



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER M-796

Appeals M_9400377 and M_9500139

Toronto Board of Education



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NATURE OF THE APPEALS:

The Toronto Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all of the requester's personal information within the Board's "care and control", including any information held by a named law firm which acts for the Board.

The requester appealed the Board's decision in relation to this request. In Order M-315, Inquiry Officer John Higgins disposed of the issues arising in that appeal. Provisions 6, 7 and 8 of Order M-315 read:

6. I order the Board to conduct a further search for responsive records within its custody and to advise the appellant of the results of this further search, within thirty (30) days after the date of this order.
7. I order the Board to arrange for a search for responsive records under its control in the custody of its solicitors and to advise the appellant of the results of this search, within thirty (30) days after the date of this order.
8. In the event that further records are located as a result of the searches mentioned in Provisions 6 and 7 of this order, I order the Board to provide an access decision to the appellant, in the form contemplated by sections 19, 22 and 23 of the Act, within thirty (30) days after the date of this order, without recourse to a time extension.

In compliance with Provision 8 of Order M-315, the Board issued two decision letters: one respecting the records described in Provision 6, and the other respecting the records described in Provision 7. The requester appealed these two decisions. While these appeals were underway, the Board located 25 additional records and issued another decision, which the requester also appealed.

Following mediation of these appeals, the records remaining at issue are those which I have listed in Appendix "A" to this order. The exemptions raised by the Board are:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1)
- law enforcement - sections 8(1)(a), (b), (c) and (d)
- endanger life or safety - section 8(1)(e)
- right to fair trial - section 8(1)(f)
- security - section 8(1)(i)
- facilitate commission of an unlawful act - section 8(1)(l)
- relations with other governments - section 9
- third party information - section 10
- economic and other interests - section 11(f)
- solicitor-client privilege - section 12

- danger to safety or health - section 13
- information available to the public - section 15
- invasion of privacy - section 38(b)

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties. In his representations, the appellant indicated that he became aware of the existence of an additional record during testimony made during an arbitration hearing and raised the issue of whether further responsive records exist. Supplemental representations were sought from both parties.

The Board indicated that the appeals should be dismissed on the basis that the requests and appeals are unreasonable, and that there was bad faith on the part of the appellant. Supplemental representations on this issue were also sought and received from the Board and the appellant. Subsequently, Order M-618, which involved parties other than those in this appeal but addressed the issue of whether requests and/or appeals amount to an abuse of process, was issued and the Board and the appellant were invited to comment on the order as it pertained to the appeals currently before me. Neither party submitted further representations.

Later, the Board alleged bias on the part of the Commissioner, and all decision-makers, and demanded return of all records previously forwarded to this office as a result of amendments made to the Act which affect the Commissioner's jurisdiction. The records were not returned, but the Board and the appellant were invited to submit supplemental representations on these issues. Representations were received from the Board.

The Board has withdrawn its reliance on sections 10, 11(f) and 15, its reliance on section 7 for Record B2, and its reliance on section 8 for Record B16. The Board has not made representations respecting the requirements of sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(f), 8(1)(l) and section 9 of the Act as they relate to the records at issue in Appeal M-9400377. Additionally, although the Board has indicated it is claiming the application of sections 7 and 12 to all or parts of Record 240, it has not made representations respecting the requirements of these sections as they relate to this particular record. Accordingly, these exemption claims will not be considered in this order and are not upheld.

PRELIMINARY ISSUES:

BIAS

The Board indicates that it is concerned that the Commissioner is unable to interpret the provisions relevant to this inquiry in an objective and unbiased manner. Its concern is tied to comments made by the Commissioner regarding amendments to the provincial and municipal Freedom of Information and Protection of Privacy Acts proposed under Bill 7 - Labour Reform Act, 1995 (now the Labour Relations and Employment Statute Law Amendment Act, 1995). The Board states that the Commissioner's public opposition to the policy underlying the amendments and his comments on the application of the changes to ongoing proceedings raise a reasonable apprehension of bias, and that the same concern exists in respect of other decision-makers employed in our office since all are appointed by and accountable to the Commissioner.

The Board does not allege that bias actually exists. The Board argues that a reasonable person would **perceive** bias on the part of the Commissioner and, by extension, all decision-makers employed by the Commissioner, in the circumstances of this appeal.

Under section 41(1) of the Act, the Commissioner has a duty to conduct inquiries. Under sections 59(a) and (e) of the provincial Freedom of Information and Protection of Privacy Act, the Commissioner has a legislated mandate to offer comment on the privacy protection implications of proposed legislative schemes or government programs and to provide information concerning the Act and the Commissioner's role and activities. The Commissioner's comments were made specifically in this context.

The Commissioner has a duty to provide the public with information about the Act, which necessarily includes identifying the implications of proposed amendments. In my view, the comments made by the Commissioner would not lead a reasonably informed person to perceive bias on the part of the Commissioner or any of his decision-makers. Given the Commissioner's legislated mandate, it can only be expected that he will offer comment on such issues. A reasonable person would not infer that in doing so, the Commissioner and all of his decision-makers might no longer be able to impartially adjudicate an appeal which involved interpretation of legislation he had offered comment on prior to its becoming law.

Accordingly, I find that there is no basis for a reasonable apprehension of bias in the circumstances of this appeal.

APPLICATION OF THE ACT

While this inquiry was underway, section 52 of the Act was amended such that certain records relating to labour relations and employment matters were excluded from the scope of the Act. The Board submits that these amendments should be applied retrospectively.

There is a general presumption that a statute is not to be treated as acting retrospectively. In other words, should a statute impose new legal consequences upon transactions which occurred prior to the statute's enactment, the courts will presume that the legislature intended that these new legal consequences should not be imposed unless the statute requires them to be imposed, either expressly or by necessary implication.

The Board submits that to find that the amendments do not apply retrospectively would require all institutions throughout Ontario to divide or somehow identify those records collected, prepared, used or maintained prior to the enactment from those collected, prepared, used or maintained after its enactment. The Board submits that the Commissioner should take judicial notice of the obvious fact that this would constitute an extremely large amount of documentation and, hence, would be a formidable expense to most institutions. Moreover, the Board submits, such an interpretation assumes that the institutions have knowledge that pre and post enactment records will be treated differently and that this is undoubtedly not the case. It further argues that it will be extremely difficult to distinguish between such records for the purposes of applying the amendments as it is very likely that the dates of many documents will soon become obscured or forgotten.

The Board argues that the focus of the legislation is on the act of maintaining the records, which can only be characterized as a continuing act, in which case the new legislation cannot be characterized as attaching new consequences to prior actions. The Board argues that the new legislation attaches new consequences to current action -- the act of maintaining records. The Board submits that the legislation cannot be said to be operating retrospectively and the presumption against such operation does not arise.

I do not agree with the Board's submissions. This appeal was brought under the part of the Act which focuses on a request for access to records. In my view, it is the date of the request, which will not be difficult or onerous to discern, which determines whether or not the amendments will apply, not the date of the records.

The amendments eliminate certain rights and obligations which previously existed. The general rule with respect to statutes affecting substantive matters is that they do not apply to pending cases, even those under appeal (see Pierre-André Côté, The Interpretation of Legislation in Canada, Quebec, 1991 at p.160).

In addition, the amendments obviously affect the Commissioner's jurisdiction. In Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd., [1971] S.C.R. 1038, 1040, the court found that a statute modifying a court's jurisdiction is not generally applicable to pending cases, because "... it is well established that jurisdiction is not a procedural matter ...". This has been applied to lower courts and courts sitting on review and there have also been cases involving administrative tribunals where similar reasoning has been applied (see Picard v. Public Service Staff Relations Board, [1978] 2 F.C. 296 and Garcia v. Minister of Employment and Immigration and Immigration Appeal Board, [1979] 2 F.C. 772 (C.A.)).

In my view, the above cases make it clear that any request made prior to the passage of the amendments should be dealt with, both at the request stage and on appeal, under the Act as it was at the time of the request. Once a request has been submitted, the case can be said to be "pending" in the same way as a civil action is "pending" once a statement of claim has been issued and served. The case law supports the view that it would be at that point that the right of the requester to information or correction would crystallize.

Further, I note that the government had initially drafted the bill such that the amendments had clear retroactive effect. This wording was later changed, demonstrating a legislative intention that the amendments are not meant to operate retrospectively.

Accordingly, I find that as the request was made prior to the enactment of the amendments, it should be dealt with under the provisions of the Act as they were at that time.

ABUSE OF PROCESS

The Board submits that the request amounts to an abuse of process. It submits that the request was not consistent with the legitimate purposes of the Act, but rather was made out of caprice or an intention to harass the Board and the individuals involved in other litigation generated by the appellant.

In Order M-618, Commissioner Tom Wright found that he has the necessary authority to control what he identified as abuse of his own process. I agree, and find that I have this authority as well.

The Board's arguments in this regard relate primarily to the appellant's motives, in that he is pursuing access to records which he should know are not accessible, that he has a history of threatening behaviour, and a history of generating voluminous and costly requests, complaints and litigation.

In Order M-618, the Commissioner stated that "I am not prepared to say that this fact of volume alone would necessarily amount to an abuse of process." Later in the order, he stated that "[t]aken together with other factors, however, the excessive volume of requests and appeals may amount to an abuse of process." The "other factors" which were found to justify a conclusion that the appellant in that case had abused the access process included:

- the varied and broad nature of the requests together with the fact that identical requests were submitted to a number of different government organizations;
- a dramatic increase in the number of requests submitted after the institution applied for an injunction based on the requests being "frivolous, vexatious and an abuse of process"; and
- the association of the requester with an individual whose stated purpose in making freedom of information requests was to harass government and to burden or break the system.

In my view, these factors are not the only ones which could lead to a finding of abuse of process, but they provide examples of such factors.

I also note the Commissioner's comment in Order M-618, that "[o]ther instances of abuse of process may arise in the future. However, from my experience in administering the Acts, I believe such instances would be extremely rare." I agree with the Commissioner, and would add that I believe that finding an abuse of process where the request was for access to the requester's own personal information would be most extremely rare.

The circumstances here are very different from those described in Order M-618. The number of requests submitted by the appellant is dramatically smaller than the volume submitted by the requester in Order M-618, they were all submitted to the same institution, and all relate essentially to the appellant's efforts to secure his own personal information. This particular order does not stem from a new request, but a four year old request, the Board's response to which was found to be inadequate in Order M-315. Moreover, the appellant is a former employee of the Board, who has been engaged in ongoing litigation with the Board in several different proceedings, suggesting a reason and a practical purpose for pursuing access to information in the custody or under the control of the Board. Finally, each request relates to the appellant's own personal information. Simply because an institution may have compiled a great deal of personal information regarding an individual, does not mean that the appellant's motives are questionable for that reason alone.

For these reasons, I am not prepared to find that the appellant is abusing the access process.

REASONABLENESS

The Board submits that sections 23 and 36(1)(b) of the Act give the Commissioner scope to apply a frivolous, vexatious or abuse of process standard in the appropriate case. Section 23 reads:

- (1) Subject to subsection (2), a person who is given access to a record or part of a record under this Act shall be given a copy of the record or part **unless it would not be reasonably practicable** to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
- (2) If a person requests the opportunity to examine a record or part **and it is reasonably practicable to give the person that opportunity**, the head shall allow the person to examine the record or part.
- (3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions **unless it would not be reasonably practicable** to reproduce them by reason of their length or nature. [Emphasis added]

Section 36(1)(b) provides:

Every individual has a right of access to,

any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it **reasonably retrievable** by the institution.

In Order M-618, Commissioner Wright determined the issue of his authority to deal with an abuse of process issue without resorting to reliance on these sections of the Act. I agree with Commissioner Wright's approach and, in my view, it is not necessary or appropriate to use sections 23 and 36(1)(b) of the Act to address an alleged abuse of process. In my opinion, the appropriate interpretation of these sections is one which is associated with the physical characteristics of a record and the mechanics of conducting a search, not the motivations of a particular requester.

BAD FAITH

The Board submits that the request is made in bad faith. The Board indicates that the request and appeal have been filed to harass the Board and/or generate legal costs and is not a genuine attempt to obtain information.

The appellant has provided representations which outline his reasons for appeal. I am satisfied that this appeal represents a genuine attempt to obtain information, and find that the appeal was not made in bad faith.

JURISDICTION TO ORDER A FURTHER SEARCH

The Board submits that the Commissioner does not have the jurisdiction to order the Board to conduct a further search. This issue was raised by the Board in Order M-315 and considered by Inquiry Officer John Higgins. Inquiry Officer Higgins found that the Commissioner does have the power to order a further search, and he did so. It was as a result of the search ordered in Order M-315 that the Board located the records which are at issue in this appeal.

The Board has not applied for judicial review or reconsideration of any aspect of Order M-315. I agree with the findings of Inquiry Officer Higgins, and I will not revisit these issues in this order.

RESPONSIVENESS OF RECORDS

The Board initially identified most of the records currently before me as responsive to the request, provided a decision on access and claimed exemptions for all records or parts of records which were withheld. The Board has provided representations in support of all exemptions claimed.

After the appeal was commenced, the Board indicated that two records were outside of the scope of the request. Following mediation, one of these records no longer remains at issue in this appeal. The Board now indicates that an additional 63 records are entirely or partially unresponsive, and that the only information which has not been disclosed from an additional eight records is information which is not responsive to the appellant's request. The basis for the Board's submissions is that, in its view, these records or parts of records do not contain the appellant's personal information and since the request was for access to the appellant's personal information, the Board has concluded that they are not responsive.

There is no evidence before me which would suggest that the Board took steps to clarify this point with the appellant, or that the appellant and the Board are in complete agreement about what constitutes the appellant's personal information.

The issue of responsiveness was considered by Inquiry Officer Higgins in Order M-315, the order which gave rise to the decisions which are at issue in this appeal. Inquiry Officer Higgins addressed this issue as follows:

In my view, the words "personal information" in the appellant's request must be read in the context of his relationship with the Board. He is an ex-employee of the Board. After his termination he was charged with two offences under the Criminal Code. The alleged circumstances which led to the laying of these charges related to the appellant's employment with the Board. The appellant and the Board have also been involved in grievance proceedings, an arbitration under the Labour Relations Act, two proceedings under the Workers' Compensation Act and a further investigation under that same Act. The appellant has also been

involved in several freedom of information requests, appeals and compliance investigations with the Board under the Act.

In the circumstances of this appeal, the request ought to be interpreted as including all records relating to the conduct of these matters which may reasonably be linked to the appellant, as well as any other records containing information relating to the appellant's employment with the Board. In my view, taking a narrow interpretation of "personal information" for the purpose of interpreting the request would not be reasonable in the circumstances and would run contrary to the spirit of the Act.

I agree.

Of the records identified by the Board as being unresponsive, five were not identified in the index which accompanied the Notice of Inquiry, and I find these records are not at issue in this appeal. Record 302.85 does not contain the appellant's personal information, has no apparent connection to the subject matter of the request, and appears to have been placed in the file in error. I find that it is not responsive to the request and, on this basis, should not be disclosed to the appellant.

Two of the records identified as being unresponsive were identified in the index, but the Board has not provided me with a copy of them. I have reviewed the affidavit evidence submitted by the Board respecting the contents of these records and I am satisfied that they are responsive to the request. As I will later find that these two records are not under the control of the Board, it is not necessary for me to order the Board to produce them to me.

Having reviewed the remaining records and parts of records which the Board claims are unresponsive, I am satisfied that they all relate to the conduct of the various matters and proceedings referred to by Inquiry Officer Higgins. In my view, these records and parts of records are responsive to the request.

CUSTODY OR CONTROL

The Board submits that many of the records are not within its custody or under its control within the meaning of section 4(1) of the Act and that, as a result, they are not subject to an access request under the Act. The Board asks, however, that I determine the issue of custody or control only after having examined the application of exemptions to these records and determining that the exemptions do not apply.

Where a record is found not within the custody or under the control of an institution covered by the Act, I have no jurisdiction to conduct a further inquiry. Accordingly, the issue of custody or control necessarily precedes a consideration of the exemptions claimed by the Board.

The Board has not provided me with a copy of Records 253, 267, 268, 271, 288B, 289, 394, 409 and 411. It has, however, submitted affidavit evidence which describes the contents and nature of each of these records.

The Board's copy of Record 259 is found in Record 184, the Board's copy of Record 260 is found in Record 185, the Board's copy of Record 269 is found in Record 186, the Board's copy of Record 360 is found in Record 210, the Board's copy of Record 396 is found in Record 223, and the Board's copy of Record 445 is found in Record 188. Accordingly, I find that Records 259, 260, 269, 360, 396 and 445 are not at issue in this appeal.

Section 4(1) states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

It is clear from the wording of section 4(1) that, in order to be subject to an access request under the Act, a record must be **either** in the custody **or** under the control of an institution. In the circumstances of this appeal, where a record has been identified through a search of the lawyers' offices, the relevant question is whether these records which are in the custody of the Board's lawyers are under the **control** of the Board.

In its representations, the Board refers to Records 241-433 as "the law firm documents". Accordingly, I will consider Records 241-433 as having been located during a search of the lawyers' offices and I will consider Records 123-240 as having been located during a search of the Board's offices.

Section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:

Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. [emphasis added]

This section indicates that records which **belong** to the client must (unless there are unpaid fees) be delivered to the client on demand, or otherwise disposed of as the client directs. Accordingly, in my view, ownership of documents constitutes "control" for the purposes of section 4(1) of the Act.

A review of the law and authorities in this area indicates that ownership of records in a lawyer's file depends on the nature of the record (Aggio v. Rosenberg et al (1981) 24 C.P.C. 7 and Spencer v. Crowe and Nova Scotia Legal Aid Commission (1986), 74 N.S.R. (2d) 9, 180 A.P.R. 9 (NSTD), "A Lawyer's Authority Over Documents On Termination of Retainer" (1981), 15 L.S.U.C. Gaz. 103).

The Board submits that the records which they claim belong to the law firm fall into 13 broad categories:

- (1) lawyers' hearing notes and hearing preparation notes
- (2) internal memoranda between lawyers (or students or staff)
- (3) lawyers' (or students') memoranda to file
- (4) lawyers' (or students') notes of conversations
- (5) handwritten notes or corrections made on top of documents
- (6) handwritten notes by lawyers (or their staff) to each other
- (7) lawyers' *aides memoirs* and notes used to help formulate their thoughts
- (8) the law firm's copies of correspondence sent **by** the client
- (9) the law firm's copies of correspondence sent **to** the client
- (10) facsimile transmission confirmation sheets
- (11) telephone message slips
- (12) the law firm's "file detail" sheets
- (13) an invoice

The Board confirms with affidavits from its lawyers that none of the above records have been given to the Board and that there are no circumstances under which any of these records would be given to the Board. However, two of the records which the Board has listed in the above categories, Records 212 and 222, have not been identified as "the law firm documents" by the Board, and I must assume that they were located during a search of the Board's offices. Accordingly, I am satisfied that the Board has custody of Records 212 and 222.

Having reviewed the records and the representations, I am satisfied that all records listed by the Board in its representations under categories 1-3 and 11-12 do not belong to the Board, and are therefore not under the Board's control for the purposes of the Act.

I am also satisfied that certain of the records listed under categories 4, 6 and 7, specifically Records 256, 275, 278, 280, 282, 288, 289, 292, 316, 318, 330, 333, 334, 337, 342, 344, 345, 348, 350, 381, 384, 385, 388, 400, 401, 403, 410, 412, 430 and 444, do not belong to the Board and are not, therefore under the Board's control.

Lawyers' (or Students') notes of conversations

Records 375, 406 and 416 are documents which have notes written on them. The Board submits that the notes belong to the lawyers, and that copies of Records 406 and 416 which have been produced to me belong to the lawyers.

Record 375 is a copy of a draft letter to the appellant prepared by the Board and sent to the law firm. Record 406 is a copy of a letter from the appellant to the Board which the Board sent to the law firm. Record 416 is a draft index of records prepared for the Board by the law firm. The Board has not produced its copy of Records 406 or 416, and has not informed me how its copy of these records was dealt with in response to the appellant's requests.

Records 375 and 406 are not letters to the lawyers, and I find that their ownership was not intended to pass to the lawyers when sent. Rather, they are documents delivered to the lawyers for use in the matters being dealt with, and belong to the Board.

Record 416 is a draft of a document prepared by the lawyers for the benefit of the Board, and belongs to the Board.

The Board submits that all handwritten notes belong to the lawyer, despite the fact that they may have been written on top of other documents. In my view, where the lawyer has written on a record which properly belongs to the Board, the ownership of the document is not transferred to the lawyer or forfeited by the Board. The best practice for the lawyer wishing to retain control of these kinds of notes would be to make a copy of the document at his own expense on which to write the notes. Where the notes have been written on a document which belongs to the Board, in my view, the document as it exists, notes included, belongs to the Board. Accordingly, I find that Records 375, 406 and 416 are under the control of the Board for the purposes of the Act.

Handwritten notes or corrections made on top of documents

The Board's submissions identify Record 250 as a draft letter to the appellant. However, a review of the record numbered 250 reveals that it is actually a letter the appellant sent to the Board. I am satisfied that this record belongs to the Board and is under its control for the purposes of the Act.

Record 251 is a draft letter prepared by the Board and faxed to its lawyers for comment. In my view, this record belongs to the Board and is under the Board's control.

The notes on Record 257.1 are found on a draft letter prepared by the lawyers. The draft was clearly prepared for the Board's benefit, and this record and the notes made on it belong to the Board and are within the Board's control for the purposes of the Act.

Record 297 contains notes which were made by lawyers on letters which were sent by a third party to the lawyers. I am satisfied that Record 297 belongs to the Board and is, therefore, within the Board's control.

Records 371, 415, 416 and 417 are drafts of documents which were prepared by the lawyers for the benefit of the Board and, therefore, belong to the Board and are under its control for the purposes of the Act.

Handwritten notes by lawyers (or their staff) to each other and Lawyers' aides memoires and notes used to help formulate their thoughts

Records 273, 297, 312 and 340 are letters sent by third parties to the lawyers, and the Board, in my view, is entitled to claim each of the letters as its property. Presumably, if the notes had not been made on the original, the Board would have produced two copies, one clean and one

marked, to me. Accordingly, I find that the records, notes included, are under the Board's control for the purposes of the Act.

Law firm's copies of correspondence sent by the client and Law firms' copies of correspondence sent to the client

Records 254, 255 and 395 are the lawyers' file copy of letters written by the lawyers to the Board. The authorities confirm that the copy which the lawyers retain belongs to the lawyers and, in my view, these three records are not under the control of the Board. The Board has not, however, produced its copy to me, nor has it informed me how its copy was dealt with in response to the appellant's request for access. In attempt to bring some finality to the issue of access to these documents, I have decided to review them and determine how the Board's copy of these records would be dealt with under the Act.

Records 266, 372 and 378 are letters sent to the lawyers by the Board. I am satisfied that these records were intended to be passed to the lawyers, and are not under the control of the Board. Again, however, the Board has not produced its copy of any of these records. Accordingly, I have decided to review them as well to determine how the Board's copy of these records would be dealt with under the Act.

Records 251, 375 and 376 are copies of letters to the appellant which the Board prepared and sent to the lawyers. Records 279 and 406 are letters from the appellant to the Board which the Board sent to the lawyers. In my view, even though notes have been made on some of them, these records belong to the Board and are under its control.

Records 281 and 284 are copies of facsimile transmissions from the lawyers to the Board. By fax, the lawyers sent drafts of letters to the appellant to the Board. Record 387 is a draft document prepared by the lawyers, on which the Board has made notes and sent back to the lawyers. In my view, these are not letters to the Board, but draft documents prepared for the benefit of the Board and properly belong to the Board. Accordingly, I find that these records are under the control of the Board for the purposes of the Act.

Record 391 is a copy of correspondence sent to the Board by a third party which the Board has written on and sent by fax to its lawyers. In my view, this record belongs to the Board and is under its control for the purposes of the Act.

Facsimile transmission confirmation sheets

The first page of Records 281, 284, 314, 347, 371 and 383 and the first two pages of Records 276 and 307 consist of facsimile transmission confirmation sheets. These sheets are generated by the lawyers' fax machine to confirm a successful transmission. These records are more in the nature of office administration than for use in the matter being dealt with, and I am satisfied that they do not belong to the Board and are not under the Board's control for the purposes of the Act.

Although the Board listed Records 290 and 359 as falling within this category as well, these records do not include a facsimile transmission confirmation sheet.

The remainder of Records 307 and 383 have been disclosed to the appellant. Accordingly, it is not necessary for me to address these records further in this order.

An invoice

Record 398 is an invoice received by the law firm. The Board submits that if this record is considered a “voucher for disbursements” it is one to which the Board is entitled. I am satisfied that this is an appropriate characterization of the record and I find that it is under the Board’s control for the purposes of the Act.

Miscellaneous

The Board states in its representations that the copies of Records 261, 263, 270, 286, 287 and 359 which were produced to me belong to the law firm and are not, therefore, controlled by the Board or subject to the Act. However, other than categorizing Record 359 as containing a facsimile transmission confirmation sheet (which it does not), the Board has not made specific arguments in support of a finding that these records are not under its control.

These records are letters sent by the lawyers to third parties on the Board’s behalf. The legal authorities I referred to above confirm that the Board is entitled to a carbon copy of these documents. The Board has not, however, produced its copy to me, nor has it informed me how its copy was dealt with in response to the appellant’s request for access. Again, in an attempt to bring some finality to the issue of access to these documents, I have decided to review them and determine how the Board’s copy of these records would be dealt with under the Act.

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Previous orders issued by the Commissioner’s office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter. The policy adopted by the Commissioner’s office gives institutions 35 days from the date of the confirmation of appeal to raise any new discretionary exemptions not originally claimed in its decision letter.

In Order P-883, Inquiry Officer Anita Fineberg pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. She also indicated that the objective of the policy enacted by the Commissioner’s office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

The Ontario Court of Justice (General Division) (Divisional Court) reviewed this order in Ministry of Consumer and Commercial Relations v. Anita Fineberg, Inquiry Officer et al. (21

December 1995), Toronto Doc. 220/95 (Ont. Div. Ct.). In its decision, the court endorsed the manner in which the Inquiry Officer proceeded on this particular issue. An application for leave to appeal this decision was filed, but was refused.

I have carefully reflected on the approach set out in Order P-883, as endorsed by the Divisional Court, and I find that it is equally applicable in the context of the present appeal.

The Board indicates in its representations that it is aware of the Commissioner's jurisprudence and the direction in issues of *IPC Practices* concerning the identification of new exemptions.

In this appeal, the Board claims the application of sections 6(1)(b) and 8(1)(i) for the first time in its representations. It also seeks to extend its application of sections 8(1)(d), 8(1)(e), 12 and 13 to records in respect of which these exemptions were not initially claimed. In my view, the objective of the 35-day policy is equally applicable to both situations.

The Board has provided no explanation as to why it now wishes to apply sections 8(1)(d), 8(1)(e), 12 and 13 of the Act to these additional records, and the only explanation offered to support the late raising of section 6(1)(b) is inadvertence. The Board has provided an explanation regarding the late raising of section 8(1)(i).

In my view, the 35-day "window of opportunity" provided to institutions to raise new discretionary exemptions is intended to allow the Board to review the records and the exemptions claimed, correct typographical errors and/or consult with legal counsel. During this period, it is incumbent upon the Board to confirm the discretionary exemptions on which it will rely as the appeal proceeds through the mediation and inquiry stages of the process. The Board has been involved with this appeal for a significant period of time and has provided no explanation as to why it failed to include these records within the scope of its original exemption claims earlier. Accordingly, I am satisfied that the 35-day time limit should apply in the present appeal.

Therefore, I will not consider the application of section 8(1)(d) to Records 123, 162 and 174, the application of section 8(1)(e) to Records 151, 154, 156, 162, 184, 199, 203, 205, 206, 209, 210, 211, 212, 217, 219, 228, 236, 240, "all documents in the custody of the solicitors" and "all documents containing the name of an individual other than the appellant", the application of section 12 to Records 123, 173 and 228, the application of section 13 to Records 184, 199, 203, 205, 206, 209, 210, 211, 212, 217, 219, 228, "all documents in the custody of the solicitors" and "all documents containing the name of an individual other than the appellant", or the application of section 6(1)(b) of the Act.

The Board explains that section 8(1)(i) was not relied on until late in the appeals process because it was not considered relevant until a particular incident occurred, and has provided details regarding the impact of the incident on its decision to claim this additional exemption. In the circumstances of this appeal, I am prepared to consider this exemption in the context of the facts and developments which have arisen subsequent to the head's decision.

DISCRETION

- [IPC Order M-796/June 28, 1996]

The Board submits that the Commissioner lacks jurisdiction to ask whether a head has exercised his/her discretion or whether the head has exercised that discretion properly. The Board relies on section 43(2) of the Act, which reads:

If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

The Board submits that once the Commissioner decides that a record **may** be withheld, that ends the matter and the Commissioner **shall not** order disclosure.

In the case of a mandatory exemption, the only decision to be made by the Board is whether the record or part meets the requirements of the exemption. In the case of a discretionary exemption, two decisions are necessary. First, the Board must determine whether the record or part meets the requirements of the exemption and second, if it does, the Board must determine whether the record or part nevertheless should be disclosed in the circumstances of the particular case.

Similarly, in order for the Commissioner to uphold the Board's application of a discretionary exemption, the Commissioner will not only have to be satisfied that the requirements of the exemption have been met, but also that the Board has exercised his/her discretion in accordance with established legal principles.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. Former Commissioner Linden stated that it is the responsibility of the Commissioner to ensure that the head has exercised the discretion he or she has under the Act. While the Commissioner may not have the authority to substitute his discretion for that of the head, he can and, in the appropriate circumstances, he will order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of his office as the reviewing agency to ensure that the concepts of fairness and natural justice are followed.

Clearly, section 43(2) does not apply if the Commissioner has not upheld the decision of the head. A decision of a head will not be upheld unless or until the Commissioner is satisfied that the head has exercised his/her discretion in accordance with established legal principles. Accordingly, I have reviewed the Board's exercise of discretion in the course of determining whether to uphold any of the Board's exemption claims.

COSTS

The Board submits that section 43(3) of the Act provides that the Commissioner's order may contain any conditions the Commissioner considers appropriate. It requests that I order the appellant to pay the Board's costs associated with these appeals.

The Board indicates that it is not seeking costs in respect of any part of the appeals where the appellant is successful, but seeks an order relating to the cost of responding to the appeals over

records which the appellant ultimately does **not** receive. The Board submits that the Act does not state that a requester:

... has *carte blanche* to waste an institution's time and money by requesting personal information that clearly is exempt under section 12 or another section of the Act. It does not save a requester from the cost consequences of an unsuccessful request, at least where the request was made in bad faith or is frivolous, vexatious or abusive.

The Board makes similar claims with respect to the records to which it claims the Act does not apply.

I recognize that the Board has gone to considerable expense in responding to this appellant and these appeals. The representations and affidavits it submitted to me are impressive, and were quite helpful to me.

While the Board may not agree with my finding that the appellant's request was not made in bad faith, and was not frivolous, vexatious or an abuse of process, I repeat that this is a four year old request for the appellant's own personal information, arising from an order in which the Board's response was found to be inadequate. Many of the issues before me are complex and without precedent and, in my view, not so straightforward that the appellant should simply know that he would not be successful. The Board retained outside counsel to act on its behalf at an early stage of this appeal, and expended a great deal of its resources on issues which go beyond the issues of control of records and the application of exemptions. I have carefully considered the Board's position, but even if I were to find that I had the requisite legal authority to award costs to a party in an appeal, I am convinced that I would not have awarded costs against the appellant given the history of this case.

DISCUSSION:

PRIVILEGED EVIDENCE AND REPRESENTATIONS

Records 261, 263, 270, 287, 404 and 434 are letters the Board sent to this office during the mediation or inquiry stages of other appeals or compliance investigations.

With respect to the correspondence between the Board and the IPC during the inquiry stage of the process, section 41(13) of the Act reads:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The issue of access to representations has been addressed by both former Commissioner Sidney B. Linden in Order 164 and by Commissioner Tom Wright in Orders 207 and P-345. In Order 164, former Commissioner Linden stated that section 52(13) of the provincial Freedom of

Information and Protection of Privacy Act, which is similar in wording to section 41(13) of the Act, does not confer a right on a party to an appeal to obtain access to the other party's representations. He noted that while section 52(13) does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be an extremely unusual case where such an order would be issued.

Former Commissioner Linden also stated that since the Statutory Powers Procedures Act does not apply to an inquiry under the Act, the only statutory procedural guidelines that govern inquiries under the Act are those which appear in the Act. He went on to discuss the procedures respecting inquiries:

... while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

...

Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

In Order 207, Commissioner Wright adopted the reasoning of former Commissioner Linden and noted that:

If an appellant were provided with access to the [representations] or other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant.

Access to representations and section 52(13) of the provincial Act were the subject of further discussion by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 16, 1991, in the context of an application for judicial review of Order 167. At pages 11 and 12 of his decision, Mr. Justice Isaac commented:

I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the provincial Act. The latter provision prohibits the Commissioner and his staff from disclosing information which comes to their knowledge in the performance of their duties.

In the circumstances, I conclude that the appellant has no right of access to the records which were sent to the IPC during the inquiry stage of the appeals process.

Similarly, with respect to the correspondence between the Board and the IPC which was created during the mediation or pre-inquiry stage of the appeals process, I agree with the approach taken by Inquiry Officer Anita Fineberg in Order P-592. In that order, Inquiry Officer Fineberg concluded that records of this type should not be disclosed for the following reasons:

- (1) The Commissioner's office has a right to control its own process.
- (2) It is possible that these records may contain the same information which was the subject of the original appeal which was not disclosed.
- (3) To grant access to these records would encourage duplicate appeal proceedings and militate against finality in the appeals process.

Accordingly, I uphold the Board's decision not to disclose Records 261, 263, 270, 404 and 434.

Record 287 is correspondence sent to the IPC during the course of an investigation by our Compliance department. In Order P-404, I considered the application of section 52(9) of the provincial Act to records produced in the course of a compliance investigation. I stated:

In my view, the privilege afforded to records by section 52(9) extends only to records which are supplied or produced in the course of an **inquiry** by the office of the Information and Privacy Commissioner/Ontario. The inquiry process is set in motion when an appeal is filed pursuant to section 50(1) by a person who has made an access to information request, has been notified of such a request, or has made a correction of personal information request. A compliance investigation undertaken by the office of the Information and Privacy Commissioner/Ontario is not an **inquiry** for the purposes of the Act, and records which are produced in the course of a compliance investigation are not records produced in the course of an inquiry pursuant to section 52(1). Accordingly, the privilege described in section 52(9) does not extend to the records at issue in this appeal.

Based on the reasoning found in Order P-404, I find that section 41(9) and, similarly, section 41(13) do not apply to Record 287.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the records and find that they contain the personal information of the appellant. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 6, 7, 8, 12 and 13, would otherwise apply to that information.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Board must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation

[Order 49. See also Order M-2 and Order M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[See Order 210]

The Board makes a general claim that Records 241-433 (the “law firm documents”) are covered by the second part of Branch 1 of the exemption as, by definition, all of the documents in the custody of the lawyers acting for the Board in litigation against the appellant are part of those lawyers’ briefs in that litigation.

In my view, it is inappropriate for the Board to claim an exemption under the Act on anything other than a document by document basis, and it on this basis that each of the records will be evaluated. For greater efficiency, I will address the individual records according to the sub-categories provided by the Board in its representations.

Additionally, I note that in Toronto Board of Education v. David Burk and Mumtaz Jiwan (6 March 1996), Toronto Doc. 213/95 (Ont. Div. Ct.), the Divisional Court rejected the Board’s contention that disclosure of the location of information, if the location is a legal office, is as protected by the privilege as disclosure of the contents of the information, in an appeal which involved circumstances similar to this appeal. In dismissing the Board’s application for judicial review of Order M-500, the Court found that the Board’s conduct “... estops it from being entitled to draw the solicitor-client line where it sees to draw it.” The Court concluded on this issue that “... the Board has long ago let the horse out of the barn. Its attempt to recapture it at this late stage trivializes the genuinely important doctrine of solicitor-client privilege.”

Notes related to the investigation

Records 150, 151, 154, 156, 158, 159, 161, 162, 174, 227, B2, B5, B7, B14, B15, B16, B17, B19, B23 and B25 are categorized by the Board as “notes related to the investigation”. The Board has provided affidavit evidence which confirms that Records 150, 151, 154, 156, 158, 159, 161, 162, 174, B2, B5, B7, B14, B15, B16, B17, B19, B23 and B25 relate to the Board’s investigation of the appellant’s activities, and submits that it is clear on the face of Record 227 that it relates to the investigation.

The Board submits that the dominant purpose of the investigation was to determine whether there was just cause to discipline the appellant or terminate his employment, and to present the Board’s case at the grievance arbitration hearing which would follow discipline or dismissal.

Having reviewed these records and the evidence provided concerning the circumstances under which they were created, I am satisfied that each was created or obtained especially for the lawyer’s brief for existing or contemplated litigation. Accordingly, I find that Records 150, 151, 154, 156, 158, 159, 161, 162, 174, 227, B2, B5, B7, B14, B15, B16, B17, B19, B23 and B25 qualify for exemption under section 12 of the Act.

Notes made in preparation for giving information to or receiving advice from legal counsel

The Board submits that pages 3-5 of Record 187 consist of notes made in preparation for meetings where the author would either give legal counsel or seek legal advice concerning the issues or questions identified in the notes.

The last three pages of Record 187 are a letter to the Board from an Appeals Officer with this office, with notes made on the second page.

The letter itself, without the notes, is not a confidential communication between a client and a legal advisor and is not subject to solicitor-client privilege. The notes, the Board submits, were made for the purpose of providing the Board's legal representative with information and responding to the Appeals Officer. I am satisfied that the notes reflect a confidential communication between a client and legal advisor which is directly related to formulating legal advice and, therefore, the notes qualify for exemption under section 12 of the Act. The letter, with notes severed should, however, be disclosed to the appellant.

Notes of meetings with legal counsel

The Board submits that Records 181 and 195 are notes of meetings with legal counsel and reveal the substance of solicitor-client communications relating to the seeking, formulating or giving of legal advice. I am satisfied that disclosure of these records would reveal confidential communications between a client and a legal advisor, and that these communications were directly related to the seeking, formulating or giving of legal advice. Accordingly, these records qualify for exemption under section 12 of the Act.

Records made in contemplation of or during litigation for the purpose of obtaining information to furnish to the Board's lawyers

The Board submits that Records 188 and 320 are covered by the second part of Branch 1 of the exemption because their purpose was to obtain information to be furnished to the Board's lawyer(s) for use in litigation.

Having reviewed the records and representations, I am satisfied that Record 320 was created especially for the lawyer's brief for existing litigation. I am not satisfied, however, that Record 188 was created or obtained especially for the lawyer's brief. Rather it was merely the means by which something created especially for the lawyer's brief was conveyed or obtained. Accordingly, I find it does not qualify for exemption under this part of the exemption.

Communications from third parties to the lawyers for the lawyers' use in litigation

The Board submits that Records 210, 323, 332, 398 and 431.1 through 431.6 are communications from third parties to the Board's lawyers, made during or in contemplation of litigation, created or obtained especially for the lawyers' brief(s) for litigation and fall under the second branch of the section 12 exemption.

Having reviewed the records and representations, I am satisfied that Records 210, 323, 332 and 431.1 through 431.6 were created or obtained especially for the lawyers' brief for existing litigation, and qualify for exemption under section 12 of the Act. In my view, Record 398,

which is an invoice for copies made, was not created or obtained especially for the lawyers' brief, and is not exempt under section 12.

Solicitor-client communications

The Board submits that Records 184, 185, 186, 209, 212, 218, 219, 222, 223, 243, 245, 246, 247, 251, 254, 255, 257.1, 257.2, 257.3, 266, 279, 281, 284, 290, 308, 321, 328, 343, 347, 351, 371, 372, 375, 376, 378, 379 (page 3), 387, 391, 395 and 406 qualify for exemption under Part 1 of Branch 1 of the section 12 exemption.

Having considered the representations and the nature of the records, I find that only pages 1, 3, 4, the third sentence of page 5, and the last 10 pages of Record 184 meet the requirements of Part 1 of Branch 1, and qualify for exemption under section 12. Similarly, I find that only the last two pages of Record 212 and only the notes recorded on Records 391 and 406 qualify for exemption under section 12. I am satisfied that all of the information which remains at issue in Records 185, 186, 218, 222, 223, 243, 251, 254, 255, 257.1, 257.2, 257.3, 266, 281, 284, 290, 328, 347, 371, 372, 375, 376, 378, 387 and 395 qualifies for exemption under section 12.

Although page 5 of Record 184 is not actually a communication between the Board and its lawyers, the Board submits that the first and third sentences of this record reveal part of the substance of the advice provided by the lawyers to the Board. Having reviewed page 5 of this record, however, I find that the only information revealed by the first sentence is the fact that legal advice was sought and received -- the substance of the advice is not apparent. Although privilege is often claimed to protect the very fact that legal counsel was sought, in the circumstances of this case, the appellant is well aware that the Board has consulted with its legal counsel with reference to numerous issues during the ongoing litigation with him, and I find that this information does not qualify for exemption under section 12.

The Board also claimed in its representations that pages 6 and 7 of Record 184 are also exempt, but in its affidavit evidence (which the Board submits provides the basis for each claim of privilege) it makes no mention of the basis for such a claim. Finally, page 9 of Record 184 is not a communication between the Board and its legal advisors, and does not relate to the seeking, formulating or giving of legal advice.

Although the client was given a copy of the correspondence, Record 379 is simply not a confidential communication between a client and a legal adviser. The remaining records which the Board claims fall under this part are not sufficiently related to the seeking, formulating or giving of legal advice to attract the application of the exemption.

Documents prepared in contemplation of or during litigation, all intended for use in litigation

The Board submits that Records 188, 199, 206, 217, 241, 242, 244 and 245 were all prepared in contemplation of or during litigation and, consequently, are protected by the second part of Branch 1 as well as Branch 2 of the exemption.

Having reviewed these records, they were not, in my view, created or obtained especially for the lawyers' brief for existing or contemplated litigation. I am satisfied, however that Records 199,

206, 217 and 242 were prepared by or for counsel retained by the Board in contemplation of litigation, and section 12 applies. I am not satisfied that the remaining records were prepared for use in giving legal advice, in contemplation of litigation or for use in litigation and I find that they do not qualify for exemption under these parts of section 12.

Records 203, 205 and 211

These records have been partially disclosed to the appellant. The information which has been withheld is the list of names to whom each of the records was sent, and one paragraph from Record 203. None of these records was created or obtained especially for the lawyer's brief for litigation, and I find that the exemption does not apply.

Communications from the lawyers to third parties made during or in contemplation of litigation for the purpose of conducting litigation

The Board submits that Records 286, 309, 310, 326, 327, 359 and 370 are communications made by the lawyers to third parties (witnesses, mostly) during the course of litigation or in contemplation of litigation, all for the purpose of conducting the litigation and, consequently, were created for the lawyers' litigation brief(s) and are protected by the second part of the common law privilege.

In my view, none of these records were created or obtained especially for the lawyers' brief for existing litigation. However, Records 286 and 359 contain information which would reveal the contents of other records which were actually created or obtained especially for the lawyers' brief, and qualify for exemption under section 12.

The Board submits that Records 309, 310, 326, 327 and 370 qualify for exemption under Branch 2 of the section 12 exemption. I am satisfied that all of these records were prepared by counsel retained by the Board. The records themselves are not the type of record which a lawyer would use in giving legal advice or in litigation. The records merely convey hearing dates and return original information or copies of information to the witnesses who provided it, or request that a private company arrange for copying. In my view, these records do not qualify for exemption under section 12 of the Act.

Records which reveal the substance of lawyers' advice

The Board submits that the second paragraph of Record 199 discloses advice given or a communication made to the Board by its lawyer. I have reviewed the record and I agree that the second paragraph would reveal a communication between the Board and its legal counsel, which is directly related to the seeking, formulating or giving of legal advice. I find, therefore, that the second paragraph of this record meets the requirements of Part 1 of Branch 1 of the exemption.

Notes of a grievance meeting with union officials

The Board submits that Record 236 consists of notes made during a grievance step meeting between union officials and Board officials and, as such, that it was prepared during or in contemplation of grievance litigation.

I am satisfied that this particular record was created or obtained especially for the lawyer's brief for that litigation. Accordingly, I find that Record 236 qualifies for exemption under section 12 on this basis.

Lawyers' drafts, notes, internal memoranda, computer records and other working papers

The Board submits that Records 212, 250, 251, 273, 276, 297, 307, 312, 314, 340, 383, 406, 415, 416 and 417 are drafts, notes, internal memoranda, computer records and other working papers which are protected under all aspects of the section 12 exemption.

Record 212 appears to be a collection of various documents. The first page is a cover page for a facsimile transmission. In my view, the information contained on this page of the record is not sufficiently detailed or related to the business of seeking, formulating or giving of legal advice, the lawyer's brief, or the conduct of existing or contemplated litigation to attract the application of the section 12 exemption.

The next three pages of Record 212 have been disclosed to the appellant. The last two pages consist of a letter from the Workers' Compensation Board to the Board on which the Board's lawyer has written various notes. I am satisfied that the notes found on these pages of the record were prepared by counsel retained by the Board for use in giving legal advice. The third and fourth pages of this record are a clean copy of the same letter, and this clean copy has been disclosed to the appellant. Given that the appellant has a clean copy of the same letter and that the copy with the notes does not lend itself well to severance, I will not order the Board to sever the notes such that the letter may be disclosed.

The Board's index and representations describe Record 250 as a draft letter to the appellant. Having reviewed the copy of Record 250 which the Board has provided to me, however, it is apparent to me that it is a letter **from** the appellant. As such, I find that this record does not qualify for exemption under section 12.

Records 273 and 312 have been disclosed to the appellant with the exception of handwritten notes. Although the notes were made by a lawyer and/or his staff, I find that they are not sufficiently detailed or connected to the business of litigation or legal advice to attract the application of any part of the section 12 exemption. Accordingly, I find that the severed portion of these records should be disclosed to the appellant.

Record 276 is a letter written on the Board's behalf by its lawyers to the Workers' Compensation Board. The Board's only submission in support of section 12 is that the record was prepared by the Board's lawyer during litigation involving the appellant, and that it is a communication to the tribunal conducting the litigation. These representations are not, in my view, sufficient to support the application of either branch of the section 12 exemption. In any event, I would hesitate to find that any privilege which may have attached to the information contained in the record had not been waived as a result of having sent this letter to the Worker's Compensation Board.

The Board's representations regarding Record 297 only address the notes made on this record. The Board has not made representations in support of the application of section 12 to the remainder of the record, and I am satisfied that section 12 does not apply. I am satisfied that the notes on Record 297 and those on Record 340 were prepared by counsel retained by the Board for use in giving legal advice, and qualify for exemption under Branch 2 of section 12.

The page remaining at issue in Record 314 is a fax cover page. I am satisfied that section 12 does not apply to the fax cover page in the circumstances of this appeal.

Record 406 is a copy of a letter sent to the Board by the appellant which the Board has sent to the lawyers by fax. There are handwritten notes on the first page of this record. In my view, the notes reveal a confidential communication between the Board and its lawyers which is directly related to the seeking, formulating or giving of legal advice. Accordingly, I find that the notes qualify for exemption under the first part of Branch 1 of the section 12 exemption. The remaining parts of this record do not qualify for exemption under section 12 and should be disclosed to the appellant.

Records 415, 416 and 417 are draft lists of records prepared by counsel retained by the Board for use in giving legal advice and/or in contemplation of litigation. Accordingly, I find that these records qualify for exemption under Branch 2 of the section 12 exemption.

Correspondence with the IPC during the course of access/privacy litigation

The Board submits that Records 261, 263, 270, 287, 404 and 434 are privileged settlement communications which are protected by section 12 of the Act. The Board submits that in Order 49, former Commissioner Linden confirmed that privileged settlement communications would be exempt under section 19 of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of section 12 of the Act.

What former Commissioner Linden actually said was, "... it is **possible** for letters or communications passing between opposing lawyers to obtain the status of a privileged communication **if** they are made "without prejudice" **and** in the pursuance of settlement" [emphasis mine]. Former Commissioner Linden found nothing in the records at issue in Order 49 to indicate that those circumstances existed, and did not uphold the application of the exemption. I agree with former Commissioner Linden. I find that the circumstances described by former Commissioner Linden do not exist, and the records do not qualify for exemption under section 12 of the Act.

Miscellaneous

Records 209, 219, 246, 247, 279, 308, 309, 310, 326, 327, 343, 351, 370 and 398 are not records which, in my opinion, were prepared especially for the lawyers' brief or for use in giving legal advice, in contemplation of litigation or for use in litigation, are not directly related to seeking, formulating or giving legal advice, and do not qualify for exemption under section 12.

ADVICE OR RECOMMENDATIONS

- [IPC Order M-796/June 28, 1996]

The Board indicates in its index that section 7(1) applies to Records 125, 151, 154, 156, 158, 173, 174, 181, 222, 227, 236, 240 and B5.

I have found that Records 151, 154, 156, 158, 174, 181 and 227 qualify for exemption under section 12 of the Act, and that Record 222 is not under the control of the Board. Consequently, it is not necessary for me to consider the application of section 7(1) to these records.

The Board has made representations specifically under section 7(1) with regard to Records 125 and B5. It relies on the representations it made in the context of section 12 for Records 173, 236 and 240. Given its nature, it is my view that it is more appropriate to assess Record 240 under section 38(b). Accordingly, I will only address the application of section 7(1) to Records 125, 173, 236 and B5.

Section 7(1) of the Act states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or an employee of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13 of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He states that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

Record 125 consists of a draft recommendation regarding the appellant’s employment with the Board and covering memoranda. I am satisfied that the disclosure of the information contained in this record would permit the drawing of accurate inferences as to the nature of a suggested course of action which would be ultimately accepted or rejected by its recipient during the deliberative process. Accordingly, I find that Record 125 qualifies for exemption under section 7(1) of the Act.

Records 173, 236 and B5 consist of handwritten notes. In my view, these records do not contain information which qualifies as advice or recommendations, nor would their disclosure permit the drawing of accurate inferences about any advice or recommendations which may have been given. Accordingly, I find that Records 173, 236 and B5 do not qualify for exemption under section 7(1).

DANGER TO SAFETY OR HEALTH

The Board submits that section 13 of the Act applies to Records 125, 150, 151, 154, 156, 158, 159, 161, 173, 174, 222, 227, 236 and 240. I have found that Record 125 qualifies for exemption under section 7(1), that Records 150, 151, 154, 156, 158, 159, 161, 174 and 227 qualify for exemption under section 12, and that Record 222 is not under the control of the Board. It is my view that it is most appropriate to address Records 240 and 273, with the exception of the severance on the first page of Record 173, under section 38(b) of the Act. Accordingly, I need only consider the application of section 13 to Records 173 and 236.

Section 13 of the Act states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Board submits that the reference to health in section 13 of the Act is broad enough to include emotional and mental health. The Board indicates that the people involved with this case are already frightened, and that disclosure of the records, which outline their role in the investigation or litigation involving the appellant, to the appellant would threaten the emotional well-being of persons named in the records.

The first page of Record 173 contains a reference to one individual, whose name and role in the investigation are known to the appellant according to the records at issue in this appeal. Record 236 does not refer to any individuals. In my view, I have not been provided with sufficient evidence to demonstrate that the disclosure of Record 236 and the information severed from the first page of Record 173 could **reasonably** be expected to seriously threaten the health or safety of any individual. Accordingly, I find that section 13 does not apply in the circumstances of these appeals.

ENDANGER LIFE OR SAFETY

The Board submits that section 8(1)(e) applies to the Records 125, 158, 159, 161, 173, 174, 222 and 227. I have found that Record 125 qualifies for exemption under section 7(1), that Records 158, 159, 161, 174 and 227 qualify for exemption under section 12, that Record 222 is not under the control of the Board for the purposes of the Act, and that Record 173, with the exception of the first page, is more appropriately dealt with under section 38(b) of the Act. Accordingly, the only record which I need to address under this section is the severance made to the first page of Record 173.

Section 8(1)(e) of the Act reads:

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

endanger the life or physical safety of a law enforcement officer or any other person.

In my consideration of the application of section 13 to this record, I found that I had not been provided with sufficient evidence to demonstrate a reasonable expectation that disclosure of the information severed from the first page of Record 173 would seriously threaten the health or

safety of any individual. Similarly, I am not satisfied, based on the evidence provided, that disclosure of the same information could reasonably be expected to endanger the life or physical safety of any person. Accordingly, I find that section 8(1)(e) does not apply in the circumstances of this appeal.

SECURITY

The Board has not specified which records it is claiming are exempt under section 8(1)(i) of the Act. Accordingly, I have reviewed the records which I have found do not qualify for any of the other exemptions claimed but are within the Board's control to determine whether this exemption would apply. Section 8(1)(i) reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

I am satisfied that the facts and developments referred to in the Board's representations occurred, and that it is reasonable for the Board to consider them relevant to this appeal. However, I am not satisfied that disclosure of any of the records remaining at issue, which are all identified in the index which accompanies this order, could reasonably be expected to result in the harm described in section 8(1)(i). Accordingly, I find this section does not apply in the circumstances of this appeal.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the records or parts of records remaining at issue, I find that they all contain the personal information of the appellant.

In its representations, the Board refers to an agreement reached in a discussion with the Appeals Officer that the Board's representations would not address the application of the personal privacy exemptions to Records 241-433 (the law firm documents). Given my obligation with respect to the protection of personal privacy, I have reviewed all of the records remaining at issue to determine if they contain the personal information of individuals other than the appellant. In my view, Record 173, with the exception of the severance on the first page, and Records 228, 240, 243 and 244 also contain the personal information of other employees of the Board. The remaining records, including the first page of Record 173, refer to Board employees or other individuals acting in their employment or professional capacity, and I find that the information which relates to these individuals does not qualify as their personal information.

As the Appeals Officer agreed that the Board need not submit extensive representations on this issue at that point in the inquiry, I will not finalize my order with respect to this issue without giving the Board the opportunity to submit additional representations.

The appellant has indicated that he is not seeking access to personal identifiers of other individuals whose personal information may be contained in the records. Accordingly, this information should be severed from Records 173, 228, 240, 243 and 244 and not disclosed to the appellant as it is not responsive to his request. I am satisfied that, even with the personal identifiers removed, certain of the individuals referred to in these records will still be identifiable to the appellant and that the records as severed, therefore, contain their personal information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both a requester and other individuals and the Board determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Board has the discretion to deny the requester access to that information. In this situation, a requester is not required to provide that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since a requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information. The Board has not raised the application of any of the presumptions found in section 14(3), and I find that none apply.

If none of the presumptions contained in section 14(3) apply, the Board must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case. The Board submits that sections 14(2)(e) (unfair exposure to harm), (f) (highly sensitive information), (g) (information unlikely to be accurate or reliable), and (h) (information provided in confidence) are relevant considerations.

Record 173 relates to another employee's involvement in some of the incidents which led to the appellant's termination, Record 240 relates to the employment-related consequences of that employee's involvement, and Record 243 contains one reference to proceedings involving that individual. Record 228 is a handwritten summary of surveillance of a group of employees over a period of about three weeks. Record 244 contains a reference to the vacation plans of a Board employee.

Based on the evidence provided to me, I am not persuaded that disclosure of the contents of any of these records would unfairly expose any individual to pecuniary or other harm, nor that the personal information is unlikely to be accurate or reliable. I find that sections 14(2)(e) and (g) are not relevant considerations in the context of these records. Further, none of the personal information found in Records 173 and 228 can be said to have been supplied by the individual to whom it relates and, therefore, section 14(2)(h) is not a relevant consideration in respect of Records 173 and 228.

I am satisfied that the personal information of other individuals which is found in Records 173, 228, 240 and 243 is properly characterized as “highly sensitive” (section 14(2)(f)). I am also satisfied that, with respect to the personal information in Record 244 and the personal information contained in Records 173, 228, 240 and 243 which was actually supplied by the individual to whom it relates, it would have been reasonable for the individual to have had a reasonable expectation of confidentiality with respect to that information (section 14(2)(h)). These factors weigh in favour of privacy protection.

Having weighed the factors favouring privacy protection against the appellant’s right to access personal information about himself, I find that the factors favouring privacy protection are more compelling in the circumstances of this appeal. Accordingly, I find that Records 228 and 240 and parts of Records 173, 243 and 244 qualify for exemption under section 38(b) of the Act. I have attached a copy of Records 173, 243 and 244 to the copy of this order sent to the Board’s Freedom of Information and Privacy Co-ordinator which highlights those portions of these records which should **not** be disclosed.

CLOSED MEETING

The Board raised the discretionary exemption found in section 6 of the Act in respect of Records 125, 227 and 240. As I have found that these records are exempt under other sections of the Act, it is not necessary for me to determine the issue of whether the Board is entitled to rely on this discretionary exemption, nor whether it applies to these records.

REASONABLENESS OF SEARCH

The appellant raised the issue of reasonableness of search after noting one record in particular had not been identified as responsive by the institution. He submits that the missing record raises doubts about whether further records also exist.

When a requester provides sufficient details about the records which he or she is seeking and the Board indicates that no additional records exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

Upon being notified that the appellant believes further responsive records exist, the Board conducted a further search and located 25 additional records in a location which it had not

expected such records to be. It informed the appellant of the results of this search, and asked the appellant for information which would assist the Board to locate any other records which the appellant believes exist. The appellant did not respond to the Board's request for information.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Additionally, although the Board identified a solicitor's memo to file dated August 24, 1992 and catalogued it as Record 283 in its index, it has been unable to locate it since, despite further searches.

The Board has provided details of the searches conducted in the form of affidavits. Having reviewed all the information provided by the appellant and the Board, I am satisfied that the Board has undertaken reasonable searches in order to locate the records that are responsive to this request.

ORDER:

1. I order the Board to disclose Records 123, 188, 203, 205, 209, 211 and 219 to the appellant by sending him a copy of these records by **August 2, 1996** but not before **July 29, 1996**.
2. I order the Board to disclose the parts of Records 173, 184, 187, 199 and 212 which I have found do not qualify for exemption to the appellant by sending him a copy of these records by **August 2, 1996** and not before **July 29, 1996**.
3. I order the Board to provide me with written representations addressing the application of section 38(b) of the Act to Records 241, 244, 245, 246, 247, 250, 273, 276, 279, 297, 308, 309, 310, 312, 314, 326, 327, 340, 343, 351, 370, 379, 391, 398 and 406 and the Board's copy of Record 287 by **July 12, 1996**. I remain seized of the issue of the application of this exemption to these records.
4. I uphold the Board's decision not to disclose the remaining records to the appellant.
5. In order to verify compliance with the provisions of this interim order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

June 28, 1996

APPENDIX "A"

LIST OF RECORDS AND EXEMPTIONS

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
123	05/10/79 witness statement re: incident	14, 38(b)	Disclose
125	15/10/79 and 18/10/79 internal Board memo	7(1), 8(1)(a), (d), (e), (f), (l), 12, 13, 14, 38(a), 38(b)	Exempt, s.7
150	21-24-25/09/90 Handwritten note	as above	Exempt, s.12
151	22/10/90 Handwritten note	7(1), 8(1)(a), (f), 12, 13, 14	Exempt, s.12
154	24/10/90 Handwritten note	7(1), 8(1)(a), (f), 12, 13, 14	Exempt, s.12
156	07/11/90, 28/10/90, 30/10/90 Handwritten notes	7(1), 8(1)(a), (f), 12, 13, 14	Exempt, s.12
158	31/10/90 Handwritten note	7(1), 8(1)(a), (d), (e), (f), 12, 13, 14, 21	Exempt, s.12
159	01/11/90 Handwritten notes	as above	Exempt, s.12
161	Handwritten note (n.d.)	8(1)(a), (d), (e), (f), (l), 12, 13, 14	Exempt, s.12
162	Handwritten notes dated 07/11/90	not responsive 8(1)(a), (f), 12, 14	Exempt, s.12
173	Handwritten memos dated 19/11/90 and 13/11/90	partially exempt 7(1), 8(1)(a), (e), (f), 13, 14	Partially exempt, s.38(b)
174	Handwritten notes dated 12/11/90, 26/10/90, 29/10/90, and invoice dated 02/04/90	partially exempt 7(1), 8(1)(a), (e), (f), 12, 13, 14	Exempt, s.12
181	Handwritten notes dated 16/03/92 and 30/03/92	7, 12	Exempt, s.12

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
184	Correspondence and notes dated 09/06/92, 12/06/92, 10/06/92, 22/06/92, 07/07/92, 30/06/92, 14/07/92, 13/07/92 to 17/07/92	partially exempt 8(1)(a), (f), 12	Page 1, 3 & 4 - Exempt, s.12 Page 5 - one line exempt, s.38(b) Page 6 - disclose Page 7 - disclose Page 9 - disclose Last 10 pages - Exempt, s.12
185	Memo from solicitors to Board dated 17/07/92, incl. attach.	partially exempt 12	Exempt, s.12
186	Letter from solicitors to Board dated 06/08/92, incl. attach.	12	Exempt, s.12
187	Letter from solicitors to IPC dated 06/08/92, incl. attach.	12	Partially exempt - Notes Exempt, s.12
188	Internal memo dated 10/08/92	12	Disclose
195	Handwritten notes dated 28/10/92	12, 14	Exempt, s.12
199	Internal memo dated 09/12/92	8(1)(a), (f), 12	Partially exempt - 2nd paragraph Exempt, s.12
203	Internal memo dated 02/03/93	partially exempt as above	Disclose
205	Internal memo dated 08/04/93	partially exempt as above	Disclose
206	Handwritten notes dated 16/04/93	as above	Exempt, s.12
209	Letter from solicitors to Board dated 14/05/93	as above	Disclose
210	Letter from solicitors to Board dated 26/05/93	as above	Exempt, s.12
211	Internal memo dated 31/05/93	partially exempt as above	Disclose

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
212	Letter from solicitors to Board dated 08/07/93, 03/06/93, incl. attach.	partially exempt exemptions as above	First page - disclose Last 2 pages Exempt, s.12
217	Internal memo dated 03/09/93	as above	Exempt, s.12
218	Letter from Board to solicitors dated 10/09/93	12	Exempt, s.12
219	Letter from Board to solicitors dated 24/09/93, 10/08/93	partially exempt 8(1)(a), (f), 12	Disclose
222	Handwritten note dated 26/10/93	7(1), 8(1)(a), (d), (e), (f), (l), 12, 13, 14	Exempt, s.12
223	Letter from Board to solicitors dated 07/01/94	12	Exempt, s.12
227	Handwritten notes (n.d.)	7(1), 8(1)(a), (d), (e), (f), 12, 13, 14	Exempt, s.12
228	Handwritten notes (n.d.)	8(1)(a), (f), 14	Exempt, s.38(b)
236	Handwritten notes (n.d.)	7(1), 8(1)(a), (f), 12, 13, 14	Exempt, s.12
240	Typed notes (n.d.) "Table of Contents", incl. attach.	7(1), 8(1)(a), (f), 12, 13, 14	Exempt, s.38(b)
241	Internal memo dated 15/01/91	12	Disclose
242	Handwritten notes (n.d.)	12	Exempt, s.12
243	Letter from Board to solicitors dated 12/04/91	12	Exempt, s.12
244	Internal memo dated 22/10/91	12	Partially exempt, s. 38(b)
245	Letter from Board to affected person dated 17/01/92	12	Record 36 almost same Exempt, s.12
246	Letter from Board to solicitors dated 10/02/92	12	Disclose
247	Letter from Board to solicitors dated 11/03/92	12	Disclose

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
248	Solicitor's memo to file dated 23/03/92	not in custody or control, 12	No control
250	Draft letter dated 03/04/92	12	Disclose
251	Draft letter dated 10/06/92	12	Exempt, s.12
252	File detail record for solicitor dated 11/06/92	not in custody or control, 12	No control
253	Memo between solicitors dated 11/06/92	not in custody or control, 12	No control
254	Letter from solicitors to Board dated 29/06/92	12	Exempt, s.12
255	Letter from solicitors to Board dated 30/06/92	12	Exempt, s.12
256	Solicitor's notes from telephone call with clients dated 30/06/92	not in custody or control, 12	No control
257.1	Letter to client from solicitor dated 22/07/92	12	Exempt, s.12
257.2	Letter to solicitor from client with notes dated 14/07/92, 08/07/92, 17/04/91, 04/07/91, 05/03/92, 06/04/92, 22/04/92, 05/27/92	12	Exempt, s.12
257.3	Fax to client from solicitor, 21/07/92, 07/05/92, " , 13/05/92	12	Exempt, s.12
258	File detail record for solicitor dated 01/07/92	not in custody or control, 12	No control
259	Internal memo dated 07/07/92, letter from solicitors to Board dated 30/06/92, incl. attach. dated 14/07/92, 13/07/92, 17/07/92	12	Not at issue
260	Memo from solicitors to Board dated 17/07/92, incl. attach.	12	Not at issue
261	Letter from solicitors to IPC dated 17/07/92, incl. attach.	12	Do not disclose
263	Draft letter to IPC dated 17/07/92	12	Do not disclose
264	File detail record for solicitor dated 20/07/92	not in custody or control, 12	No control

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
266	Letter from Board to solicitors dated 06/08/92	12	Exempt, s.12
267	Memo between solicitors, with attached drafts and notes dated 06/08/92	not in custody or control, 12	No control
268	Memo between solicitors dated 06/08/92	not in custody or control, 12	No control
269	Letter from solicitors to Board dated 06/08/92, incl. attach.	12	Not at issue
270	Letter from solicitors to IPC dated 06/08/92, incl. attach.	12	Do not disclose
271	Memo between solicitors dated 06/08/92	not in custody or control, 12	No control
273	Letter from WCAT to solicitors dated 06/08/92	partially exempt 12	Disclose
274	File detail record for solicitor dated 10/08/92	not in custody or control, 12	No control
275	Solicitor's memo to file dated 10/08/92	not in custody or control, 12	No control
276	Letter from solicitors to WCAT dated 18/08/92	12	Pages 1&2 - no control Disclose rest
278	Solicitor's memo to file dated 20/08/92	not in custody or control, 12	No control
279	Fax from Board to solicitors dated 21/08/92, incl. attach. dated 05/08/92	12	Disclose
280	Solicitors memo to file dated 24/08/92	not in custody or control, 12	No control
281	Fax from solicitors to Board dated 24/08/92, incl. attach.	12	Page 1 - no control Rest - Exempt, s.12
282	Solicitor's notes of telephone call dated 24/08/92	not in custody or control, 12	No control
283	Solicitor's memo to file dated 24/08/92	not in custody or control, 12	Missing
284	Fax from solicitors to Board dated 24/08/92, incl. attach.	12	Page 1 - no control Rest - Exempt, s.12
286	Letter from solicitors to solicitors dated 02/09/92	12	Exempt, s.12
287	Letter from solicitors to IPC dated 09/09/92	12	Disclose

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
288	Solicitor's memo to file dated 9&10/09/92	not in custody or control, 12	No control
289	Solicitor's memo to file dated 11/09/92	not in custody or control, 12	No control
290	Correspondence between solicitors and WCB dated 21/09/92	partially exempt pp. 5, 6 and 7 - s.12	Exempt, s.12
292	Solicitor's notes to file dated 06/10/92	not in custody or control, 12	No control
297	Letter from WCB to solicitors dated 13/10/92	12	Notes - Exempt, s.12 Rest - disclose
298	Solicitor's file detail record dated 13/10/92	not in custody or control, 12	No control
301	Solicitor's memo to file dated 19/10/92	not in custody or control, 12	No control
302.85	Letter to Board from WCB 08/04/93		Not responsive
305	Memo to file and other solicitors dated 26/10/92	not in custody or control, 12	No control
307	Letter from solicitors to WCB dated 30/10/92	partially exempt pp. 1&2 - s.12	Pages 1&2 - no control Rest - Not at issue
308	Letter from solicitors to Board dated 03/11/92	12	Disclose
309	Letter from solicitors to Board dated 03/11/92	12	Disclose
310	Letter from solicitors to affected person dated 03/11/92	12	Disclose
312	Letter from WCB to solicitors dated 06/11/92	partially exempt 12	Disclose
314	Letter from solicitors to WCB dated 19/11/92	partially exempt pp. 1&2 - s.12	Page 1 - no control Page 2 - disclose
316	Solicitor's notes of telephone call dated 24/11/92	not in custody or control, 12	No control
317	Memo between solicitors dated 24/11/92	not in custody or control, 12	No control
318	Solicitor's notes of telephone call with client dated 25/11/92	not in custody or control, 12	No control

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
319	File detail record for solicitor dated 26/11/92	not in custody or control, 12	No control
320	Internal memo dated 09/12/92	12	Exempt, s.12
321	Memo between solicitors with attachments dated 11/12/92	not in custody or control, 12	No control
323	Notes from third party to Board, under cover of 16/12/92	12	Exempt, s.12
325	Memo between solicitors with notes dated 17/12/92	not in custody or control, 12	No control
326	Letter from solicitors to affected person dated 22/12/92	12	Disclose
327	Letter from solicitors to affected person dated 23/12/92	12	Disclose
328	Letter from solicitors to Board dated 23/12/92, incl. attach.	12	Exempt, s.12
330	Solicitor's notes dated 08/01/93	not in custody or control, 12	No control
331	Solicitor's memo to file dated 14/01/93	not in custody or control, 12	No control
332	Letter from solicitor to solicitors dated 01/02/93	12	Exempt, s.12
333	Memo between solicitors dated 08/02/93	not in custody or control, 12	No control
334	Solicitor's memo to file dated 22/02/93	not in custody or control, 12	No control
337	Solicitor's memo to file dated 02/03/93	not in custody or control, 12	No control
339	Solicitor's memo to file dated 19/03/93	not in custody or control, 12	No control
340	Letter from WCB to solicitors dated 24/03/93, incl. attach.	partially exempt p.2 - s.12	Notes - Exempt, s.12
342	Solicitor's memo to file dated 31/03/93	not in custody or control, 12	No control
343	Letter from solicitors to Board dated 31/03/93	12	Disclose
344	Solicitor's memo to file dated 31/03/93	not in custody or control, 12	No control
345	Solicitor's memo to file dated 02/04/93	not in custody or control, 12	No control
346	Memo between solicitors dated 02/04/93	not in custody or control, 12	No control

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
347	Fax memo from solicitors to Board dated 05/04/92 (should be 93), incl attach. dated 05/04/93	12	Page 1 - no control Rest - Exempt, s.12
348	Solicitor's telephone messages and notes to file dated 05/04/93, 08/04/93, 14/04/93	not in custody or control, 12	No control
350	Solicitor's memo to file dated 19/04/93	not in custody or control, 12	No control
351	Letter from solicitors to Board dated 21/04/93	12	Disclose
357	Solicitor's memo to file dated 18/05/93	not in custody or control, 12	No control
358	File detail for solicitor dated 20/05/93	not in custody or control, 12	No control
359	Letter from solicitors to solicitors dated 26/05/93	12	Exempt, s.12
360	Letter from solicitors to solicitors dated 26/05/93	12	Not at issue
369	File detail record for solicitor dated 30/06/93	not in custody or control, 12	No control
370	Letter from solicitors to affected person dated 07/07/93	12	Disclose
371	Fax from solicitors to Board dated 08/07/93, incl. draft submissions	12	Page 1 - no control Rest - Exempt, s.12
372	Letter from Board to solicitors dated 09/07/93	12	Exempt, s.12
373	Solicitor's memo to file dated 08/07/93	not in custody or control, 12	No control
375	Draft letter from Board to Burk dated 15/07/93	12	Exempt, s.12
376	Fax from Board to solicitors dated 20/07/93 and invoices dated 22/07/92, 20/10/92, 11/05/93	12	Exempt, s.12
378	Memo from Board to solicitors dated 15/02/93	12	Exempt, s.12
379	Letter from solicitors to WCB dated 18/08/93	partially exempt pp. 3 - s.12	Disclose
381	Solicitor's notes to file dated 19/08/93	not in custody or control, 12	No control

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
383	Letter from solicitors to WCB dated 03/09/93	partially exempt pp. 1 - s.12	Page 1 - No control Rest - not at issue
384	Solicitor's notes to file dated 22/09/93	not in custody or control, 12	No control
385	Solicitors noted from telephone call with client dated 22/09/93	not in custody or control, 12	No control
387	Draft submission from Board to solicitors dated 30/09/93	12	Exempt, s.12
388	Solicitor's notes from telephone call with client dated 08/10/93	not in custody or control, 12	No control
390	Memo between solicitors dated 02/11/93	not in custody or control, 12	No control
391	Letter from IPC to solicitors dated 15/12/93, incl. attach.	12	Notes - Exempt, s.12 Rest - disclose
392	Memo between solicitors dated 21/12/93	not in custody or control, 12	No control
393	Internal solicitors' memo dated 23/12/93	12	No control
394	Solicitor's notes from dismissal arbitration dated 1994	not in custody or control, 12	No control
395	Letter from solicitors to Board dated 04/01/94	12	Exempt, s.12
396	Letter from Board to solicitors dated 07/01/94 and 10/10/94	12	Not at issue
397	Memo from solicitor to student-at-law dated 10/01/94	not in custody or control, 12	No control
398	Invoice for copying for FIPPA Appeal dated 11/01/94	not in custody or control, 12	Disclose
399	Memo from student-at-law to solicitor without referenced attach. dated 11/01/94	not in custody or control, 12	No control
400	Solicitor's notes re: telephone call with client dated 24/01/94	not in custody or control, 12	No control
401	Solicitor's memo to file dated 24/01/94	not in custody or control, 12	No control
403	Solicitor's memo to file dated 25/01/94	not in custody or control, 12	No control
404	Letter from solicitors to IPC dated 25/01/94	12	Do not disclose

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
406	Letter from appellant to Board dated 07/02/94, incl. solicitor's notes	12	Note - Exempt, s.12 Rest - disclose
408	File detail record for solicitor dated 02/03/94	not in custody or control, 12	No control
409	Memo between solicitors dated 08/02/94	not in custody or control, 12	No control
410	Solicitor's memo to file dated 07/03/94	not in custody or control, 12	No control
411	Solicitor's notes to file dated 06/94	not in custody or control, 12	No control
412	Solicitor's memo to file (n.d.)	not in custody or control, 12	No control
415	Draft list of records with solicitor's notes (n.d.)	12	Exempt, s.12
416	Draft index of records within custody and control of Board (n.d.)	12	Exempt, s.12
417	Draft list of records with solicitor's notes (n.d.)	12	Exempt, s.12
424	Package of undated solicitors notes	not in custody or control, 12	No control
429	Telephone message slips for solicitor	not in custody or control, 12	No control
430	File and contents marked "solicitor's notes"	not in custody or control, 12	No control
431.1	Prepared notes of anticipated evidence of a potential witness	12	Exempt, s.12
431.2	Prepared notes of anticipated evidence of a potential witness	12	Exempt, s.12
431.3	Prepared notes of anticipated evidence of a potential witness	12	Exempt, s.12
431.4	Handwritten notes of witness	12	Exempt, s.12
431.5	Handwritten notes of witness	12	Exempt, s.12
431.6	Handwritten notes of witness	12	Exempt, s.12
432	Solicitor's notes of section 54 hearing dated 22-23/02/93, 03/11/92, 24/11/92	not in custody or control, 12	No control
434	Letter from solicitors to IPC dated 17/08/93	12	Do not disclose

RECORD NUMBER	DESCRIPTION	EXEMPTIONS CLAIMED	DISPOSITION
444	Solicitor's notes dated 25/10/92	12	No control
445	Internal Board memorandum dated 10/08/92	not responsive, 12	Not at issue
B2	Handwritten notes dated 12/11/90, 09/11/90, 28/09/90 and undated	not responsive, 12, 13, 14, 38(b)	Exempt, s.12
B5	Handwritten notes, undated	Partially exempt, 7, 12, 13, 14	Exempt, s.12
B7	Handwritten notes dated 13/11/90	12	Exempt, s.12
B12	Handwritten notes, undated	Not responsive, 14	Exempt, s.12
B13	Handwritten notes, undated	Not responsive, 14	Exempt, s.12
B14	Handwritten notes, undated	Not responsive, 8(1)(i), 8(1)(l), 12, 14	Exempt, s.12
B15	Handwritten notes, undated	Not responsive, 12, 13, 14	Exempt, s.12
B16	Handwritten memo dated 25/10/90	Not responsive, 12	Exempt, s.12
B17	Handwritten notes dated 02/07/91	Not responsive, 12, 13, 14, 38(b)	Exempt, s.12
B19	Handwritten notes dated 12/10/90 and 23/10/90	Partially exempt, 12, 13, 14, 38(b)	Exempt, s.12
B23	Handwritten notes dated 13/11/90	Not responsive, 12, 14	Exempt, s.12
B25	Handwritten notes dated 07/01/90	Not responsive, 12, 14	Exempt, s.12