a child's guardian. The bottom of page 36 contains a complete entry that records a communication between the principal and a student. In my view, these entries when viewed together are reasonably related to part 3 of the appellant's request (the pages 35-36 entries).

[60] A single entry spans page 37 and the top of page 38. It is a record of a communication between the principal and a guardian. In my view, it is not responsive to any part of the appellant's request and I uphold the board's decision to withhold it.

[61] The bottom of page 38 contains a single entry that records a communication between the principal and a guardian. In my view, it is not reasonably related to the appellant's request and I uphold the board's decision to withhold it as not responsive.

[62] The top of page 39 contains two complete entries that record communications that the principal had with staff at the school. A single entry spans the bottom of page

39 and top of page 40 that records a communication between the principal and a guardian. In my view, these entries when viewed together are reasonably related to part 3 of the appellant's request (the pages 39-40 entries).

[63] The bottom of page 40 contains two complete entries. The first complete entry on the page records a communication between the principal and an individual. In my view, the entry is not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold it. The second complete entry on the page records a communication between the principal and a guardian. In my view, it is reasonably related to part 3 of the appellant's request (the page 40 entry).

[64] Page 41 contains a single entry that records a communication between a guardian and the principal. In my view it is not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold it as not responsive.

Page 29

[65] Page 29 contains two complete entries. The one at the top of the page is not reasonably related to any part of the appellant's request and I uphold the board's decision to withhold it. The one at the bottom of the page is a record of a communication between the principal and the appellant that is reasonably related to part 3 of the appellant's request (the page 29 entry). The board has not made any alternative exemption claims in relation to this record so I will order it to make an access decision for this information.

Page 24 and the one-page email

[66] Page 24 and the one-page email are emails. The board has not made any specific representations in relation to these pages, although it had initially asserted that these records were excluded under section 52(3)(3), a claim that it has withdrawn. In light of the board's position and because it has not asserted any exemption claims in the alternative, I will order it to issue an access decision in respect of these pages.

Pages 25-26

[67] Pages 25 and 26 consists of a two-page email that when viewed with some of the notebook entries described above is reasonably related to part 3 of the appellant's request (pages 25 and 26).

The three-page email

[68] The three-page email does not reasonably relate to part 3 or any part of the appellant's request and I uphold the board's decision to withhold it as not responsive.

Summary

[69] I uphold the board's decision to withhold the information on pages 5, 8, 9, 10,

24- 41 and the three-page email on the basis that it is non-responsive except for the following entries or pages: the page 27-28 entry, the page 30 entry, the pages 30-31 entry, the page 31 entry, the page 32 entry, the page 33 entry, the page 34 entry, the pages 35- 36 entries, the pages 39-40 entries, the page 40 entry, and pages 25 and 26. I will refer to these entries and pages 25 and 26 collectively as the "notebook entries" in the remainder of this order.

[70] In the alternative to its claim that these records are not responsive to the request, the board has claimed the section 14(1) personal privacy exemption. I will consider below the applicability of section 14(1) to the information that I have found is responsive to the request.

[71] I will order that the board issue an access decision in relation to the page 29 entry, page 24 and the one-page email.

Issue D: Do the notebook entries, pages 42-48, the withheld information on pages 14-23, and the two-page email contain "personal information" as defined in section 2(1)?

[72] The board relies on the exemptions in section 14(1) to withhold the information on pages 14-23 and the notebook entries; and section 38(a) in conjunction with section 12 to withhold the information on pages 42-48 and the two-page email. Sections 14(1) and 38(a) in conjunction with section 12 are only available to the board if it is established that the information contains personal information of any individual other than the appellant or her child, in the first case, and of the appellant or her child, in the second. It is therefore necessary to determine whether the information at issue contains personal information within the meaning of the *Act.*

[73] Generally speaking, the information on pages 14-23 and the notebook entries pertains to students' activities, other than those of the appellant's child, at the school. The information on pages 14-23 relates to students who were injured at the school and the information in the notebook entries consists of the principal's notes about conversations he had with parents or guardians of children at the school. Other than page 14, the information includes the names of the students and their family members and describes specific things that relate to those students' lives. Page 14 is an email that does not contain any student's name but it describes an injury that occurred at the school. None of the information on these pages pertains to the appellant or her child.

[74] Pages 42-48 and the two-page email are a summary of interactions between the principal and the appellant prepared at the request of legal counsel.

[75] "Personal information" is defined at section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[76] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[16]

[77] 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.[17] To qualify as personal information, it must be reasonable to expect that an

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[16] Order 11.
[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

individual may be identified if the information is disclosed.[18]

[78] Of relevance to this appeal, section 54(c) of the *Act* provides that the appellant is able to assert any rights arising in relation to the personal information of her child.

Representations

[79] The appellant states that she does not seek access to the names of the students if disclosure of their name would reveal other personal information about the individual as provided for in paragraph (h) of the definition of personal information. The appellant asserts that if the names of individuals are severed, disclosure of the information will not reveal any personal information.

[80] On this point, the board submits that all of the withheld information constitutes personal information, the disclosure of which would be an unjustified invasion of personal privacy and therefore exempt under section 14(1). The board submits that the records cannot reasonably be severed because the appellant would be able to identify the students and families as a result of the appellant's familiarity with the individuals and the small size of the student population at the school.

[81] The appellant disputes that she would be able to deduce the identity of particular students if their names were withheld. She accepts the board's description of the school size but submits that her child only interacted with about 20 of the students so she has less – or no – familiarity with the balance of the student population. She cites the fact that the board produced redacted insurance forms (pages 15-23) and that she was unable to determine the identity of the students who were the subject of those forms.

[82] In reply, the board submits that because disclosure to the appellant is considered to be disclosure to the world at large, the test is not only whether the appellant could identify the individuals but whether another person could identify them.

[83] Page 14, an email describing a student injury that occurred at the school, is unique because it does not contain any individual's name, other than the sender and recipient who are staff of the board. The board submits that it withheld information on page 14 that contained personal information. It asserts that based on the description of the incident, most of which has been severed, the appellant would be able to identify the student in question.

[84] Regarding pages 42-48 and the two-page email, the board admits that these pages contain the appellant's personal information. The board claims that the records are exempt from disclosure because of section 12 (solicitor client privilege) in

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

conjunction with section 38(a).

Analysis and Findings

[85] I will first briefly address pages 42-48 and the two-page email. After reviewing the records and considering the board's position, I find that these pages contain the personal information of the appellant and her child. I will review the board's exemption claims in section F, below.

[86] Pages 14-23 pertain to the part 2 of the appellant's request, incidents where students were injured at the school. Page 14 is an email; pages 15-23 are copies of Ontario School Boards' Insurance Exchange (OSBIE) forms. These pages have been disclosed with severances.

[87] The notebook entries are described in the discussion above for Issue C. None of these records contain any reference to the appellant or her child.

[88] I agree with the board's submission that the records on pages 15-23 and the notebook entries are replete with personal information. The OSBIE forms include information relating to the medical history of students, address and telephone numbers of students and their families, and birthdates. The notebook entries contain information relating to the students' education and in some cases the family status of the parents, as well as views and opinions about the students' experience at the school. Furthermore, I find that the very fact that these communications occurred, in and of themselves, constitutes personal information of the student and their family member(s).

[89] The appellant takes no serious issue with the claim that the withheld information contains personal information. However, she argues that the information can be reasonably severed in a way that protects the personal information of named individuals (as well as arguing that disclosure of the information in total would not constitute an unjustified invasion of personal privacy within the meaning of section 14(1), which will be addressed in the next section of this order).

[90] Section 4(2) *Act* obliges the board to disclose as much of a responsive record as can reasonably be severed without disclosing material which is exempt. However, this provision of the *Act* does not require the board to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[19]

[91] The OSBIE forms (pages 15-23) have already been severed and disclosed to the

[19] Orders MO-2532 and PO-1663.

appellant. Unlike the notebook entries, the OSBIE forms pertain to the entire school population, not just the appellant's child's class, and they are *forms* with consistent fields and common general information to help understand the information in context. In my view, the board accurately severed information in the OSBIE forms that is properly characterized as personal information of identifiable individuals.

[92] In contrast to the OSBIE forms, the notebook entries apply to a much smaller population of the school – those students who interacted with the teacher. In further contrast to the OSBIE forms, the information contained in the notebook entries[20] consists of unstructured, free-form notes of the principal. They take no consistent form or approach. There are no common fields or common styles to the manner in which the notes are recorded. Information in this form poses challenges for determining reasonable severances that would withhold information that could reasonably be expected to identify an individual, which would not lead to only disconnected snippets being disclosed.

[93] I find that the notebook entries cannot reasonably be severed so as to render the individuals mentioned in them unidentifiable. To do so would result in disconnected and disjointed information that would be meaningless to any reader.

[94] This leaves page 14. I must determine whether the withheld parts of page 14 contain personal information. I find that the withheld information on page 14 qualifies as recorded information about an identifiable individual and is personal information for the purposes of section 2(1) of the *Act*. In my view, there is sufficient detail in the email on page 14 that the severances made by the board were reasonable and necessary to withhold personal information. I agree with the board that it is reasonable to expect that the individual in question would be identified if this information were disclosed.

[95] Having determined that the withheld information on pages 14-23 and the notebook entries contain personal information, I will consider whether the mandatory exemption in section 14(1) applies to these records in the next section of this order.

Issue E: Does the mandatory exemption at section 14(1) apply to the information on pages 14-23 and the notebook entries?

[96] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy (section 14(1)(f)).

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[20] With the exception of the information on pages 25 and 26, which are free form notes of another person.

Representations

[97] The board submits that disclosure of the withheld information on pages 14-23 (the OBSIE forms) would constitute a presumed unjustified invasion of personal privacy under section 14(3)(a) and that disclosure of the information in the notebook entries would constitute a presumed unjustified invasion of personal privacy under section 14(3)(d) or, in the alternative, would be considered to be an unjustified invasion of personal privacy on the basis that the information at issue is highly sensitive within the meaning of section 14(2)(f).

[98] As mentioned above, the appellant submits that if the names of students are severed, then there will not be an unjustified invasion of personal privacy because the individuals will not be identified. Furthermore, she submits that "disclosing non-personal information" about students injured at the school or complaints relating to the teacher is "desirable for the purpose of subjecting the activities of the institution to public scrutiny [(section 14(2(a))] and may also promote public health and safety [section 14(2)(b)] as well as facilitate the fair determination of rights affecting me and my child [section 14(2)(d)]. I have concluded that the records cannot be reasonably severed without disclosing personal information and so the issue is whether disclosure of the notebook entries would constitute an unjustified invasion of personal privacy.

[99] Giving the appellant's representations a broad reading, I understand the appellant to also submit that disclosure of the withheld information, in general, would not constitute an unjustified invasion of personal privacy and that disclosure is necessary for the same reasons noted above (i.e. the factors in sections 14(2)(a), (b) and (d) of the *Act*).

[100] The appellant also submits that if the board is correct that she is able to deduce the identity of the students described in the withheld information that a presumed invasion of privacy cannot arise under section 14(3) because it would amount to an absurd result: that the appellant already has knowledge of the incidents. The appellant has not provided any evidence to establish that she is otherwise aware of the information in the records.

[101] Finally, the appellant asserts that the board should have contacted affected parties to obtain consent.

[102] In reply, the board says that it has a positive obligation to protect the privacy of its students. The board replies that section 14(1)(a) of the *Act*, dealing with consent, only applies where an individuals has already consented in the context of an access request but that it has no obligation to notify the affected parties when it does not intend to disclose the information.

Analysis and Findings

[103] I accept the board's submission that it was not under any obligation to notify the

affected parties. The obligation in section 21 only arises when an institution intends to disclose the records.[21]

[104] In this appeal, the only possible exception to the exemption that could apply is section 14(1)(f) and so the issue then for determination is whether disclosing the withheld personal information would constitute an "unjustified invasion of personal privacy." If disclosure would not be an unjustified invasion of personal privacy, the section 14(1)(f0 exception to the personal privacy exemption applies and the information is not exempt under section 14(1).

[105] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[106] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.[22] In an analysis under section 14(1), a presumed unjustified invasion of personal privacy established under section 14(3) cannot be overcome by the existence any of the section 14(2) factors. Only the existence of a circumstance listed in section 14(4), or the application of the public interest override provision at section 16 can overcome a section 14(3) presumption.[23] Here, none of the section 14(4) circumstances is relevant and section 16 is not in issue.

Pages 14-23

[107] The board relies on section 14(3)(a) in support of its submission that disclosure of the information on pages 14-23 would constitute an unjustified invasion of personal privacy. Section 14(3)(a) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information:
>
> > Relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[108] The withheld information would indicate that a student was injured and received medical treatment, and the prognosis of this treatment. I agree with the board that the withheld information in pages 14-23, if disclosed, would reveal students' medical conditions and disclosure therefore would constitute a presumed unjustified invasion of

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[21] Order MO-1549
[22] *John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.) ("*John Doe*").
[23] *John Doe,* cited above.

personal privacy.

[109] In light of this finding, I need not consider the appellant's argument that sections 14(2)(a), (b) or (d) weigh in favour of a finding that disclosure does not constitute an unjustified invasion of personal privacy – as I noted above, a section 14(3) presumption cannot be rebutted by the existence of section 14(2) factors. Given the existence of a section 14(3) presumption, the section 14(1)(f) exception is not made out, and the information is exempt under section 14(1). I accordingly uphold the board's decision to withhold the withheld information on pages 14-23.

[110] I do not accept the appellant's argument that the application of section 14(1) would lead to any absurd result in this case. There is no information before me to suggest that the appellant does, in fact, already know about any of the incidents described in pages 14-23; as noted, the appellant makes the alternative submission.

The notebook entries

[111] As noted, the board argues that the information in the notebook entries relates to the educational history of the students and therefore that disclosure of these entries would constitute a presumed unjustified invasion of personal privacy within the meaning of section 14(3)(d) of the *Act.* Section 14(3)(d) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information:
>
> relates to employment or educational history;

[112] As noted, the appellant asserts that if the board is correct that she is familiar with the students described in the entries that the presumption should not apply to avoid the an absurd result. For the same reasons described above in relation to pages 14-23, I do not accept the appellant's argument that an absurd result will arise if the notebook entries are not disclosed to her.

[113] I will now turn to the board's argument that section 14(3)(d) applies. This office has addressed the application of the presumption against disclosure in section 14(3)(d).[24] To qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.

[114] Based on my review of the information, I do not agree that the personal information contained in the records relates to a significant part of the students' educational history. While the information reveals interactions with the school, they do

[24] Orders MO-3900, M-609, MO-1343, PO-3819.

not relate to significant things like the students' progress, standing or status in the school. I find that section 14(3)(d) does not apply to the notebook entries.

[115] With no presumption established, I must now consider whether disclosure of the entries would, nevertheless, be an unjustified invasion of personal privacy. Section 14(2) of the *Act* lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.[25] 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).[26]

[116] The appellant submits that the following factors in section 14(2) support her claim that disclosure of the information would not constitute an unjustified invasion of personal privacy:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[117] Section 14(2)(a) contemplates disclosure in order to subject the activities of the board to public scrutiny.[27] In consideration of the nature of the notebook entries, I am not persuaded that their disclosure would assist or impact on any public scrutiny that could come to bear on the board. The notes related to specific students and day-to-day events.

[118] Section 14(2)(b) contemplates disclosure in order to promote public health and safety. As I understand the appellant's representations, she relied more heavily on this factor in relation to the OSBIE forms. I have nevertheless considered this claim and have concluded that disclosure of the notebook entries could not have any impact on public health or safety.

[119] For section 14(2)(d) to apply, the appellant must establish that:

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[25] Order P-239.
[26] Order P-99.
[27] Order P-1134.

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing[28]

[120] Although the appellant asserts that section 14(2)(d) applies, she has not explained the nature of the legal right that she asserts, the nature of the proceeding, or how the information has any relation to that proceeding. Although the representations of both parties refer to legal proceedings between the parties, the appellant has also submitted that I not refer or consider that information in my determination of the issues in this appeal. Having said that, the appellant argues that she has, in general, been unfairly treated by the board and that her and her child's rights have been violated because of the board's actions.

[121] Accordingly, while it is clear that there are or have been disputes and legal proceedings between the board and the appellant, I do not have sufficient information to conclude that the factor in section 14(2)(d), which would weigh in favour of disclosure of the withheld information, applies.

[122] The board submits that section 14(2)(f) – "that the personal information is highly sensitive" – applies and weighs in favour of finding that disclosure would constitute an unjustified invasion of personal privacy. The board says that given its obligation to protect personal information of students, disclosure of the notebook entries would be considered highly distressing. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[29]

[123] I find that the notebook entries contain highly sensitive information and I agree that it is reasonable to conclude that the families referenced in those entries would be distressed if they were disclosed. I note and acknowledge that the appellant has only vigorously argued for disclosure of these records with identifying information severed. As noted, I have concluded that the notebook entries are not capable of being

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

reasonably severed.

[124] In addition, after reviewing the information, it is also my view that another factor favouring privacy protection applies: section 14(2) (h), which is:

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

[125] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[30]

[126] As submitted by the board, it has a mandatory duty to protect personal information of its students and families. Families interacting with the school would reasonably and objectively expect that records of communications pertaining to them would be maintained in confidence.

[127] After considering the information and the representations of the parties, I have concluded that disclosure of the notebook entries would constitute an unjustified invasion of personal privacy. While I have considered the factors argued by the appellant (sections 14(2)(a), (b) and (d)), I find that other factors that favour privacy protection (sections 14(2)(f) and (h)) ought to be given more weight.

[128] For the exception in section 14(1)(f) to apply – that is, for me to conclude that disclosure would not constitute an unjustified invasion of personal privacy – it must be established that one or more factors favour disclosure. As discussed above, I find that none of the factors favour disclosure and many weigh against disclosure. As a result, I find that the exemption in section 14(1) applies and I uphold the board's decision to withhold the notebook entries.

Issue F: Does section 38(a) in conjunction with section 12 (solicitor client privilege) apply to pages 42-48 and the two-page email?

[129] Pages 43-48 consist of the principal's summary of events involving the appellant prepared at the request of the board's legal counsel. Page 42 is the principal's email forwarding this to another board employee. The two-page email is a copy of an email from that employee to the board's legal counsel, enclosing the same attachment.

[130] I have found that these records contain the personal information of the appellant or her child. Section 36(1) of the *Act* gives the appellant a greater right of access to

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[30] Order PO-1670.

their personal information and, in this case[31], her child. However, the board asserts that pages 42-48 and the two-page email are exempt from disclosure because of section 38 of the *Act,* in conjunction with the solicitor-client communications exemption (section 12).

[131] Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6,7, 8, 8.1, .2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[132] 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.[32]

[133] 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.

[134] The board relies on section 38(a) in conjunction with section 12. 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.

[135] 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 board must establish that one or the other (or both) branches apply. I will provide an overview of section 12 and then consider the representations of the parties.

Section 12 – solicitor-client privilege

Branch 1: common law privilege

[136] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

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[31] As a result of section 54(c).
[32] Order M-352.

Solicitor-client communication privilege

[137] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[33] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[34] 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.[35]

[138] 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.[36]

Litigation privilege

[139] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[37] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[38] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[39] The litigation must be ongoing or reasonably contemplated.[40]

[140] Common law litigation privilege generally comes to an end with the termination of litigation.[41]

Branch 2: statutory privilege

[141] 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,

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[33] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[34] Orders PO-2441, MO-2166 and MO-1925.
[35] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[36] *General Accident Assurance Co*. v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[37] *Blank* v*. Canada (Minister of Justice)* (2006), cited above.
[38] *Ontario (Attorney General)* v*. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[39] *Ontario (Ministry of Correctional Service)* v*. Goodis*, 2008 CanLII 2603 (ON SCDC).
[40] Order MO-1337-I and *General Accident Assurance Co.* v. *Chrusz,* cited above; see also *Blank* v*. Canada (Minister of Justice)*, cited above.
[41] *Blank* v*. Canada (Minister of Justice)*, cited above.

although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[142] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[143] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[42]

[144] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[43]

Representations

[145] The board claims both branches of section 12 apply. The board explains that the records at issue form part of the continuum of communications between it and its legal counsel who was retained to respond to a lawsuit filed by the appellant. The board's representations emphasize the importance and sanctity of common law solicitor-client and litigation privilege with reference to Supreme Court of Canada decisions.[44] The board refers to Order PO-3665, decided under the equivalent sections of the *Freedom of Information and Protection of Privacy Act*, as an order where the adjudicator determined that records relating to an investigation conducted at the direction of legal counsel in order to provide legal advice and in anticipation of litigation were subject to the solicitor- client privilege exemption.[45]

[146] In response, the appellant provides context about the legal proceedings referred to in the board's representations. She asks that this office protect her and the public's interest, which I understand the appellant to mean her right to access personal information about her and her child and to properly scrutinize the board's exercise of discretion in withholding this information.

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[42] See *Ontario (Attorney General)* v. *Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service)* v. *Goodis*, cited above.
[43] *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[44] *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, 2010 SCC 23, *Canada (Attorney General)* v. *Federation of Law Societies of Canada*, 2015 SCC 7 and *Blank* v*. Canada (Minister of Justice)* (2006), cited above.
[45] Order PO-3665.

Analysis and Findings

[147] I find the two-page email is, on its face, a common law solicitor-client privileged communication between the board and its lawyer. I uphold the board's decision to apply section 38(a) in conjunction with section 12 to withhold access to this email.

[148] For the reason that follow, I find that the summary and the email from the principal to the board employee are subject to litigation privilege under Branches 1 and 2 and I accordingly uphold the board's decision to withhold pages 42-48 under section 38(a).

[149] Based on the evidence before me, I accept that the records were created in response to a request from legal counsel that was necessary only because of a legal proceeding ongoing at the time between the appellant and the school. Pages 42-48 were prepared within the zone of privacy necessary to prepare a case for litigation that was, in fact, ongoing.

[150] As I noted above, the branch 2 litigation privilege does not end when the litigation ends. Therefore, even if the litigation in question has now concluded, the privilege continues to apply.

[151] Accordingly, I find that section 12 applies to this information and I will now consider whether the board properly exercised its discretion under section 38(a).

Issue G: Did the board exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

[152] The section 38(a) exemption is discretionary, and permits 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. In addition, this office may find that the institution erred in exercising its discretion where, for example,

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

[153] While I may send the matter back to the board for an exercise of discretion based on proper considerations,[46] I may not substitute the board's own discretion for

[46] Order MO-1573.

that of the institution.[47]

[154] The appellant asserts that in deciding to withhold records[48] the board had an ulterior motive to prejudice her in her other legal proceedings against the board and it acted in bad faith toward her. As I understand the latter submission, the appellant asserts that the board's actions toward her in other proceedings are evidence of the board's bad faith.

[155] The board submits that it properly exercised its discretion to withhold pages 42-48 and the two-page email and has acted in good faith with regard to appropriate considerations. The board submits it considered the appellant's interest in receiving the records including the fact that they contain her personal information and the public interest in transparency. The board weighed these considerations against the need for confidentiality and the fact that there is ongoing litigation by the appellant. The board was also concerned about the risk of waiving privilege by disclosing these records to the appellant. The board explains that it concluded that the potential for harm from disclosure outweighed any public interest in release of the records.

[156] Relevant considerations in the exercise of discretion may include those listed below:

- 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;
- whether the requester has a sympathetic or compelling need to receive the information;

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[47] Section 43(2).

[48] The appellant's representations on this issue, although under the heading of solicitor-client privilege, appear to relate to all of the board's decisions. I note this to acknowledge the appellant's point of view; however, this section of the order deals only with the board's exercise of discretion under section 38(a) in conjunction with section 12.

- 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;

[157] After review of the representations, I find that the board considered appropriate factors, including that the appellant sought her own (or her child's) personal information. The board also considered other considerations, such as its interest in protecting privileged information in the context of a legal dispute, and on the basis of those considerations concluded that it would not disclose the records. In reaching this conclusion, I have been persuaded by the board's overall response to the request. In my view, its actions indicate that it understands that different considerations may come to bear on records that contain a requester's own personal information. I uphold the board's exercise of discretion.

Issue H: Did the board conduct a reasonable search for records?

[158] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[49] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the board's decision. If I am not satisfied, I may order further searches.

[159] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[50] To be responsive, a record must be "reasonably related" to the request.[51]

[160] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[52]

[161] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

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[49] Orders P-85, P-221 and PO-1954-I.
[50] Orders P-624 and PO-2559.
[51] Order PO-2554.
[52] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[53]

[162] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[54]

Representations

[163] The board provided affidavit evidence describing the search undertaken. The board's freedom of information coordinator managed the request, first identifying people who would likely have responsive records. This included a list of three employees. Two of these employees advised that they "had no responsive records." One employee, who provided an affidavit in this appeal, searched for records in their possession and provided those to the coordinator. The board says that the appellant has provided no basis for her assertion that additional records exist.

[164] In response, the appellant makes several specific claims that additional records ought to exist. I will describe each claim and the board's response.

[165] The appellant was provided with eight pages of hand-written notes, responsive to part 4 of her request – reports made by the school to the police and children's aid society, etc. in which the appellant or her child's name appear.[55] These eight pages of notes are from various dates in 2016. The appellant says: "The current principal has indicated that there are principal's notes dated before [2016], which relate to me and/or my [child]." The board says that the records sought by the appellant in her representations are outside of the scope of the original request, noting that the appellant's request was not a request for all records relating to the appellant and her child. The board's affirms its position that the records produced in response to part 4 of the appellant's request are complete.

[166] The appellant also says that in response to part 4 of her request, the board should have interpreted "etc." to mean "any communication internal or external related to any of my [child's] interactions with the institution." The board replies that while it gave part 4 of the appellant's request a liberal reading to include informal records such as the principal's notes, it is not reasonable for the appellant to suggest that "etc." referred to all of the appellant's interaction with the board. The board states that the request as framed by the appellant in her representations, "bears little resemblance to the request" made and further that it is an "entirely different request" to the one that was made.

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[53] Order MO-2185.
[54] Order MO-2246.
[55] "Reports made by [the specified school] before the Police, CAS [Children's Aid Society] etc. in which my name or my [child's] name appear. My [child's] name is [name of child]."

[167] Regarding parts 5 and 6 of the appellant's request – copies of the practice book and the insurance policy – the appellant says that there exist records of communication relating to the insurance policy and her requests for the practice book. In response, the board submits that parts 5 and 6 were unambiguously requests for a single record and they rely on the wording used by the appellant in her request: "My [child's] EQAO book from Grade3: or at least the last pages with my highlights"; and, "Copy of the Board's insurance policy contracted with OSBIE [Ontario School Boards' Insurance Exchange] or any other insurance company."

[168] Regarding part 2 of her request, accident reports, the appellant believes that there were more than 8 accidents at the school and accordingly she calls into question the sufficiency of the search in response to that request. The board does not specifically address this claim but says, "[t]he other objections made by the Appellant to the Board's search amount to simple speculation to that further records exist which have not been produced. [The appellant] has not offered any basis to believe that the Board has failed to conduct a reasonable search…."

[169] The appellant submits that the board should have asked the teacher referred to in part 3 of her request to search for records. In response, the board refers to its original representations about how its freedom of information coordinator carried out the search, including how she assessed who to ask and the evidence from one of those asked (the principal) that if records responsive to part 3 (complaints about a specified teacher) existed, the principal would have possession of them.

Analysis and Findings

[170] I find there is sufficient evidence before me to conclude that the board's search was reasonable. I am satisfied that employees with sufficient expertise, knowledge of the circumstances and experience conducted the search and that these employees reasonably determined the locations to search. Although the appellant has raised certain questions, she has not put forward a reasonable basis to suggest that additional records that are within the scope of the request exist and I find the board's explanations persuasive.

[171] I agree with the board that some of the appellant's representations on this issue are in fact entirely new requests for information and are therefore not before me in this appeal.

[172] Before leaving this issue, it is important to acknowledge and address one aspect of the appellant's submission. The appellant submits that the board's search was not reasonable because certain responsive records were not identified until the mediation stage of the appeal process. I do not accept this argument and give it no weight.

ORDER:

1. I order that the board issue an access decision for the page 29 entry, page 24 and the one page email treating the date of this order, for administrative purposes, as the date of the request.

2. I uphold the board's decision to withhold certain records and withheld information because they are not responsive to the appellant's request.

3. I uphold board's decision to withhold certain information on pages 14-23 and the notebook entries, as defined in this order, on the basis of the mandatory section 14(1) personal privacy exemption.

4. I uphold the board's decision to withhold pages 42-48 and the two page email on the basis of section 38(a) in conjunction with section 12.

Original signed by | April 29, 2020

Valerie Jepson
Adjudicator