

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4282

Appeal MA19-00291

Conseil des écoles catholiques du Centre-Est

November 24, 2022

Summary: The Conseil des écoles catholiques du Centre-Est (the school board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about an incident that occurred on the school ground. The school board granted partial access to the responsive information relying on section 38(b) (personal privacy) to deny access to the remaining responsive information. In this order, the adjudicator upholds the school board's decision and dismisses the appeal.

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), (e), (f) (h) and (i), 38(b) and 54(c).

Orders and Investigation Reports Considered: Orders P-447, P-1014 and MO-4002-I.

OVERVIEW:

[1] This appeal considers records related to an investigation conducted by the Conseil des écoles catholiques du Centre-Est (the school board) into an incident that occurred between two students during recess at an elementary school.

[2] Following the investigation, the school board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) from the parent of one of the students, on behalf of her minor child, her daughter, for

access to the following information:

...une copie du dossier et de toutes correspondance écrite (courriel, notes prise à la main, rapports) relative à l'incident survenus à l'école (nom de l'école) [une date précise] entre ma fille (nom de la fille) et (nom d'un élève). Je demande une copie de toute les dépositions écrites rédigé par les enfants témoins de l'incident (suite à la demande de la directrice). Je demande une copie des notes pris à la main, rapports, dépositions (écrite par (personne nommée) de la part et au nom de (nom de la fille)) et courriels de la travailleuse sociale (personne nommée). Je demande une copie de toutes note écrite à la main, rapports et courriels écrit ou reçu par la surintendante (personne nommée), l'enseignante (personne nommée), l'enseignante (personne nommée) et la directrice (personne nommée). Cette demande vise tous document (papier ou électronique) entre [deux dates précise] (ou jusqu'au jour exact où cette demande sera actionnée). Je demande aussi toutes correspondance de la part et envoyé au Policier (personne nommée).

[3] The school board located the records responsive to the request and initially denied access to them in their entirety, claiming the application of the mandatory exemption at section 14(1) (personal privacy) and the discretionary exemption at section 12 (solicitor- client privilege) of the *Act*.

[4] The requester, now the appellant,¹ appealed the school board's decision to the Information and Privacy Commissioner of Ontario (IPC). A mediator was assigned to attempt to facilitate a resolution between the parties.

[5] During mediation, the school board provided the appellant with an index setting out all of the responsive records. It also disclosed to the appellant one record, but continued to deny access to all of the remaining records. The school board confirmed that because the records contained personal information related to the appellant (or her daughter) as well as that of other identifiable individuals, it was relying on the discretionary exemption at section 38(b) (personal privacy), instead of section 14(1), to deny access to the records.

[6] The appellant confirmed that she continues to seek access to all the responsive records with the exception of those that were identified in the index as being already in her possession. As a result, section 12 of the *Act* is no longer at issue. Fifteen records remain at issue, all of which have been withheld in full.

[7] The appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

¹ As indicated above, the request was submitted by a parent, on behalf of her minor daughter. As will be discussed below, in this case there is no dispute that the requester can exercise her minor daughter's right of access.

[8] As the adjudicator assigned to the appeal, I decided to conduct an inquiry. I sought and received representations from both the school board and the appellant and those representations were shared between them in accordance with the IPC's sharing procedure set out in the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In this order, I uphold the school board's decision not to disclose the personal information of individuals other than the appellant or the appellant's daughter pursuant to section 38(b).

RECORDS:

[10] The records remaining at issue are records 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, as identified on the index of records provided by the school board. The records include emails and notes related to the investigation into the incident. Specifically,

- records 2, 3 and 5 are 1-page emails,
- records 7 to 16 are handwritten statements of students who were present at the time of the incident,
- record 17 is a 36-page document detailing the specifics of the incident and the subsequent investigation, and
- record 18 is a 3-page document containing notes detailing a meeting that occurred with school employees, school board employees and others, including the appellant, during which the incident was discussed.

ISSUES:

- A. Do the records contain "personal information" as that term is defined in section 2(1), and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the records that remain at issue?
- C. Did the school board exercise its discretion under section 38(b)?

DISCUSSION:

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

[11] I will first address section 54(c) of the *Act*, which permits the school board to treat the appellant's request as though it came from her daughter.

[12] The appellant is seeking to exercise a right of access to information on behalf of her daughter, a minor. Under section 54(c) of the *Act*, a parent may exercise a minor child's right of access to information on their behalf. Section 54(c) reads:

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.

[13] 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.

[14] In this case, there is no dispute between the parties that the appellant has the right to exercise her daughter's right of access to her own personal information under the *Act*. Therefore, in this appeal, as a result of the application of section 54(c), the appellant stands in the shoes of her daughter with respect to the right of access to her daughter's personal information.

Issue A: Do the records contain "personal information" as that term is defined in section 2(1), and, if so, whose personal information is it?

[15] Prior to determining whether the discretionary personal privacy exemption at section 38(b) applies to the records remaining at issue, I must determine whether these records contain "personal information" and if so, to whom the personal information in the records belongs.

[16] This question is relevant because if a record contains the requester's own personal information, the requester's access rights are greater than if they do not.² Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.³ In this appeal, the requesters are the appellant and her daughter.

[17] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual." Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the

² Under section 47(1) of the *Act*, a requester has a right of access to their own personal information and any exemption from that right is discretionary, meaning that the institution can still choose to disclose the information to the requester even if the exemption applies.

³ See sections 21(1) and 49(b).

information either by itself or if combined with other information.⁴

[18] Section 2(1) of the *Act* gives a non-exhaustive list of examples of personal information:

“personal information” means recorded information about an identifiable individual, including,

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

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

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

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

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

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

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

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.⁵

Parties’ representations, my analysis and findings

[19] The school board takes the position that all of the records contain the personal information of both the appellant’s daughter and other identifiable individuals, including

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ See Order 11. The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be “personal information.”

other minor students who attended the same school as the appellant's daughter at the time of the incident. It submits that, first and foremost, the records contain sufficient detail that disclosure of the personal information that they contain would render the individuals identifiable, within the meaning of the preliminary wording of the definition of personal information. The school board submits that the records also contain personal information about the individuals of the types described in section 2(1), including information relating to their education (paragraph (b)), their personal opinions and views and opinions and views about them (paragraphs (e) and (g)) and correspondence sent to the school board by these individuals that is implicitly or explicitly of a private or confidential nature (paragraph (f)).

[20] The appellant does not specifically address whether the records contain personal information within the definition of section 2(1), in her representations.

[21] I have reviewed the records, in light of the school board's representations and the definition of "personal information" at section 2(1) of the *Act*. It is clear that all of the records contain the personal information of the appellant's daughter. They include the appellant's daughter's name, as it appears with other personal information about her (paragraph (h)). The records also contain her personal opinions or views (paragraph(e)).

[22] Some of the records also contain the personal information of the appellant herself. They include her name, as it appears with other personal information about her (paragraph (h)), as well as her personal opinions or views (paragraph (e)). In addition to the personal information of the appellant and the appellant's daughter, the records also contain the personal information of other identifiable individuals, including other students at the school and other individuals who were contacted about the incident, namely, parents of students. This information includes their names, together with other personal information about them (paragraph (h)). The records also contain the personal opinions or views of most of these individuals (paragraph(e)).

[23] Accordingly, the personal information in the records consists of the appellant's daughter's personal information (and in limited circumstances the appellant's personal information) together with the personal information of other identifiable individuals. Because the personal information is intertwined, the school board's decision to withhold the information on the basis of personal privacy, must be considered under the discretionary exemption at section 38(b) of the *Act* which requires that the appellant's right of access to their own personal information be weighed against the other individuals' rights to personal privacy.

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

[24] Section 36(1) of the *Act* gives individuals a general right of access to their own

personal information held by an institution.⁶ Section 38 provides a number of exemptions from this right.

[25] Relevant to this appeal is the personal privacy exemption at section 38(b). Since the records contain the personal information of both the appellant's daughter and other individuals, the school board may refuse to disclose the other individuals' personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individuals' personal privacy.

[26] Section 38(b) states:

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

...

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy [....]

[27] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester, even if doing so would result in an unjustified invasion of the other individual's personal privacy.

[28] However, if disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b) and must be disclosed.

Sections 14(1), (2), (3) and (4) – unjustified invasion of personal privacy

[29] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

[30] If any of the exceptions in sections 14(1)(a) to (e) applies, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). From my review of the records, none of the exceptions in sections 14(1)(a) to (e) are relevant in this appeal.

[31] Section 14(2) lists a number of factors to be considered when determining whether disclosure would be an unjustified invasion of personal privacy.

[32] Section 14(3) lists a number of circumstances, where if present, disclosure is presumed to be an unjustified invasion of personal privacy.

[33] Section 14(4) lists situations where disclosure would not be an unjustified

⁶ As discussed above, in this appeal, the appellant is exercising the right of access to personal information on behalf of her minor daughter pursuant to section 54(c).

invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. Having reviewed the information at issue, I find that none of the situations identified in section 14(4) are relevant to the present appeal.

[34] As none of the exceptions in sections 14(1) and 14(4) apply here, in this case, when deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁷

[35] The school board submits that the presumptions in sections 14(3)(d) and (g) apply in this case. The school board also submits that the factors at sections 14(2)(e), (f), (h) and (i) apply to support its decision not to disclose the information that remains at issue. The appellant did not make representations specifically addressing this issue.

Section 14(3): presumptions against disclosure

[36] The school board has claimed that the presumptions against disclosure at sections 14(3)(d) and (g) apply to the some of the withheld personal information. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

...

(d) relates to employment or educational history;

...

(g) consists of personal recommendations or evaluations, character references or personnel evaluations [...]

Section 14(3)(d): educational history

[37] The school board submits that section 14(3)(d) applies to portions of all of the records because they contain information about the academic background of minor students, in particular, those featured in the investigation into the incident involving the appellant's daughter.

[38] Previous orders of the IPC have considered the application of the presumption against disclosure in section 14(3)(d) and have determined that, to qualify as "employment or educational history," the information must contain some significant part

⁷ Order MO-2954.

of the history or the person's employment or education. What is or is not significant must be determined based on the facts of each case.⁸

[39] I disagree that the personal information at issue consists of information that is subject to the presumption at section 14(3)(d). While I acknowledge that all of the records relate to an incident that occurred on the grounds of an elementary school, the majority of them do not identify the school in which the incident occurred or the scholastic grade of the students involved in the incident. Additionally, even in the limited instances where the grade and school are identified, I do not accept that disclosure of this type of information qualifies as a significant part of the history of those individuals' education. I note that there is one reference in one of the records to an identifiable student or students being in a particular type of class or program, however, this reference does not note the subject matter of the class or classes taken of that particular type. While I acknowledge that individuals familiar with the particular school involved and its programs might be able to discern the nature of the particular type of class or program, I do not accept that disclosure of this information would reveal the subject matter of classes taken of that type. Even if it did, I do not accept that type of information, particularly in the context of an elementary education, amounts to a "significant part" of the individual's or individuals' educational history so as to consist of a presumed invasion of personal privacy.

[40] Accordingly, I find that section 14(3)(d) does not apply to any of the information in the records at issue in this appeal.

Section 14(3)(g): consists of personal or personnel evaluations

[41] The school board submits that the presumption at section 14(3)(g) applies to two portions of record 5 because they contain assessments of identifiable individuals, other than the appellant, that amount to personal or personnel evaluations.

[42] Previous orders of the IPC have established that "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable (or objective) standards.⁹

[43] In Order P-447 the adjudicator considered the application of the presumption in section 21(3)(g), which is the equivalent provision in the provincial act¹⁰ to section 14(3)(g), finding that records containing opinions, comments and observations provided by the primary and secondary affected persons during the course of an investigation of an allegation of sexual harassment did not consist of personal or personnel evaluations because they were not assessments made according to a measurable standard.

[44] I agree with the approach taken in Order P-447 and find that it is relevant to the

⁸ Orders M-609, MO-1343.

⁹ Orders PO-1756 and PO-2176.

¹⁰ *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F. 31, as amended.

circumstances of this appeal. The records at issue in this appeal relate to an investigation into an incident that occurred on the school ground, between two students. Record 5 is an email between two school board employees describing a step taken in the investigation into the incident. The first portion for which section 14(3)(g) is being claimed is a one sentence comment made by the author of the email setting out their opinion about a student, identified by name. The second portion is a comment made by the staff member regarding their opinion about an individual who was consulted about the incident in their professional capacity, identified only by their professional title. I do not accept that either of these two portions of information qualify as personal or personnel evaluations made according to measurable standards, within the meaning of the presumption in section 14(3)(g). Accordingly, I find that section 14(3)(g) does not apply.

Section 14(2): factors weighing for and against disclosure

[45] As previously stated, section 14(2) lists a number of factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of an individual's personal privacy. Some of the listed factors weigh in favour of disclosure, while others weigh against disclosure. Other factors, besides those listed in section 14(2), must also be considered if they are relevant. Those factors are referred to as "unlisted factors."

[46] In this appeal, the school board claims that the factors at sections 14(2)(e), (f), and (i) weigh in support of its decision not to disclose the information that remains at issue.

[47] The appellant does not specifically submit that any of the factors weighing in favour of disclosure apply, however, based on her representations, it appears that she believes that the factor at section 14(2)(a) should be considered.

[48] Those sections read:

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;

...

(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; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[49] I have also considered whether any unlisted factors, weighing for or against disclosure, might apply. No unlisted factors have been raised by the parties in their representations and I find that none apply.

Factors weighing in favour of disclosure

Section 14(2)(a): the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny

[50] If applicable, this section supports disclosure when disclosure would subject the activities of the institution (as opposed to the views or actions of private individuals) to public scrutiny.¹¹ It promotes transparency of the actions of public bodies. Institutions should consider the broader interests of public accountability when considering whether disclosure is “desirable” or appropriate to allow for public scrutiny of its activities.¹²

[51] In its representations, the school board explicitly states that, in its view, the factor weighing in favour of disclosure at section 14(2)(a) does not apply. It submits that disclosure of the records at issue in the appeal would not subject the activities of the school board to scrutiny by the greater public as this is a matter that is of interest to limited people, namely the appellant.

[52] Although, in her representations, the appellant does not specifically mention the possible relevance of the factor at section 14(2)(a), she does state that she is seeking access to the requested information in order to shed light on what exactly occurred during the investigation into the incident. She submits that she would like to be provided details about the steps taken by the school board, what exactly unfolded during the investigation and what, specifically, was deduced from the evidence that was gathered. She submits that she expects transparency from the school board regarding the investigative process and the information gathered during that process.

[53] In Order P-1014, dealing with the provincial equivalent of section 14(2)(a), the adjudicator concluded that public policy supported “proper disclosure” in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in desire to promote adherence to the principles of natural justice. The adjudicator agreed with the appellant in that appeal that an appropriate

¹¹ Order P-1134.

¹² Order P-256.

degree of disclosure to the parties involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, the adjudicator concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that justice was done in that investigation, the adjudicator found that the provincial equivalent of the factor at section 14(2)(a) did not apply.

[54] The records at issue in this appeal relate to an investigation into an incident that occurred between students on a school ground. Given these circumstances, in my view, the adjudicator's analysis in Order P-1014 provides relevant guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature. In my view, the disclosure of the personal information of other individuals, contained in the records, would not result in greater scrutiny of the school board. As in Order P-1014, this is a private interest. Therefore, I do not accept that section 14(2)(a) is a relevant consideration in this appeal and it will have no bearing on my conclusions about whether disclosure of the information would constitute an unjustified invasion of personal privacy of individuals other than the appellant or her daughter.

Factors weighing against disclosure

[55] The school board submits that a number of the factors at section 14(2) weighing against disclosure are relevant considerations in the circumstances of this appeal. It submits that the factor at section 14(2)(f) (highly sensitive) the most relevant, followed by factors 14(2)(e) (unfair pecuniary or other harm) and (i) (unfair damage to reputation), and then section 14(2)(h) (supplied in confidence).

Section 14(2)(f): highly sensitive

[56] The factor at section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.¹³ For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.¹⁴

[57] The school board submits that the records relate to an incident that happened on an elementary school ground with a number of students present. It submits that in particular, records 2, 3, 5 and 7 to 18 contain personal information of individuals other than the appellant (and her daughter) of a particularly sensitive nature, the disclosure of which could cause anguish for the individuals concerned.

¹³ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁴ Order MO-2980.

[58] As previously noted, record 2, 3 and 5 are emails, and records 7 to 16, are handwritten statements made by students describing what they observed of the incident on the school ground. Given the sensitivity of the circumstances surrounding the incident and the perspectives of the parties involved, I am satisfied that it is reasonable to expect that the individuals who provided the information would experience significant personal distress if their personal information was disclosed to the appellant and ultimately, to their former classmate, the appellant's daughter. Additionally, I am satisfied that even if their names were severed, the narrative descriptions as told from their individual perspectives would allow an individual with reasonable knowledge of the individuals to identify which individual made which statement.

[59] Portions of record 17 also contain students' statements describing their opinions or views about the incident that occurred on the school ground and staff opinions or views about a number of students' behaviours following the incident. For the same reasons as those explained for records 7 to 16 above, I accept that the individuals to whom this personal information relates would experience significant personal distress if their personal information were disclosed to the appellant.

[60] Record 18, is a written summary of a meeting about the incident that occurred between a number of school board and school employees and the appellant, as well as the appellant's daughter's father. Portions of record 18 contain the personal information of the appellant, in particular her opinions or views. However, in this record, the appellant's personal information is intertwined with the personal information of another identifiable individual and, as previously mentioned, cannot reasonably be severed. Considering the nature of the personal information of the other identifiable individual, I accept that it is highly sensitive and its disclosure would cause them significant personal distress. Accordingly, I find that section 14(2)(f) applies and is a relevant consideration with respect to this information.

[61] In finding that section 14(2)(f) applies to record 18, I have considered that the IPC has previously found that disclosure of records to an appellant is disclosure to the world because the *Act* does not impose any restrictions or limits on what a requester can do with records disclosed to them.¹⁵ Consequently, disclosing records to the appellant could effectively result in them being disclosed into the public domain where they can be freely disseminated. Given the sensitive nature of the appellant's opinions or views about another identifiable individual that are recorded in record 18 and given they are intertwined with the personal information of the individual to whom they relate, it is the possibility of this type of disclosure that I am considering when I find that the factor at section 14(2)(f) applies and weighs heavily against the disclosure of that personal information.

¹⁵ Orders M-96, P-169, P-679, MO-1719, MO-1721-F PO-3117, PO-4286, and MO-4244.

Sections 14(2)(e) and (i): the individual to whom the information relates will be exposed unfairly to pecuniary or other harm and the disclosure may unfairly damage the reputation of any person referred to in the record

[62] In order for either of the factors at sections 14(2)(e) and/or (i) to weigh against disclosure, the evidence must demonstrate that the damage or harm envisioned by the clause is either present or foreseeable, and that this damage or harm would be “unfair” to the individual whose personal information is in the record.¹⁶

[63] The school board submits that the disclosure of record 2, 3 and 5 and records 7 to 18 risks unfair prejudice to the individuals whose personal information is contained in them (section 14(2)(e)), in addition to unfairly damaging the reputation of these individuals (section 14(2)(i)). It submits that given the nature of the information contained in these records, were it disclosed, could certainly harm or damage the reputation of the individuals involved.

[64] The school board references Order MO-4002-I which relates to a request for notes taken by staff during the course of an investigation into incidents of alleged bullying at a school. The school board submits that the institution in that matter argued that the foreseeable harm in question caused by disclosure was a possible breach of trust between students and their teacher, which could negatively affect future behaviours and interactions at the school. The school board submits that in Order MO-4002-I, the adjudicator found that such harm was foreseeable and conceivable if the records were disclosed and that, as a result, the factor at section 14(2)(e) was relevant. The school board submits that the same reasoning can be applied in this case.

[65] Given the sensitive nature of the personal information in the records, I accept that the damage or harm to the individual or individuals to whom the personal information relates is foreseeable and, in the circumstances, I find that the harm would be unfair to them. For the same reasons, in particular, the sensitive nature of the personal information in the records, I also accept its disclosure could damage the reputation of an individual and that given the circumstances as a whole, that damage to their reputation is unfair.

[66] Accordingly, I find that both factors at sections 14(2)(e) and (i) apply and are considerations that weigh heavily against the disclosure of the personal information that has been withheld.

Section 14(2)(h): the personal information has been supplied by the individual to whom the information relates in confidence

[67] The factor in section 14(2)(h) is intended to weigh against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that the expectation is reasonable in

¹⁶ Order P-256.

the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."¹⁷

[68] The school board submits that the factor at section 14(2)(h) applies to records 2, 3, 5 and records 7 to 16 because the author of these documents communicated the personal information with the expectation that it would be treated confidentially and, in particular, not disclosed to the appellant. It also submits that the same can be said about records 17 and 18 even though those records were drafted by employees of the school board.

[69] Given the circumstances in which the personal information in records 2, 3, 5 and 7 to 16 and the portions of record 17 was provided, I accept that both the individuals who provided that personal information and the recipients of the information had an expectation that the information would be treated confidentially and, in particular, not disclosed to the appellant. I accept that that expectation was reasonable, in the circumstances. Therefore, I find that the factor at section 14(2)(h) applies to this personal information and weighs in favour of privacy protection.

[70] Record 18, as previously noted, is a summary of a meeting about the incident at which the appellant herself was in attendance. As a result, I do not accept that the majority of the personal information that is at issue in record 18 can be said to have been supplied, in confidence, by the individual to whom it relates and section 14(2)(h) is not a relevant factor for the first portion of the record.

[71] There is, however, a paragraph at the end of record 18 that briefly describes a telephone call that occurred following the meeting about the incident, between the school board employee and an individual who was not in attendance at the meeting. Portions of that paragraph contain the personal information of the individual who was not at the meeting; that personal information was supplied by the individual to whom it relates. Given the nature of that information, I accept that both the provider and the recipient of that information had a reasonably held expectation that that information was provided in and would be held, in confidence. Accordingly, I accept that section 14(2)(h) is a relevant consideration weighing against the disclosure of the portions of the paragraph that contain that individual's personal information.

Summary conclusion regarding the factors at section 14(2) and presumptions at section 14(3)

[72] Since the records contain the personal information of the appellant's daughter (and in some cases the appellant), as well as that of other identifiable individuals, in order to determine whether disclosing the personal information of those other individuals would be an unjustified invasion of their personal privacy, the presumptions at section 14(3) and the factors at section 14(2) must be weighed and balanced with

¹⁷ Order PO-1670.

the interests of the parties.

[73] Above, I found that none of the presumptions against disclosure in section 14(3) apply. I also found that none of the listed factors weighing in favour of disclosure at section 14(2) apply and that no unlisted factors apply. However, I found that the factors at section 14(2)(e) (pecuniary or other harm), section 14(2)(f) (highly sensitive) and section 14(2)(i) (unfair damage to reputation) apply and are relevant considerations weighing heavily against disclosure. I also found that, for some information, section 14(2)(h) (supplied in confidence) applies and weighs against disclosure.

[74] As there are no factors favoring disclosure of the withheld information, I find that disclosure of the information at issue in this appeal would be an unjustified invasion of personal privacy of the individuals, other than the appellant and her daughter, whose personal information is contained in the records. Therefore, I find that the exemption at section 38(b) applies to the records at issue. This finding is subject to my review of the school board's exercise of discretion, below.

Severability of the records

[75] As mentioned earlier in this order, section 4(2) of the *Act* requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Consequently, when reviewing the records, I have considered whether any of the portions of the records that contain the personal information of other individuals intertwined with that of the appellant, or her daughter, can be severed in a manner where the personal information of the individual who provided the information is not disclosed. However, the remaining portions of the records that contain the personal information of both the appellant or her daughter and that of other individuals is so closely intertwined, that I find that it cannot be reasonably severed.

Issue C: Did the school board exercise its discretion under section 38(b)?

[76] The section 38(b) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[77] In addition, I 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 considers irrelevant considerations
- it fails to consider relevant considerations.

[78] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ I cannot, however, substitute my own discretion for that of the institution.¹⁹

[79] Considerations that are relevant to the exercise of discretion in this appeal are:

- 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 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.

[80] Not all the listed consideration will necessarily be relevant, and additional unlisted considerations may be relevant.

Representations

[81] The school board submits that it took into consideration the appellant's right of access to her daughter's personal information (and her own), and balanced that right with the need to protect the privacy of the other identifiable individuals whose personal information also appears in the records. It submits that as explained throughout the course of its submissions, the personal information that the records contain is of a very sensitive nature that was supplied to the school board in confidence and could unfairly damage the reputation of other individuals named in them.

[82] The school board submits that it considered the purpose of personal privacy

¹⁸ Order MO-1573.

¹⁹ Section 54(2) of the *Act*.

exemption in light of the circumstances of the case, including the sensitivity of the information and the relationship between the appellant and other individuals whose personal information appears in the records, the majority of whom are minors. It submits that it disclosed the record that could be disclosed in the circumstances without infringing upon the privacy rights of the affected parties.

[83] The school board submits that it did not exercise its discretion in bad faith or for an improper purpose and it did not consider irrelevant considerations or fail to consider relevant ones.

[84] The appellant does not specifically address the school board's exercise of discretion in her representations. However, she reiterates that she is simply asking for more clarity with respect to the investigation into the incident involving her daughter, particularly given that the outcome was that no sanctions were imposed. She submits that the school board's response to the incident lacked kindness, communication and action.

Analysis and finding

[85] I have considered the circumstances surrounding this appeal and the representations of the parties. I am satisfied that the school board has properly exercised its discretion with respect to the personal information that I have found to be exempt from disclosure as a result of the application of section 38(b).

[86] I find that the school board considered the nature and the sensitivity of the information as well as the reasons why the appellant seeks access to that information. I also find that the school board considered the purposes of the *Act*, took relevant factors into account and did not rely on irrelevant ones. I have found no evidence of bad faith or an improper purpose in its actions.

[87] In all the circumstances and for the reasons set out above, I uphold the school board's exercise of discretion to deny access to the record under section 38(b).

ORDER:

I uphold the school board's decision and dismiss the appeal.

Original signed by: _____

Catherine Corban
Adjudicator

November 24, 2022