Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3944

Appeal MA16-566

Toronto District School Board

August 14, 2020

Summary: The appellant submitted a request to the Toronto District School Board (the board) seeking access to records relating to athletic domes/projects at specified Toronto schools. The board issued a decision granting the appellant access to most of the records responsive to the request. However, it withheld certain information on the basis that it was exempt from disclosure under the mandatory personal privacy exemption at section 14(1) (personal privacy) or the discretionary exemptions at section 6(1)(b) (closed meeting) and section 12 (solicitor-client privilege). The board also claimed that some records were not in its custody or under its control as required under section 4(1) of the *Act*. The board also took the position that some of the records were not responsive to the appellant's access request. At mediation, the appellant indicated that he would like access to all of the withheld information, including non-responsive information and was also of the view that more records should exist, therefore, challenging the reasonableness of the board's search. In this order, the adjudicator upholds the application of the personal privacy exemption, in part. The adjudicator upholds the board's decision with regard to the solicitor-client privilege claim and finds that the board's search was reasonable. He also finds that certain information is not responsive to the request. The adjudicator finds that the information the board claimed was not within its custody or under its control is within its custody or under its control and orders the board to issue an access decision relating to that information. Finally, the adjudicator upholds the board's claim that certain records are exempt from disclosure under section 6(1)(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.M.56, as amended, sections 4(1), 2(1) (definition of "personal information"), 12 and 14.

Cases Considered: *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg,* (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.), *City of Ottawa v. Ontario,* 2010 ONSC 6835 (CanLii).

OVERVIEW:

[1] The appellant made the following request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. All emails sent or received by [named individual] between the dates of September 1, 2013 and March 1, 2016 that contain any of the following words (in part or in full) in context to the [named project] and MPAC tax assessment situation, [named dome] or [named company]: [named school], [named company], [named company], [named individual], Taxes, MPAC, [named dome], [named company], exemption, school capital facility, License Agreement, [named individual], [named individual], [named individual], [named individual].

2. All emails sent or received by [named individual] between the dates of September 1, 2013 and March 1, 2016 that contain any of the following words (in part or in full) in context to the [named project] and MPAC tax assessment situation, [named dome] or [named company]: [named school], [named company], [named company], [named individual], Taxes, MPAC, [named dome], [named company], exemption, school capital facility, License Agreement, [named individual], [named individual], [named individual], [named individual].

[2] The board acknowledged receipt of the request and informed the appellant that they had changed the date range of the request to September 1, 2013 to February 29, 2016 as they cannot search future dates for records and the request was received on February 29, 2016.

[3] The board subsequently advised the appellant that they were applying a time extension pursuant to section 20(1) and further advised of the new time limit for responding. The board noted that the additional time was required to review the voluminous number of responsive records.

[4] The board issued an interim decision and fee estimate of $100. The board requested payment of the fee and advised the appellant that partial access would be granted to the records. Access to the withheld information was denied pursuant to sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege), and 14 (personal privacy). The board also noted that access to certain records was withheld because these records were not responsive to the request.

[5] Upon receipt of the fee, the board issued a final decision granting partial access to the records responsive to the request. Access to the withheld information was denied by the board under sections 7(1) (advice or recommendation), 10(1) (third party information), 12 and 14(1). The board again noted that certain records were withheld as not responsive to the request.

[6] The requester, now the appellant, appealed the board's decision.

[7] During mediation, the board reconsidered its decision and notified three affected parties of the request pursuant to section 21(1) of the *Act*. All three of the affected parties provided the board with their consent to disclose the records for which they were notified.

[8] The board subsequently issued a revised decision granting partial access to further records previously withheld. The board continued to deny access to the withheld information pursuant to sections 12 and 14(1) of the *Act*. The board also noted that certain information was withheld as it was not responsive to the request. The board continues to rely on the exemption at section 7(1) and also indicated that it was relying on the exemptions at sections 6(1)(b) and 15 (information available to the public). The board also claims that some information is not within its custody or control.

[9] As the board sought to claim the application of sections 6(1)(b) and 15 for the first time, the mediator raised the issue of the late-raising of a discretionary exemption. The appellant confirmed with the mediator that he continues to seek access to all of the withheld information including the records identified as not responsive. The appellant also believes that additional responsive records should exist at the board. Accordingly, the issue of reasonable search has been added to the scope of the appeal.

[10] As mediation was not successful, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The original adjudicator invited the parties to provide representations which were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The file was then transferred to me to continue the adjudication of the appeal.

[11] In its representations, the board did not address its reliance on sections 7(1) and section 15 and subsequently confirmed that it is no longer relying on these exemptions.

[12] For the reasons set out below, I uphold the board's decision to deny access to the records under section 14(1), in part. I do not uphold the board's claim that a record is not within its custody or control and order the board to issue an access decision with respect to that information. I uphold the board's claim that the discretionary exemptions at sections 6(1)(b) and 12 apply to exempt the withheld information and also uphold its claim that certain records are not responsive. Finally, I find that the board's search was reasonable.

RECORDS:

[13] At issue in this appeal are emails, some with attachments, withheld in full or in part and which are contained in Record 1, which consists of 192 pages of information

and Record 2, which consists of 545 pages of information.[1] The board separated the records into categories which include:

- Information which the board claims is not within its custody or under its control
- Information withheld under section 14(1)
- Information withheld under section 6(1)(b)
- Information withheld under section 12
- Information the board submits is not responsive to the access request.

ISSUES:

A. Is the record "in the custody" or "under the control" of the institution under section 4(1)?

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

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

D. Should the board be permitted to raise a claim to the discretionary exemptions found in section 6(1)(b) of the Act?

E. Does the discretionary exemption at section 6(1)(b) apply to the records?

F. Does the discretionary exemption at section 12 apply to the records?

G. Did the institution exercise its discretion under sections 6(1)(b) or 12? If so, should this office uphold the exercise of discretion?

H. What is the scope of the request? What records are responsive to the request?

I. Did the institution conduct a reasonable search for records?

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[1] For the purpose of this order, I will refer to the records as the board did in its representations which is two batches of records (Records 1 and 2) with several pages for each batch numbered consecutively.

DISCUSSION:

Issue A: Is the record "in the custody" or "under the control" of the institution under section 4(1)?

[14] The board takes the position that an email (page 181 of Record 1) sent by one of its employees utilizing their workplace email address is not in the custody or control of the board.

[15] Section 4(1) of the *Act* reads, in part:

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

[16] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody *or* under the control of an institution; it need not be both.[2] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[3] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption.

Are the records in the "custody or control" of the board, on the basis of established principles?

[17] The courts and this office have applied a broad and liberal approach to the custody or control question.[4] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[5] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

[18] Moreover, in determining whether records are in the "custody or control" of the board, the above factors must be considered contextually in light of the purpose of the legislation.[6]

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[2] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] Order PO-2836.
[4] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[5] Orders P-120, MO-1251, PO-2306 and PO-2683.
[6] See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.

[19] In addition to the above factors, the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*[7] articulated a two-part test to determine institutional control of a record:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[20] According to the Supreme Court, control can only be established if both parts of this test are met.

[21] To determine whether the email record listed above is in the custody or under the control of the board, I must consider the factors contextually in light of the purpose of the legislation.[8]

Representations

[22] The board submits that an email in Record 2 (page 181) is not in its custody or control. The board submits that the record at issue in this appeal is of a similar nature to those found to be outside the custody or control of the institution in *City of Ottawa v. Ontario*.[9] The board submits that the email was generated by an employee of the board, however, on its face, it is of a personal nature and contains no reference to board business. The board submits that it never relied on this record for its business. The board submits that the email was not used as part of an official records of trustee business or presented in trustee meetings.

[23] The appellant, who provided representations, did not address whether this record was in the custody or control of the board.

Analysis and finding

[24] In its representation, the board relies on *City of Ottawa v. Ontario* and submits that as this email is of a personal nature and contains no reference to board business, it is not in its custody or control. Having regard to the above, I do not agree.

[25] In reviewing *City of Ottawa v. Ontario*, I note that the email in that instance was a personal email sent by a government employee using his workplace email address. The Divisional Court held that this was private communication of an employee using his

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[7] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].
[8] *City of Ottawa v. Ontario*, cited above.
[9] 2010 ONSC 6835 (CanLii).

workplace email address and was unrelated to government business. However, the email in this appeal is not "private communication" as it is an email that is being sent by one board employee to another and appears at the end of a chain of emails that clearly related to the board's business. After reviewing the email in this appeal, I do not agree that it is a personal email with private communications sent by a government employee using their workplace email address. In this instance, the email appears at the end of a chain and although it is addressed to one person, that person is clearly also an employee of the board. In my view, this is not a personal email that contains private communication as in *City of Ottawa v. Ontario*.

[26] I also find that the board has institutional control over the record as it meets the two-part test set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*. I find that the record relates to departmental matters given that it appears in a chain of emails that the board claims are responsive to the request. Also, I find that the board could be reasonably expected to obtain a copy of the record in question upon request from the employee.

[27] Accordingly, I conclude that the email is in the custody or under the control of the board. As a result, the board will be ordered to issue an access decision with regard to this information.

Issue B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[28] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, 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,
> >
> > (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,
> >
> > (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;

[29] 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.[10]

[30] 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.[11]

[31] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[12]

Representations

[32] The board submits that the withheld records at pages 52 to 56, 119, 120, 148, 167, 168 and 183 of Record 1 and pages 70, 71, 73 and 74 of Record 2 contains the personal information of individuals involved in a petition and/or expressing opinions on the specified school's stadium and/or addressing a claim of hate mail which arose in the course of the stadium discussions. The board also submits that where it was unclear if information was personal or professional, it erred on the side of assuming that it was personal information.

[33] The appellant did not address whether the records contained personal information and also did not address whether he was seeking access to personal information as he was specifically requested to do during the inquiry.

Finding

[34] Based on my review of the information that the board claims is personal, I find that the records contain information relating to affected individuals that qualifies as their personal information. The records contain information relating to these individuals including their names appearing with phone numbers, email addresses and physical addresses (paragraph (d) of the definition of personal information). Moreover, I find that the records do not contain any information that qualifies as the personal information of the appellant.

[35] However, there is some withheld information that I find is clearly professional rather than personal information of affected individuals. Specifically, this is the information withheld on page 70 of Record 2. As only personal information can be exempt under section 14(1), I find this information is not exempt under section 14(1).

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[10] Order 11.
[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[12] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Moreover, as the board has not claimed any discretionary exemptions for this information and no other mandatory exemptions apply, I will order this information disclosed.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue?

[36] Since I found that the records contain the personal information of affected parties, I must consider whether section 14(1) applies to this information. Where a requester seeks 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.

[37] 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.

[38] The information in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) of the *Act*. The board submits that the affected parties' have not consented to the disclosure of their personal information (section 14(1)(a)).

Sections 14(2) and (3)

[39] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy. None of the section 14(4) paragraphs are relevant in this appeal.

Section 14(3) presumption

[40] 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 under section 14.

[41] The board did not submit that any presumptions under section 14(3) might apply.

Section 14(2) factors

[42] I will now consider any factors in section 14(2). 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.[13] The factors listed at paragraphs 14(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 14(2)(e) through (i), if present, generally weigh in favour of non-disclosure.

Finding

[43] The appellant did not identify any factors favouring disclosure of the personal information at issue. 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.[14] In the present appeal, the appellant did not address the application of section 14(1) to the personal information withheld, nor did he raise any factors, listed or unlisted, favouring disclosure in section 14(2). Accordingly, I find that the mandatory personal privacy exemption in section 14(1) applies to exempt the personal information from disclosure.

Issue D: Should the board be permitted to raise a claim to the discretionary exemption found in section 6(1)(b) of the *Act*?

[44] As noted, the board first raised the possible application of the discretionary exemption in section 6(1)(b) in its revised decision and the late raising of the discretionary exemption was added as an issue at mediation. This exemption permits an institution to refuse to disclose a record if the disclosure would reveal the substance of deliberations of a meeting of a board if a statute authorizes holding that meeting in the absence of the public.

[45] Institutions are required to claim discretionary exemptions no later than 35 days after the Notice of Mediation is sent by this office. Section 11.01 of the *IPC Code of Procedure states*:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

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[13] Order P-239.
[14] Orders PO-2267 and PO-2733.

[46] The purpose of this policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[15]

[47] In the Notice of Inquiry that was sent to the parties, I note that the parties were asked to consider the following:

- Whether the board would be prejudiced in any way if it is not permitted to raise a new discretionary exemption
- Whether the appellant would be prejudiced in any way if the board is permitted to raise a new discretionary exemption at this stage of the process
- Would the integrity of the appeals process as established by this office be interfered with if the board is permitted to raise a new discretionary exemption at this stage of the process.

[48] Neither the board, nor the appellant, addressed whether the board ought to be entitled to rely on the discretionary exemption in section 6(1)(b).

Analysis and finding

[49] This office has the power to control the manner in which the inquiry process is undertaken.[16] This includes the authority to set a limit on the time during which an institution may raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[17] Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[50] In determining if the board should be permitted to raise a claim to the discretionary exemption at section 6(1)(b), I must weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the institution's interests that may be caused if the exemption claim is not allowed to proceed.

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[15] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg),* Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). *See also Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[16] Orders P-345 and P-537.

[17] (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.).

[51] In my view, allowing the board to make this late exemption claim would not compromise the integrity of the appeal process or prejudice the appellant's interests.

[52] I note that although the board raised the discretionary exemption after the 35-day time period, it raised it during the mediation stage of the process and in its representations, during the inquiry, clarified that the discretionary exemption only applied to pages 69 to 81 of Record 1. The possible application of this exemption was subsequently included as an issue on appeal in the Notice of Inquiry that was provided to the parties. As a result, its inclusion did not result in any delays to the adjudication process and the appellant was provided with an opportunity to provide full representations as to whether the information for which it was claimed qualified for exemption under the relevant sections. The appellant was able to respond to the board's representations on the issue. In the circumstances, I find that the late raising of the additional exemption has not resulted in any delays that have unduly prejudiced the appellant's position.

[53] As a result, I am satisfied that the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the board to raise the application of the discretionary exemption for at section 6(1)(b) beyond the 35-day time period for raising discretionary exemptions.

Issue E: Does the discretionary exemption at section 6(1)(b) apply to the records?

[54] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[55] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting[18]

[18] Orders M-64, M-102 and MO-1248.

[56] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[19] and
- "substance" generally means more than just the subject of the meeting.[20]

[57] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[21]

[58] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[22]

[59] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?[23]

[60] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[24]

Representations

[61] In its representations, the board clarifies that the only records it claims are exempt under section 6(1)(b) are pages 69 to 81 of Record 1. The board submits that these pages contain documents provided to the Administration, Finance and Accountability Committee of the board at an in-camera meeting. The board submits that the meeting was conducted in order to permit it to deliberate upon whether to authorize the director of the board to enter into a license agreement for the building of

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[19] Order M-184.
[20] Orders M-703 and MO-1344.
[21] Order MO-1344.
[22] Order M-102.
[23] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).
[24] Orders MO-1344, MO-2389 and MO-2499-I.

a facility at one of its schools. The board refers to an affidavit sworn by the manager, board services and FOI coordinator which was included with its representations.

[62] The board submits that the meeting was appropriately held in camera and refers to section 207(2)(c) of the *Education Act* which it submits permits a committee of the board to conduct a meeting in private when the subject matter under consideration concerns the acquisition or disposal of a school site. The board submits that the term "disposal" is used broadly in the *Education Act* involving a wide variety of transfers of property rights as indicated in section 194(1) which, the board submits, permits it to "sell, lease or otherwise dispose of the real property." The board submits that it is clear that the terms of the licence agreement (page 11 to 68 of Record 2), envision the transfer of certain property rights to the licensee for the facility to be built on the school property including rights of occupancy, permitted use and limited forms of transfer of such rights.

Analysis and finding

[63] As noted above, in order to establish that the exemption in section 6(1)(b) applies, the institution must establish that each part of the following three-part test has been met:

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting[25]

[64] In the circumstances of this appeal, and for the following reasons, I find that the requirements in section 6(1)(b) have been met.

Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting

[65] In reviewing the board's representations along with the records that it claims are exempt under section 6(1)(b), I accept that a meeting did, in fact, take place. Therefore part 1 of the three part test under section 6(1)(b) has been met.

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[25] Orders M-64, M-102, MO-1248.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

[66] The board relies on section 207(2)(c) of the *Education Act* as its authority to hold meetings in the absence of the public. Section 207(2)(c), states:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves
>
> (c) the acquisition or disposal of a school site;

[67] The board refers to section 194(1) of the *Education Act* which it submits permits it to "dispose" the real property and states:

> A board that is in possession of real property that was originally granted by the Crown for school purposes and that has reverted or may have reverted to the Crown may continue in possession of the real property for school purposes and when the board determines that the real property is no longer required for school purposes, the board may, with the approval of the Lieutenant Governor in Council and subject to such conditions as are prescribed by the Lieutenant Governor in Council, sell, lease or otherwise dispose of the real property.

[68] According to the affidavit of the manager, board services and FOI coordinator, the person responsible for maintenance of records kept from in-camera meetings, a meeting was held by the Accountability Committee of the board and it was in-camera. The affiant swears that the purpose of the meeting was to permit the committee to deliberate on whether to authorize the board's director to enter into a contract with a third party to develop a sports facility on one of the board's school sites.

[69] I accept the board's submission that the meeting was appropriately held in-camera under section 207(2)(c) of the *Education Act* because it was examining whether to enter into a contract with the third party for it to develop a sports facility on one of its sites.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

[70] Under Part 3 of the test:

- "deliberations" refer to discussions conducted with a view towards making a decision[26]

- "substance" generally means more than just the subject of the meeting[27]

[71] Previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question[28], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

[72] Based on my review of the severed information on pages 69 to 81 of Record 1, I find that disclosure of its contents would reveal the substance of the deliberations at the closed meeting. Accordingly, I conclude that the third part of the test has also been met.

[73] No party argued that the section 6(2)(b) exception to the exemption applies and I do not see that it would apply. Accordingly, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt from disclosure the severed information on pages 69 – 81 of Record 1.

Issue F: Does the discretionary exemption at section 12 apply to the records?

[74] Section 12 states as follows:

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

[75] 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.

Branch 1: common law privilege

[76] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the board claims the application of the common law solicitor-client communication privilege.

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[26] Order M-184.
[27] Orders M-703, MO-1344.
[28] See Order M-98, M-208.

Solicitor-client communication privilege

[77] 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.[29] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[30] 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.[31]

[78] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[32]

[79] 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.[33] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[34]

[80] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[35] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[36]

Loss of privilege

Waiver

[81] 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.[37]

[82] An implied waiver of solicitor-client privilege may also occur where fairness

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[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[30] Orders PO-2441, MO-2166 and MO-1925.
[31] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[32] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[33] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[34] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[35] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[36] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[37] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[38]

[83] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[39] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[40]

Legal Fees and Billing Information

[84] Legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.[41]

Representations

[85] The board, referring to the Court of Appeal in *Balabel v. Air India*[42], submits that the concept of solicitor-client privilege extends beyond express requests for and provision of advice and applies to the continuum of communications between legal counsel and client.

[86] The board submits that the records withheld under section 12 fall squarely within the category of solicitor-client privilege as described in *Balabel*. It relies on an affidavit sworn by its legal counsel.

[87] The board submits that the information that was withheld under section 12 constitutes a continuum of communications between the board's internal legal counsel and elected officials. The board submits that these records clearly contain legal advice on their face or detailed legal invoices which clearly fall within the scope of privilege. The board submits that the IPC has previously determined that a rebuttable presumption of privilege arises with respect to legal invoices.[43] The board also submits that it is clear on the face of the legal invoice information that it would provide not simply an aggregate fee but a detailed breakdown of services thus extending beyond simple "neutral" information.

[88] The board also submits that it has not waived its privilege.

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[38] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[39] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[40] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[41] *Maranda v. Richer,* [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).
[42] [1988] 2 ALL E.R. 246 (C.A.).
[43] Order MO-3455.

[89] The board included an affidavit sworn by its legal counsel with its representations. In that affidavit, the affiant indicated that she was advised, by the legal counsel employed by the board during the relevant time, that in conjunction with another former legal counsel for the board, they were involved in several legal matters related to the construction of the facilities at the specified school. The affiant states that the board's legal counsel were involved in both a mediation process conducted by the OMB in order to eliminate the need for litigation concerning the issues surrounding the project and communications with the appellant.

[90] The affiant submits that legal counsel acted for the board in the mediation process with a view to negotiating minutes of settlement and in the course of acting on the board's behalf engaged in a course of confidential communications with trustees, in particular one of the specified trustees. The affiant submits that the communications were used to apprise the trustee and others involved in providing input regarding the ongoing issues and seeking input for the purpose of informing legal counsel's position at mediation. The affiant submits that this correspondence was conducted in confidence and copied only to senior staff and other board trustees as necessary.

[91] The affiant also submits that the board's legal counsel were engaged in ongoing discussions with representatives for the appellant in terms of ongoing administration issues arising from the contract between the parties. According to the affiant, the board also retained external counsel as it appeared that there were a number of legal issues which had the prospect of giving rise to litigation between the parties over the contents of a contract and adherence to same. The affiant states that in the course of these legal issues, the board's internal legal counsel continued to engage in confidential communications to apprise the trustees directly involved in the matter as well as senior staff and to obtain their input on attempting to address the issues. The affiant states that these issues included whether the contractor would comply with its legal obligations under the contract, the tax exempt status of the contractor and the board's role in obtaining tax exempt status.

[92] The appellant did not address the board's position that the discretionary exemption at section 12 applies to the withheld information.

Analysis and finding

[93] I have reviewed the records for which the board is claiming the section 12 exemption and accept that the withheld information is exempt from disclosure under Branch 1, solicitor-client communication privilege. The records contain direct communications of a confidential nature between a solicitor and board staff.

[94] After my review of the records, I find that they consist of direct communications by way of email exchanges between board staff and a staff solicitor, one of the individuals specified in the request, made for the purpose of obtaining or giving professional legal advice. As noted, the rationale for this type of privilege is to ensure that a client may freely confide in their lawyer on a legal matter. Confidentiality is an

essential component of the privilege, and I am satisfied by reviewing the records and the board's representations, that the communications were made in confidence.

[95] Some of the information at issue in this appeal is contained in a legal invoice submitted by the solicitor to his client, and is clearly legal billing information.

[96] I note that the Supreme Court of Canada's decision in *Maranda v. Richer*[44], specifically found that information in legal invoices is presumptively privileged and, therefore, qualifies for exemption unless it can be established that the information is neutral. Accordingly, in these circumstances, the burden of proof does not rest with the town, and the information is exempt unless I find that the information (or any portions of the information) is "neutral." As noted, the appellant did not address the section 12 exemption in his representations. In reviewing the information in this record, I find that the appellant's interest in the particulars of the fees charged by the town's legal counsel as well as his knowledge of the underlying matters indicates to me that he would qualify as an "assiduous inquirer" as contemplated in the *Maranda* decision and therefore the information in the invoices cannot be viewed as "neutral." I am also of the view that the "bottom line" numbers on the invoices are not neutral because, due to the appellant's knowledge of underlying matters, they would impart privileged information to him. I find that, in all the circumstances, the presumption of privilege has not been rebutted by the appellant, and that the information in the invoices is solicitor-client privileged information under Branch 1 of section 12.

[97] Further, I find that the board has not waived its privilege in the withheld records.

Issue G: Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

[98] The sections 6(1)(b) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

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[44] [2003] 3 S.C.R. 193. See also Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); and *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

- it fails to take into account relevant considerations.

[100] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[45] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[101] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[46]

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

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[45] Order MO-1573.
[46] Orders P-344 and MO-1573.

Representations

[102] In its representations, the board speaks to exercising its discretion regarding sections 6(1)(b) and 12.

[103] The board acknowledges that the factors support disclosure, including that records should be available to the public and exemptions limited and specific. The board submits that on the countervailing side, it notes that the records in dispute do not contain the appellant's personal information and that he has not presented a sympathetic or compelling reason for the records. The board submits that there is no evidence that has been presented that the records are necessary for the purpose of increasing public confidence. The board submits that the request was made in the context of an ongoing commercial relationship between it and the contractor, which at times has given rise to risks of litigations identified in the affidavit of its legal counsel. The board submits that given the relationship between the contractor and the institution, it has reason to believe that the records at issue remain sensitive.

[104] The appellant did not address the board's exercise of discretion in his representations.

Finding

[105] In reviewing the board's exercise of discretion, I find that it did not err in its exercise of discretion. Taking into account all of the circumstances present in this appeal, including my review of the withheld information in the records, the board's representations on the exemptions and the fact that I have upheld the severances claimed, as well as the importance of solicitor-client privilege as recognized by the courts, I am satisfied that the board has appropriately exercised its discretion under sections 12 and 6(1)(b) of the *Act*. I am satisfied that the board took into account relevant considerations and did not take into account irrelevant ones. Accordingly, I uphold the board's exercise of discretion to withhold this information.

What records are responsive to the request?

[106] 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).

[107] 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.[47]

[108] To be considered responsive to the request, records must "reasonably relate" to the request.[48]

Representations

[109] The board submits that the appellant was seeking information "in context to [a specified school's] Championship Field." The board submits that it is clear on the face of each record or portion of record identified that the subject matter does not relate to the subject of the request or the building of the facility at that location and therefore falls outside the scope of the request.

[110] The appellant did not speak to this issue in his representations.

Finding

[111] After a review of the portions of the withheld information that the board submits are not responsive to the appellant's request, I agree with the board. In my review, it is clear on the face of each record or portion of record identified as not responsive, that the subject matter does not relate to the subject of the request or the building of the facility at that location and therefore falls outside the scope of the request. Accordingly, I find that the board is not required to disclose the information it has identified as not responsive to the request.

Issue I: Did the institution conduct a reasonable search for records?

[112] 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 institution's decision. If I am not satisfied, I may order further searches.

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[47] Orders P-134 and P-880.
[48] Orders P-880 and PO-2661.
[49] Orders P-85, P-221 and PO-1954-I.

[113] 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]

[114] 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]

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

[116] 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

[117] The board submits that at no time did the appellant identify any basis for the claim that its search was not reasonable. The board submits that it conducted a search of emails responsive to items (a) and (b) of the request using the specific terms identified by the request and the located records were provided to the appellant in whole or in part.

[118] The board provided an affidavit in support of its search with its representations. In the affidavit, sworn by the freedom of information and privacy analyst for the board, the affiant stated that as part of her functions she coordinates the searches for records under the *Act*. The affiant swears that she organized the search for any email correspondence that would be responsive to the request. In coordinating the search, the affiant states that she contacted the chief technology officer in the board's IT department, who is responsible for board databases including email databases. The affiant swears that she was informed that the IT department conducted a search through the entire email database for the two board employees noted in the request using the search terms set out in the request. The affiant swore that she was provided with the records obtained through the search which were reviewed and provided to the appellant save and except for those records or portions of records at dispute in this appeal.

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[50] Orders P-624 and PO-2559.
[51] Order PO-2554.
[52] Orders M-909, PO-2469 and PO-2592.
[53] Order MO-2185.
[54] Order MO-2246.

[119] Although the appellant maintained that the board's search was not reasonable, he does not address this issue in his representations.

Finding

[120] As noted above, although an appellant will rarely by in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. However, on my review of the appellant's representations, he does not address the board's search and does not provide a reasonable basis to conclude that further records exist.

[121] Having reviewed the representations and evidence of the parties, I am satisfied that the board conducted a reasonable search for responsive records in this appeal. I accept the affidavit evidence provided, that it has made reasonable efforts to identify and locate responsive records. I find that the appellant's position that further records exist is not supported by any evidence to establish that there is a reasonable basis to conclude that additional records should exist. Accordingly, I uphold the board's search for responsive records.

ORDER:

1. I uphold the board's decision regarding sections 6(1)(b) and 12 of the *Act*.

2. I uphold the board's decision regarding section 14(1), in part, and order it to disclose the withheld information on page 70 of Record 2 as set out in the highlighted copy of that page provided with the board's copy of this order. To be clear, highlighted portions of this record should be disclosed to the appellant by **September 22, 2020** but not before **September 14, 2020**.

3. I do not uphold the board's decision regarding custody or control and order it to issue an access decision for the withheld information at page 181 of Record 2.

4. For administrative purposes, the board should treat the date of this order as the date of the request.

5. I uphold the board's search as reasonable.

Original signed by: August 14, 2020

Alec Fadel
Adjudicator