Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4002-I

Appeal MA18-151-2

Toronto Catholic District School Board

January 26, 2021

Summary: The requesters made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Catholic District School Board (the board) for access to records related to alleged bullying incidents at their son's former school. The board issued a decision granting partial access to the responsive records with severances under the discretionary personal privacy exemption at section 38(b) of the *Act*. The requesters appealed the board's decision and also claimed that additional responsive records should exist. In this order, the adjudicator upholds the board's decision to withhold portions of the records under section 38(b), but orders the board to conduct a further search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(2)(a), (b), (d), (e), (f) and (h), 38(b), and 17.

OVERVIEW:

[1] This order addresses the issue of access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records related to alleged bullying incidents at an elementary school. The Toronto Catholic District School Board (the board) received a request for any and all records related to the requesters' son and specified incidents involving several other named elementary school students for the time period of May 23, 2017 to the date of the request (January 27, 2018).

[2] The board issued a decision granting partial access to the responsive records, while withholding information under the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] The requesters, now the appellants, appealed the board's decision to this office.

[4] During mediation, the appellants took issue with the board's decision to withhold information under section 38(b) of the *Act* and the adequacy of the board's search, claiming that further records responsive to their request exist. The board claimed that it conducted a reasonable search, and maintained its position that section 38(b) applies to the withheld information, because disclosure of the withheld information would constitute an unjustified invasion of other individuals' personal privacy.

[5] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the board, initially. The board's representations were shared with the appellants, and representations were invited and received from the appellants.

[6] In this order, I uphold the board's decision to withhold the names of the other children contained in the principal's handwritten notes under section 38(b) of the *Act*. However, I find that the board did not conduct a reasonable search and order it to conduct a further search for responsive records.

RECORDS:

[7] The information at issue is the severed names of elementary school children related to alleged bullying incidents contained in seven pages of the principal's handwritten notes.

ISSUES:

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

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

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

D. Did the board conduct a reasonable search for responsive records?

DISCUSSION:

Preliminary issue: section 54(c) of the *Act*

[8] Before I review the board's denial of access, I begin by addressing section 54(c)

of the *Act*, which permits the board to treat the appellants' request as though it came from their son. In the Notice of Inquiry sent to the board, I asked the board to clarify if it was treating the appellants' request as a request under section 54(c) of the *Act*, which states:

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

[9] Under this section, a requester can exercise another individual's right of access under the *Act* if he or she can demonstrate that:

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

[10] If the appellants meet the requirements of this section, they would be entitled to have the same access to the personal information of their son as their son would have. The request for access to the personal information of their son would be treated as though the request came from their son himself.[1]

[11] In the board's representations, it stated that it had treated the appellants' request as a request under section 54(c) of the *Act,* and that the appellants meet the requirements of this section. In support of its position, the board submitted the appellants' son's most recent Office Index Card. The board explains that upon school registration, the birthdate of the student is verified as well as the student's legal parentage/guardianship. The board further explains that this information is recorded for the school's use as part of a student's Ontario Student Record requirements under the *Education Act*.

[12] Based on my review of the board's representations and the appellants' son's Office Index Card, I am satisfied that the appellants' son is less than sixteen years old and that the appellants have lawful custody of him. Therefore, I find that the appellants were entitled to make this request, and pursue an appeal of the board's decision, on behalf of their son under section 54(c) of the *Act.*

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

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

---

[1] Order MO-1535

decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), which states in part:

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

[14] 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.[2]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[16] The board submits that the records contain the personal information of the appellants' son and other elementary school students who were involved in the incidents described in the principal's notes.

[17] The appellants submit that the records contain the personal information of their son and other students who were part of the reported incidents.

Analysis and findings

[18] After reviewing the records at issue and the representations of the parties, I find that the records contain the mixed personal information of the appellants' son and that of other elementary school children at his former school. Specifically, I find that the records contain their names and ages, along with their personal opinions and views,

---

[2] Order 11.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

which fits within paragraphs (a), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*. Since the records contain the personal information of the appellants' son, the relevant personal privacy exemption is the discretionary one in section 38(b).[4]

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

[19] As noted above, the board withheld the names of the other elementary school children related to the incidents involving the appellants' son under section 38(b) of the *Act.*

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

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

[22] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[23] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[5]

[24] 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 38(b). Section 14(2) also lists various factors that may be relevant in determining

---

[4] When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 14(1).
[5] Order MO-2954.

whether disclosure of the personal information would be an unjustified invasion of personal privacy. 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).[6]

Representations, analysis and findings

[25] The board submits that the discretionary section 38(b) exemption applies to the withheld information, because it consists of the names of the other elementary school children related to the incidents involving the appellants' son. The board further submits that the withheld information is not the appellants' or their son's personal information.

[26] The board submits that none of the exceptions in paragraphs (a) to (e) of section 14(1) apply to the withheld information. The board also submits that none of the presumptions in section 14(3) and none of the exceptions in section 14(4) apply to the withheld information.

[27] The appellants submit that the discretionary personal privacy exemption at section 38(b) does not apply to the withheld information. The appellants also submit that none of the exceptions in paragraphs (a) to (e) of section 14(1) apply to the withheld information. The appellants further submit that none of the presumptions in section 14(3) apply to the withheld information.

[28] Based on my review of the withheld information and the representations of the parties, I find that none of the exceptions at sections (a) to (e) of 14(1) and 14(4) apply. I also find that none of the presumptions against disclosure in section 14(3) apply to the withheld information. In light of these findings, it is the factors in section 14(2) that are the focus of my determination of whether disclosure would constitute an unjustified invasion of personal privacy under section 38(b).

[29] The board submits that the factors at sections 14(2)(e) (pecuniary or other harm), 14(2)(f) (highly sensitive), and section 14(2)(h) (supplied in confidence) apply to the withheld information. These factors weigh against disclosure, if they are found to apply.

[30] The appellants submit that the factor at section 14(2)(a) (public scrutiny), the factor at section 14(2)(b) (public health and safety), and the factor at section 14(2)(d) (fair determination of rights) apply to the withheld information. These factors weigh in favour of disclosure, if they are found to apply.

[31] Sections 14(2)(a), (b), (d), (e), (f), and (h) state:

---

[6] Order P-99.

> 14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (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;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence

Factors weighing in favour of disclosure

Sections 14(2)(a), public scrutiny and 14(2)(b), public health and safety

[32] The appellants submit that the factor at section 14(2)(a) applies to the withheld information, because disclosure of the witness names is critical to exposing the board's investigative process to public scrutiny. The appellants submit this is important, because:

- the board is a publicly funded statutory corporation, and it should be open to the same level of public scrutiny as a government organization;
- it is in the public interest to be fully aware of the investigative practices and dispute resolution processes of the board, as this transparency drives accountability and process integrity relative to ensuring the safety of our children.

[33] The appellants submit that the factor at section 14(2)(b) applies to the withheld information for the same reasons as those given for the factor at section 14(2)(a) above. The appellants argue that disclosure of witnesses' names increases the transparency of the board's investigative processes and practices, and this increased transparency will in turn drive institutional accountability for the safety of children while they are at school, under the care of board employees.

[34] The board submits that the factors at section 14(2)(a) and 14(2)(b) do not apply to the withheld information.

[35] In the circumstances of this appeal, I find that these factors do not apply to weigh in favour of disclosure of the withheld information. Section 14(2)(a) contemplates disclosure in order to subject the activities of the government, as opposed to the views or actions of private individuals, to public scrutiny.[7] Given that the only withheld information is the names of the other children related to the bullying incidents, I am not persuaded that there is a connection between the disclosure of the names and subjecting the activities of the board to greater public scrutiny under section 14(2)(a).

[36] Section 14(2)(b) is a factor favouring disclosure if access to the information may protect public health and safety. Previous orders of this office have held that this factor applies in favour of disclosure of information such as the name of a dog owner, whose dog bites or attacks another person, because it may promote public health and safety.[8] However, in the circumstances of this appeal, I find that disclosure of the withheld information would not promote public health and safety as contemplated by section 14(2)(b) of the *Act.*[9] The withheld information is the names of children related to bullying incidents at a specific school, and on the face of it, this information is unrelated to public health and safety. While the appellants argue that disclosure of the withheld information would promote public health and safety, they have not established how the names specifically would promote public health and safety. Without this link, the section 14(2)(b) factor cannot apply. Therefore, I find that disclosure of the withheld names would not promote public health or safety. Accordingly, I find that the factors at sections 14(2)(a) and (b) do not apply to weigh in favour of the disclosure of the withheld information.

Section 14(2)(d), fair determination of rights

[37] The appellants submit that the factor at section 14(2)(d) applies to the withheld information. The appellants argue that the withheld information is "absolutely essential" to the fair determination of their rights, because:

- If the board is relying on witnesses to reconcile the opposing perspectives of the two parties involved in an incident, then the appellants have a legal right to correlate the specific witness statements with the individuals that made those statements.

- The board's failure to provide the withheld information makes it impossible for them to effectively represent their interests and those of their son.

---

[7] Order P-99.
[8] Orders MO-2980, MO-3370, and MO-3383.
[9] Order MO-1664.

- The appellants agreed to participate in the board's mediation process upon full disclosure of the relevant information, which is necessary to fully represent their interests.

- The appellants' right to this information is also related to any additional actions that the appellants would consider undertaking.

[38] The appellants do not accept the board's position that all information related to a fair determination of their rights has been provided. The appellants allege that the board has not provided them with disclosure of information in advance of meetings, which makes them unable to properly represent their interests in these discussions.

[39] As suggested, the board submits that the factor at section 14(2)(d) does not apply to weigh in favour of disclosure, because the information relevant to a fair determination of rights has already been disclosed to the appellants through both formal and informal avenues after the appellants first reported alleged bullying at the school. The board notes that these avenues of disclosure include:

- meetings with the investigating principal and superintendent;

- offers by the board to engage its Conflict Resolution Department to mediate the relationship between the school administration and the appellants; and

- the alleged bullying concerning the appellants' son was reported to the Corporate Services, Strategic Planning, and Property Committee of the TCDSB Board of Trustees.

[40] The board submits that the appellants were given an opportunity to speak to the Committee, and the Committee issued a report to which the appellants were given full access. The board submits that the various methods of seeking to address the appellants' concerns are based on TCDSB's Policy A.33 "Guidelines for Trustees, Parents and Staff in Addressing School Related Concerns".

[41] In order for the factor at section 14(2)(d) to apply in favour of disclosure, the appellants must establish all four parts of the following test:

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.[10]

[42] I am not persuaded by the appellants' representations that section 14(2)(d) applies to the personal information at issue in this appeal. The appellants have argued that the withheld information is required to fully represent their interests and those of their son in their discussions with the board, and "any additional actions" that they would consider taking. The withheld information is the names of the other children related to the incidents, and their statements have already been released in full to the appellants. Given this, it is unclear from the appellant's representations how the withheld information is significant to or required for the fair determination of rights for the purpose of the third and fourth parts of the test. I also note that the board's withholding of the other children's names does not prevent the appellants from pursuing other legal remedies that might be available to them.[11] I find that the appellants have not provided sufficient evidence to establish the application of either the third or the fourth part of the test. In order for section 14(2)(d) to apply, all four parts of the test must be established. Since the appellants have not persuaded me that all four parts of the section 14(2)(d) test have been met, I find that section 14(2)(d) does not apply to weigh in favour of the disclosure of the withheld information in this appeal.

Factors weighing against disclosure

Sections 14(2)(e), pecuniary or other harm, 14(2)(f), highly sensitive and 14(2)(h), supplied in confidence

[43] The board submits that the factors at sections 14(2)(e), 14(2)(f), and 14(2)(h) apply to the withheld information and weigh against disclosure.

[44] The board submits that the severed notes released to the appellants already contain information about the other parties involved in the alleged bullying incidents. The board submits that it is important to note that protection of the withheld information is a highly sensitive matter, because the information consists of the names of pre-teen elementary school students at the appellants' son's former school. The board submits that these students are discussed in the notes as a means for the principal to gather a comprehensive understanding of the alleged incidents to undertake further investigation.

---

[10] 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.).

[11] Section 51(1) of the *Act* provides that "This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation."

[45] The board further submits that the students did not expect that the appellants would be permitted to identify them in relation to the claims and opinions they express within the handwritten notes. The board submits that the ability of the school administration to properly investigate alleged incidents concerning students is reliant upon the students placing their trust in adults who have a great deal of power over their everyday lives. The board further submits that if the students, who were assured by their principal and vice-principal that they would not be identified as a result of providing their frank responses, were to have their trust in their principal/vice-principal broken, it is foreseeable that they may develop undesirable attitudes about the processes that govern their school lives. The board submits that this represents an identifiable harm that is arguably particularly unfair because, in the circumstances of the investigation, no formalized disciplinary action resulted from the principal's investigation.

[46] The appellants submit that the factors at section 14(2)(e), 14(2)(f), and 14(2)(h) do not apply to the withheld information for the following reasons:

- The appellants do not intend to publicize the names of the witnesses or follow up with them. The appellants require the identities of the witnesses and the statements that they made in order to: better understand the investigative process; determine the basis on which the board made their decisions; and assess the integrity of the information, investigators, and process. Given this intent, the disclosure of this information to them will not expose those individuals to harm.

- There is no way to verify what assurances the principal provided to the other students prior to obtaining their perspectives on the reported incidents. Furthermore, if the principal did provide such assurances, he did so incorrectly, as there are circumstances under which disclosure could be mandatory.

- The appellants understand and appreciate the fact that the witnesses are pre-teen students. Their objective is only to determine who made statements and what they said, because that information would provide them with a better understanding of the basis on which the board made their decisions. Therefore, they do not consider the personal information to be highly sensitive.

[47] In order for section 14(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.[12] In this case, I find that the harm that the board has identified is foreseeable, and I find that the harm would be unfair to the individuals involved. I find that the board has provided sufficient evidence

---

[12] Order P-256.

to demonstrate that if the withheld information were disclosed under the *Act*, revealing the names of the other children involved in the alleged incidents, the resulting broken trust between students and their principal or vice-principal may lead to them developing undesirable attitudes about school processes, which could further harm both the students and the processes themselves. I am also satisfied that this harm would be unfair in the circumstances of this appeal. Therefore, I find that the factor at section 14(2)(e) applies to the withheld information and weighs against disclosure.

[48] In order for section 14(2)(f) to apply, the withheld information must be considered to be highly sensitive, which means there must be a reasonable expectation of significant personal distress if the information is disclosed.[13] The board submits that protection of the withheld information, which contains the names of pre-teen elementary school students related to the alleged incidents, is a highly sensitive matter. The appellants argue that the information is not highly sensitive, because they do not plan to publicize their names or follow up with them.

[49] Based on my review of the records and the representations of the parties, I am satisfied that the withheld information can be considered to be "highly sensitive", because it is reasonable to expect that disclosure of the names of the other students involved in the alleged incidents would cause these individuals significant personal distress. Therefore, I find that the factor at section 14(2)(f) applies to the withheld information, and weighs in favour of non-disclosure in this appeal.

[50] Section 14(2)(h) 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. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[14] Based on my review of the representations of the parties, I find that this factor applies to some of the withheld information in this appeal for the reasons that follow.

[51] I find that this factor applies to the withheld names of the students who were interviewed and whose statements appear in the records. These students had a reasonable expectation that their identity would be kept in confidence and that they would not be identified with the information they supplied to the principal. I am satisfied that assurances of confidentially were given to them by their principal and vice-principal in exchange for their statements. Therefore, I find that the factor at section 14(2)(h) applies to these particular students' names and weighs against their disclosure.

[52] I find that the factor at section 14(2)(h) does not apply to the withheld names of

---

[13] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[14] Order PO-1670.

the students who were not interviewed or only appear in the notes peripherally, such as in the hand drawn diagram of the classroom. There is no evidence these students were given the same assurances from the principal as the students who were interviewed. Therefore, I find that the factor at section 14(2)(h) does not apply to these students' names for the purpose of section 14(2)(h). For the sake of completeness, however, I note that my finding above regarding the factors in sections 14(2)(e) and (f) applies equally to the names of the students interviewed and those who were not.

Unlisted factors

[53] Outside of the listed factors in section 14(2) above, the appellants outlined two additional unlisted factors that they argue weigh in favour of disclosure:

- The board's investigative and dispute resolution process is "inherently unfair", because "the board's policy is that they will not act on anonymous complaints, but they want us to accept decisions that they made on the basis of information provided by sources that are anonymous to us"; and

- Disclosure of the withheld information will increase public confidence in the board, because it "will improve the integrity of the investigative process and increase personal and institutional accountability. This will in turn increase public confidence that the board is accountable for the safety of their children while they are in school."

[54] Based on my review of the appellants' representations, I find that these unlisted factors do not apply in the circumstances of this appeal. I considered, and was not persuaded by, some of these submissions under the factors at sections 14(2)(a) and (b) above. While it is clear that the appellants have concerns with the adequacy of the board's investigative and dispute resolution processes, making any assessment with respect to the adequacy of these processes is not an issue for me to decide. Having said that, it is clear that the appellants are arguing that inherent fairness is an unlisted factor that should apply to weigh in favour of disclosure of the other students' names. Based on the evidence before me, I am not satisfied that disclosure of the names of the other students related to the bullying incidents would ensure fairness in the board's processes. The statements of these students have already been disclosed to the appellants and they already know what those students said with respect to the incidents. Given that the appellants have stated that they do not intend to question or contact the students about their statements, I am not persuaded by the appellants' submissions of the link between disclosure of the students' names and ensuring fairness in the board's processes. Therefore, I find that the unlisted factors the appellants argue in favour of disclosure do not apply to the withheld information in the circumstances of this appeal.

[55] Apart from the listed factors in section 14(2) and the unlisted factors the appellants argue apply to the withheld information, I have also considered whether any other unlisted factors favouring disclosure apply and I find that none of them do.

Absurd result

[56] The appellants argue that the absurd result principle applies to the withheld information, because in the incident reports they filed with the school, they identified by name the assailant and witnesses to the incidents. The appellants also argue that the board has referred to the names of the other students involved in the alleged incidents during their discussions. The appellants argue, therefore, that it is absurd for the board to sever the names of these individuals from the records on the premise that disclosure of this information would be an unjustified invasion of their personal privacy.

[57] The board submits that the absurd result principle does not apply to the withheld information. The board submits that while the appellants are familiar in varying degrees with the students at their son's former school, they have admitted that they cannot infer who specifically made the statements in the severed notes.

[58] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[15]

[59] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

[60] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[19]

[61] In this appeal, the appellants argue that they are already aware of the identities of the other students involved in the alleged incidents. While I accept that the appellants may be aware of the other children related to the alleged incidents, the appellants have acknowledged that they cannot connect the names of the children to the individual statements based on the information already disclosed. That is why the appellants are pursuing this appeal for the withheld information. I find that the absurd

---

[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, PO-1679 and MO-1755.
[19] Orders M-757, MO-1323 and MO-1378.

result principle does not apply in this appeal, because the appellants cannot make this link between the withheld students' names and the disclosed narrative content of the records. In the circumstances, I find that creating this linkage between the students and their narratives by disclosure of the names would be inconsistent with the purpose of the personal privacy exemption.

Conclusion

[62] After reviewing the records and the representations of the parties, I find that the factors at section 14(2)(e) (pecuniary or other harm) and section 14(2)(f) (highly sensitive) apply to the withheld personal information, and weigh in favour of non-disclosure. I also find that section 14(2)(h) (supplied in confidence) applies to some of the withheld information weighing in favour of non-disclosure. I do not find that the other factors listed at section 14(2) or any unlisted factors, including those that might weigh in favour of disclosure, apply in the circumstances of this appeal. Since there are no factors favouring disclosure of the withheld information, and balancing the interests of the parties, the circumstances of this appeal weigh against disclosure of the personal information at issue. Therefore, I find that the withheld student names' in this appeal are exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my findings below with respect to the board's exercise of discretion.

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

[63] The board argues that it properly exercised its discretion under section 38(b), while the appellants argue that it did not.

[64] The section 38(b) 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, the Commissioner may determine whether the institution failed to do so.

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

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

[66] In either case, this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.[20] This office may not, however, substitute its own discretion for that of the institution.[21]

[67] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[22]

- 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.

Representations of the board

[68] The board submits that it properly exercised its discretion under section 38(b)

---

[20] Order MO-1573.
[21] Section 43(2).
[22] Orders P-344 and MO-1573.

and that it considered only relevant factors. The board submits that the context of the appellants' request is their dissatisfaction with the board's investigation into alleged bullying incidents involving their son, and their desire to examine for themselves the investigative process. The board submits that in exercising its discretion, it balanced the principle that individuals should have a right of access to their own personal information with the principle that the personal privacy of individuals should be protected.

[69] The board submits that in terms of the appellants' right of access, the board has already disclosed all correspondence relating to incidents involving the appellant's son for the time period specified by the appellants with no severances applied, and all of the principal's handwritten notes relating to the investigation. The board submits that the only severances made to the handwritten notes were to de-identify the other elementary school children involved in the incidents under investigation.

[70] The board submits that the records already released to the appellants provide a detailed accounting of the board's investigative process, which should fulfill the appellants' stated aim of scrutinizing the board's investigation into the alleged incidents involving their son.

Representations of the appellant

[71] The appellants submit that the board did not properly exercise its discretion under section 38(b). The appellants argue that by placing the need to protect the personal information of other individuals over the need for disclosure of witness statements, the board has failed to properly exercise its discretionary powers. The appellants argue that by failing to provide the names and source of information of the witness statements, the information provided by the board is of no value to them.

[72] The appellants submit that the board acted in bad faith and for an improper purpose by withholding the information at issue under section 38(b). The appellants argue that section 38(b) is discretionary, so the board could have released the withheld information. The appellants further argue that the board did not release the withheld information, because the withheld information is incriminating, not because the board wanted to protect the privacy of the individuals. The appellants also argue that the board has a history of acting in bad faith in their negotiations.

[73] The appellants submit that the board did not take into consideration all relevant factors, including that disclosure would increase public confidence in the institution and that the appellants have a compelling need to receive the information.

Analysis and findings

[74] After considering the representations of the parties and the circumstances of this appeal, I find that the board did not err in its exercise of discretion with respect to its application of section 38(b) of the *Act*.

[75] While the appellants raise concerns about the board withholding the information in bad faith or for an improper purpose, there is insufficient evidence to support this. The appellants argue that the board withheld the information at issue, because it is incriminating to the board. The board argued that it has released all the witness statements and only withheld the names of the other elementary school children involved in the alleged incidents to protect their privacy. I accept the board's submission and, based on the other evidence before me, I am satisfied that the board did not exercise its discretion in bad faith or for an improper purpose.

[76] I am also satisfied that the board took into account relevant factors, such as whether disclosure will increase public confidence in the operation of the board, and also find that it did not take into account irrelevant factors in the exercise of its discretion. In particular, I am satisfied that the board properly considered the purpose of the exemption and the rights sought to be protected under section 38(b), and that it balanced the appellants' son's right of access to his own personal information and the protection of the other children's personal privacy rights. Accordingly, I see nothing improper in the board's exercise of discretion, and I uphold it.

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

[77] The appellants claim that further records responsive to their request exist. Where a requester claims 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.[23] If I am satisfied 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.

[78] 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 it has made a reasonable effort to identify and locate responsive records.[24] 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.[25]

[79] 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 such records exist.[26]

---

[23] Orders P-85, P-221 and PO-1954-I.
[24] Orders P-624 and PO-2559.
[25] Orders M-909, PO-2469 and PO-2592.
[26] Order MO-2246.

Representations of the board

[80] The board submits that it conducted a reasonable search for records. In support of its position, the board submitted the affidavit of the board's Superintendent of Education for the relevant area, who conducted the search for responsive records. The relevant parts of this affidavit include the following submissions:

- The board did not require additional clarification of the request as the appellants' original request for records was sufficiently clear and detailed. As such, the appellants were not contacted for additional clarification.

- The Superintendent responded literally to the request and provided the instructions for search of the records to the principal, who is the individual responsible for holding the records at the school. The principal was able to produce all records relevant to the request, which consisted solely of handwritten principal's notes and email correspondence.

- The Superintendent is satisfied that the records produced by the principal are all the responsive records in this appeal, and that no records were destroyed. The Superintendent submits that, in accordance with their duties under the *Education Act*, school principals are required to make a thorough investigation of all incidences of bullying. As such, logging and retention of notes and correspondence for any required subsequent reporting is an integral element of the investigative process.

Representations of the appellant

[81] The appellants argue that affidavit of the board's Superintendent of Education is insufficient, that the board did not conduct a reasonable search and that further records responsive to their request exist, because:

- Records that they believe should exist were not identified as part of the responsive records;

- They believe there are responsive records that exist outside of the school;

- The principal did not make investigative notes for more serious incidents, which suggests "a counterintuitive change in policy or process"; and

- There is an absence of written notes or internal correspondence regarding the reported incidents that creates an organizational risk for the board.

[82] The appellants submit that the board's search should have included the following records:

- A specified teacher's investigative notes from a December 21, 2017 incident;

- Email correspondence between the appellants and a specified teacher; and
- Email correspondence between the appellants and the board's Director of Education.

[83] The appellants submit that the superintendent provided the sworn affidavit, when it appears that the principal conducted the search for records. The appellants also submit that the principal was not the appropriate employee of the board to conduct the search, because he has no incentive to find certain information and he does not specialize in search.

[84] The appellants argue that their request includes records such as voicemails, electronic copies of reports and email correspondence either sent/received by the board, which exist outside the school, and it is not clear whether these types of records were included in the search.

Analysis and findings

[85] The appellant's request was for any and all records related to the appellants' son and specified incidents involving several other named elementary school students for the time period of May 23, 2017 to the date of the request (January 27, 2018). I note that the appellants' representations refer to incidents that were not specified in their request, or that occurred after the date of the request. These records would be outside the scope of the appellant's request and, consequently, the board's search, since the search could only be expected to include records up to the date of the request. Therefore, I did not consider these particular submissions persuasive in my determination of whether the board conducted a reasonable search for responsive records.

[86] However, for the reasons below, I find that the board has not established that it has conducted a reasonable search for responsive records.

[87] The *Act* does not require the board to prove with absolute certainty that further records do not exist. However, the board must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[27] While the board did submit an affidavit from its Superintendent of Education for the relevant area to support its position, I find that it has not provided sufficient evidence to demonstrate that it has conducted a reasonable search.

[88] In the Notice of Inquiry sent to the board, I asked it to respond to many questions with respect to the search conducted, including the following:

---

[27] Orders P-624 and PO-2559.

> Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

[89] The board's representations and affidavit did not answer these questions. The board's affidavit does not specify who carried out the search, where they searched and what they searched. Based on the affidavit submitted by the board, I am unable to determine what the board instructed the principal to search for, whether the principal conducted the search personally, what types of records he searched or where he searched for them.

[90] Additionally, I find that the appellants have provided a reasonable basis for their belief that further records responsive to their request exists. The appellants note that their request includes records such as voicemails, electronic copies of reports and email correspondence sent/received by the board, which exist outside the school. The appellants also specify records that they claim exist and were missing from the search, such as the specified teacher's investigative notes from a December 21, 2017 incident, and email correspondence between them and a specified teacher. From the board's representations and affidavit, it is not clear whether these records or types of records were included in the search.

[91] Therefore, when completing its next search, the board should search for both electronic and physical records, related to the appellants' son and specified incidents involving other named students for the time period of May 23, 2017 to the date of the request (January 27, 2018). The board should specify in its affidavit what individual(s) conducted the search, what types of records were searched for and where the board searched for them. The board should also specify where it searched for any potentially responsive records that might be held outside of the school.

[92] Based on the board's representations, there is insufficient evidence before me to establish that the board has conducted a reasonable search. Therefore, I find the board has not conducted a reasonable search for responsive records and order it to conduct a further search in accordance with my findings above, and the order provisions below.

ORDER:

1. I uphold the board's decision to withhold the personal information at issue under section 38(b) of the *Act.*

2. I order the board to conduct a further search for both electronic and physical records, related to the appellants' son and specified incidents involving other named students for the time period of May 23, 2017 to the date of the request (January 27, 2018).

3. I order the board to issue an access decision to the appellants with respect to any further responsive records located as a result of the search ordered in provision 2, in accordance with the *Act*, taking into consideration the notice provisions under section 21(1). The board should treat the date of this order as the date of the request.

4. I order the board to provide me with a copy of the decision sent to the appellants in accordance with order provision 3.

5. The board shall send their representations on the new search referred in provision 2 and an affidavit outlining the following, by **March 12, 2021**.

    a. the names and positions of the individuals who conducted the searches;

    b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;

    c. the results of the search; and

    d. details of whether the record could have been destroyed, including information about record maintenance polices and practices such as retention schedules.

    The board's representations will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The board should indicate whether it consents to the sharing of its representations with the appellant.

6. I remain seized of this appeal in order to deal with any other outstanding issues arising from provisions 2, 3, and 5 of this interim order.

Original signed by: January 26, 2021

Anna Truong
Adjudicator