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

ORDER MO-1379

Appeal MA-990344-1

Dufferin-Peel Catholic District School Board

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NATURE OF THE APPEAL:

The Appellant made a request to the Dufferin-Peel Catholic District School Board (the Board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All records pertaining to my son... This information would include, principal, vice principal, teachers, special education teachers, child and youth workers, guidance counsellors, superintendent's, administration, etc. All notes, records, assaults including when he has been victimized, suspensions, etc.

The Board disclosed 7 groups of records consisting of 223 records (totalling 513 pages) to the appellant. The Board also informed the appellant that additional records existed the disclosure of which may affect the interests of third parties. The Board advised the appellant that it was providing these individuals an opportunity to make representations regarding disclosure pursuant to section 21 of the *Act*.

The Board subsequently issued a second decision letter. It denied access to 11 records and granted access in whole or in part to the remaining 40 records (for a total of 128 pages disclosed in whole or in part). The Board denied access to the remaining information pursuant to the following sections of the *Act*:

- closed meeting - section 6(1)(b);
- law enforcement - section 8;
- third party information - section 10;
- solicitor-client privilege - section 12; and
- invasion of privacy - sections 14 and 38(b).

The Board also claimed that portions of two records contained information that was not responsive to the request.

The appellant appealed the Board's decision to deny access to the 11 records which were withheld in full and nine other records which were withheld in part. In doing so, the appellant stated that some of the information relates to meetings at which she was present. The appellant also indicated that she believes additional records should exist.

During mediation, the appellant agreed that the two portions of Records H2:b and H2:d are not responsive to her request. As this is the only information which was severed from these two records, they are no longer at issue in this appeal.

In addition, the Mediator raised the possible application of sections 38(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) to Records C2:a and C2:b and section 38(a) to Records B2:l and H2:a with the Board. The Board agreed that they should have been claimed for these records.

On April 25, after the Mediator's Report was sent out to the parties, the Board sent a letter to the appellant disclosing an additional four records (Records R1 (one page), R2 (one page), R3 (three pages) and R4 (sixteen pages)). These records were not among those identified by the appellant as being at issue in this appeal.

I sent a Notice of Inquiry to the Board initially. After receiving its representations, I decided that certain issues needed to be more fully canvassed and that certain parties who might have an interest in the records should have been notified.

Therefore, I sent a Supplementary Notice of Inquiry to the Board and five affected parties. I included the following statement in that Notice:

> The Board has already submitted representations in response to the original Notice of Inquiry. However, it is asked to review the new questions under the heading "Third Party Information" (Issue F) and to respond to them. The affected parties are asked to respond to the questions under this heading as well. In addition, if the affected parties are of the view that disclosure of the information would constitute an unjustified invasion of their personal privacy they are invited to respond to the questions under Issues A, B and C.

I received supplementary representations from the Board. None of the affected parties responded to the Notice of Inquiry that I sent to them.

The appellant has made an access request concerning records pertaining to her son. The records appear to contain the personal information of the appellant's son. Section 54(c) of the *Act* essentially enables a parent to seek information about her child as long as she has lawful custody of the child and the information she is seeking would be accessible by the child if he were making the request. The person with lawful custody must be seeking access to the records "on behalf of" the child and not for his or her own personal objectives (Order P-673). The basis for the Board's application of the exemption in sections 14/38(b) for certain records was not clear from my review of the file. Therefore, in the Notice of Inquiry, I asked the Board to confirm whether it disputes the application of section 54(c) in the circumstances of this appeal. In responding, the Board states that it does not dispute the appellant's right to request the information about her son. There is nothing in any of the material before me to cause me to question the appellant's lawful authority or motive in requesting the information about her son. In the circumstances, I find that the appellant's request fits within the terms of section 54(c).

After reviewing the Board's submissions, I decided to seek representations from the appellant, but only with respect to certain issues and records. In particular, I asked the appellant to respond only to:

- Issues A and B (personal information and invasion of privacy) but only with respect to the application of the exemption in sections 14/38(b) to Records B2:e, B2:f, D:i and the last page of Record I:p; and

- Issues G (solicitor-client privilege), H (discretion to refuse requesters own information) and I (reasonableness of search).

I provided the appellant with the submissions of the Board, complete insofar as the issues I asked her to address. The appellant submitted representations in response. However, they address, for the most part, only the reasonableness of the Board's search for responsive records.

I subsequently sought further representations in reply from the Board regarding the issue of reasonableness of search. In her representations, the appellant provided details of records she believes should exist. I sent the appellant's complete representations to the Board for its reference and asked it to specifically address these apparently missing records. The Board submitted representations in response.

RECORDS:

There are 18 records remaining at issue totalling 97 pages. They consist of the following:

- B2:b - this record is a one page letter from the appellant to the Board dated November 25, 1998 with a three-page chronology of events attached. The Board has withheld the names and other identifying information of individuals other than the appellant and her son from pages 2 and 3 of this record;

- B2:e - this record consists of notes to file made by the vice principal of the appellant's son's school containing her observations of events relating to the son. Only the names of other individuals that have been withheld from this record are at issue;

- B2:f - is a note written by a student (apparently on his/her own volition) and given to the vice principal of the son's school. This record has been withheld in full;

- B2:l - this record consists of a "Teacher Questionnaire" which is a form document that has been completed by the appellant's son's teacher. The form contains a series of questions that are to be answered by checking the appropriate box, the results of achievement, IQ and aptitude tests and other relevant information about the child in narrative form. The record also contains a blank "Consent to Disclose Information" form. This record has been withheld in full;

- C2:a - is a letter to the vice-principal of the appellant's son's school from the Ontario Human Rights Commission Mediation Office relating to the receipt of a complaint against the Board and a number of Board staff by the appellant's son and the appellant as his next friend. This record has been withheld in full;

- C2:b - consists of a memorandum to the vice-principal of the appellant's son's school from an Employee Relations Officer with a draft memorandum prepared by the Board's legal counsel attached, both of which relate to the Human Rights complaint referred to in Record C2:a;

- D:a - this record consists of three pages of notes made by a special education teacher/consultant regarding her assessment of the appellant's son. The Board has withheld pages 1 and 2 in their entirety;

- D:g and D:h - these records consist of the handwritten notes and a "Team Meeting Referral Form." Both records were written or completed by the head of academic resources at the appellant's son's school. The Board indicates that they pertain to a meeting of the Identification, Placement and Review Committee (the IPRC). Portions of page 2 of Record D:g and portions of pages 1, 3 and 4 of Record D:h have been withheld;

- D:i - is a "Student Profile and Attendance Record." Page 2 of this record contains notes made by the head of academic resources regarding events concerning the appellant's son. The only information at issue on this page is the names of other students in the son's classroom;

- F:2a - is a letter from the appellant to the principal of her son's school. The name of another student has been withheld from this record;

- H2:a - consists of three pages of notes of a meeting relating to the appellant's son's appeal of the IPRC decision. This record has been withheld in full;

- I:k, I:l, I:m, I:n, I:o, I:p - are notes prepared by a Child and Youth Worker concerning incidents involving the appellant's son and her discussions with the appellant regarding them. The last page of this record contains the last name of a student. The Board has withheld these records in their entirety.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines "personal information," in part, as recorded information about an identifiable individual.

All of the records at issue pertain to the appellant's son and thus contain his personal information. The majority of the records also contain the appellant's personal information. The following records contain the personal information of other identifiable individuals, namely other students at the appellant's son's school: Records B2:b, B2:e, B2:f, D:i, F2:a and I:p.

Records C:a and b contain information about the teachers who have been named in the appellant's human rights complaint. The Board submits that Records D:a, D:g, D:h and I:k - p all contain the personal information of various staff members.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P-257, P-427, P-1412 and P-1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

I agree with these lines of orders. In my view, the information identified by the Board in Records D:a, D:g, D:h and I:k - p does not qualify as the personal information of the staff members involved with the appellant's son. It is apparent from the records that the information about or written by these individuals was prepared in the context of and relates to their professional responsibilities and activities. Because Records D:a, D:g, D:h and I:k - p do not contain the personal information of the Board's staff, their disclosure would not constitute an unjustified invasion of these individuals' personal privacy.

However, I find that the information pertaining to the teachers identified in Records C:a and b qualifies as their personal information since it relates to a complaint about their conduct (Orders 165, P-447 and M-122).

Severance

Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)].

The only personal information found on Record C2:a is the names of the respondents to the appellant's son's human rights complaint. This information is contained in the "Re" line of the letter. The letter itself is a form letter identifying the fact that a complaint has been received and the process that will be followed in dealing with it. This portion of the record does not contain personal information and is severable from the information in the "Re" line. Accordingly, applying the

severance principle in section 4(2) to this information, I will not consider whether the disclosure of the body of the letter constitutes an unjustified invasion of privacy.

On the other hand, although it is arguable that some of the information contained in Record C2:b does not, taken in isolation, qualify as personal information and therefore, is not subject to exemption under section 14, the record cannot reasonably be severed, since to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, given the involvement of the appellant in the matters pertaining to her son, disclosure of this remaining information could reasonably be expected to permit her to ascertain the content of the withheld information. On this basis, I will consider whether section 38(b) applies to this record in its entirety.

With one exception, Records D:a, D:g, D:h and I:k - p contain only the personal information of the appellant and/or her son. The last page of Record I:p also contains the name of an identifiable individual (a student). This information is severable from the remaining information on that page, however.

In its representations, the Board claims, for the first time that Record D:a qualifies for exemption pursuant to the exemption in section 10(1). Since this exemption is mandatory, I must consider whether it applies to this record, and I have done so further on in this order. However, because of my findings below regarding the application of section 10(1) to this record, it was not necessary for me to seek the appellant's representations with respect to it.

The Board has only claimed the application of section 38(b) for the other eight records. Since section 38(b) cannot apply to records that contain only the appellant's personal information, these records and part of a record are not exempt under the *Act* and should be disclosed to the appellant. I will consider whether the disclosure of the student's name in Record I:p constitutes an unjustified invasion of privacy.

INVASION OF PRIVACY

As I indicated above, Records B2:b, B2:e, B2:f, C2:a, C2:b, D:i, F2:a and I:p contain the personal information of the appellant and/or her son and other identifiable individuals.

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 the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Board does not specify which factors or presumptions (if any) it relies on in withholding the personal information of individuals other than the appellant and/or her son. Nor does it provide any reasoning for this decision. For example, with respect to Records B2:b and B2:e, the Board states:

> The records contain personal information of the requester, and as well, of other individuals. Access to the names has been denied, and as a result, the records were severed.

The Board's submissions relating to the other records are similarly devoid of reasoning and explanation.

I have reviewed the personal information that remains at issue in this appeal.

Records C2:a and b

As I indicated above, Record C2:a is a letter to the vice-principal of the appellant's son's school from the OHRC Mediation Office relating to the receipt of a complaint against the Board and a number of Board staff by the appellant's son and the appellant as his next friend. Record C2:b is the response prepared by the Board which was to be sent to the OHRC Mediation office in response to Record C2:a.

It is well-established that the OHRC is an agency with a law enforcement mandate, under the provisions of the *Human Rights Code* (Orders P-89, P-330, P-973, P-1013 and P-1143). However, in Order P-1167, former Adjudicator Anita Fineberg made the following comments relating to the manner in which the OHRC operates vis-a-vis its law enforcement mandate:

> The Commission further notes that section 33(1) of the *Code* requires the Commission or a person authorized by the Commission for these purposes, to "investigate a complaint and may endeavour to effect a settlement." The Commission notes that the second function is carried out by way of the conciliation process during which the human rights officer assumes the role of a conciliator and acts as a "... neutral third party performing services analogous to those of a mediator or conciliation officers appointed as a neutral third party to resolve a labour relations dispute." The settlement was not reviewed by the Commission, which had determined that it was not necessary for it to approve the settlement.
>
> In these circumstances, I do not find that the personal information on pages 1-46, 50-59, 64-74, 91-94, 107-118, 132-138 and 147-151 was compiled as a result of an

> investigation into a possible violation of the *Code* by the Commission. Rather it represents the positions of the parties to the complaints during their efforts to resolve the issues either pursuant to the early settlement initiative or as part of the conciliation phase of the Commission's process.

In my view, Records C2:a and b fall into this same category of records. Clearly, on the face of Record C2:a, it was sent to the Board as part of the "mediation" stage of the complaint process. The letter originates from the Mediation office, it states that it is made for the purpose of initiating mediation and it indicates that, at a future point, if mediation is not effected, the case will be referred to investigation. Record C2:b is the response prepared by the Board which was to be sent to the OHRC Mediation office in response to Record C2:a. Accordingly, I find that the presumption in section 14(3)(b) does not apply to these records.

That being said, however, in my view, the disclosure of information that identifies an individual as a respondent in a human rights complaint could reasonably be expected to cause that individual excessive personal distress (Order P-434). Therefore, I find that this information is highly sensitive and the factor in section 14(2)(f) is relevant to it.

Records B2:b, B2:e, B2:f, D:i, F2:a and I:p

In my view, none of the presumptions in section 14(3) applies to the remaining personal information in the circumstances of this appeal. It is apparent from these records that the personal information was included in the context of, in the case of other students, their contacts with the appellant's son which were of a nature to be of concern to his parents. In my view, there is an inherent sensitivity in incidents involving children and disclosure of information that identifies them could reasonably be expected to cause severe personal distress, either to the children, or to their parents, or both. Accordingly, I find that the factor in section 14(2)(f) is relevant to this information.

In considering the remaining factors under section 14(2) and all of the circumstances of this appeal, I find that no other factors or considerations apply to this information.

In reviewing the appellant's representations and other information in the appeal file that is not subject to mediation privilege, I find that the appellant has not provided any basis for concluding that any factors favouring disclosure are relevant to the disclosure of this information in the circumstances of this appeal.

Absurd result

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of

which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

As I indicated above, Records B2:b and F2:a are letters sent to the Board by the appellant. In my view, to withhold information contained in a letter that the appellant sent to the Board on the basis that its disclosure would constitute an unjustified invasion of personal privacy would result in an absurdity.

The only information at issue in Record C2:a in this discussion is the names of the respondents to the appellant's son's human rights complaint. This information was provided by the appellant as next friend and is clearly known to her. Although it is found on a record that was sent to the Board from the OHRC, to withhold it would, in my view, result in an absurdity.

Record B2:f is a letter to the appellant's son from another student. The Board indicates that the student wrote this letter following an incident with the appellant's son, apparently on his own volition, and gave it to the vice-principal of the son's school. The Board indicates that the letter was shown to the appellant's son but was not made available to the appellant, nor was a copy provided to either. The Board indicates that the letter was simply placed in the vice principal's file. Based on the circumstances, including the ages of the children and the fact that the appellant herself is not aware of the contents of the record, I find that no absurdity would result from the withholding of this record from disclosure.

Finally, the only information remaining at issue in Record I:p is the last name of a student. The record itself contains the notes of a telephone conversation between the appellant and a Child and Youth Worker. Although the notes contain the student's full name, the Board indicates that the appellant was only given this person's first name during the conversation. I am satisfied that the personal information regarding this student was not communicated to the appellant and withholding it from disclosure would not result in an absurdity.

Since I have found that withholding the personal information in Records B2:b, F2:a and C2:a from disclosure would result in an absurdity, I find that section 38(b) does not apply to these severances. As no other exemptions have been claimed for Records B2:b and F2:a, these records should be disclosed to the appellant. I will consider the application of section 8 to Record C2:a.

In balancing the appellant's interests in disclosure of the personal information of other individuals in the remaining records at issue in this discussion (Records B2:e, B2:f, C2:b, D:i and I:p) against the privacy interests of these other individuals, I find that the sensitivity of this information tips the balance in favour of non-disclosure. Accordingly, I find that the personal information in these records is exempt under section 38(b) of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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 section 6(1)(b), 8, 10 and 12 would apply to the disclosure of that personal information.

The Board claims that section 6(1)(b) applies to exempt Record H2:a, that section 8 applies to Record C2:a, that section 10 applies to Record B2:l and that section 12 applies to Record C2:b. I found above the Record C2:b is exempt under section 14, therefore, it is not necessary for me to consider the application of section 12 to it.

CLOSED MEETING

Section 6(1)(b) of the *Act* states:

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

Section 6(2)(b) of the *Act* states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

In order to rely on section 6(1)(b), the Board must establish that:

1. A "closed" or "*in camera"* meeting of a council, board, commission or other body or a committee of one of them took place; **and**

2. A statute authorizes the holding of such a meeting in the absence of the public; **and**

3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102 and M-219]

Each part of the section 6(1)(b) test must be established.

Requirements 1 and 2

Record H2:a consists of three pages of notes of a meeting relating to the appellant's son's appeal of

the IPRC decision. The Board's only submissions regarding this record state:

> The record contains informal minutes taken at a board meeting, one which was not open to the public. The Education Act authorizes the holding of such a meeting, as per attached Section 207(2)(b).

Section 207(2)(b) of the *Education Act* provides:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,
>
> > the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian.

Although I accept that a considerable amount of intimate and personal information about the appellant's son was discussed at the meeting held on August 25, 1999, the Board has not provided any information about the nature of the meeting or the composition of the individuals who comprised the committee. Based on the paucity of evidence submitted by the Board with respect to this record, I find that I have insufficient evidence before me to conclude that this was a meeting of the Board or one of its committees. Nor has the Board provided any evidence relating to whether this meeting was held *in camera*. Moreover, I have no evidence before me that this particular type of meeting is one that falls within section 207(2)(b) of the *Education Act*.

The record itself indicates that the notes pertain to a meeting that is being held for the purpose of giving the appellant an opportunity to appeal the decision of IPRC relating to the placement of her son. The notes also indicate that the appellant was present at this meeting.

Sections 11(1)5 and 6 of the *Education Act* provide that the Ministry may make regulations:

> 5. governing the provision, establishment, organization and administration of,
>
> > i. special education programs,
> > ii. special education services, and
> > iii. committees to identify exceptional pupils and to make and review placements of exceptional pupils;
>
> 6. governing procedures with respect to parents or guardians for appeals in respect of identification and placement of exceptional pupils in special education programs;

The identification and placement of exceptional pupils are dealt with extensively in O. Reg. 181/98. IPRCs are established in Part II of the regulation and "special education appeal boards" are established under Part VI. Section 11 sets out the composition of the IPRC:

(1) A board shall appoint three or more persons to each committee that it establishes.

(2) The board shall appoint, as one of the members of each committee,

(a) a principal employed by the board;

(b) a supervisory officer employed by the board under Part XI of the *Act*; or

(c) a supervisory officer whose services are used by the board under Part XI of the *Act*.

(3) A principal or supervisory officer appointed under subsection (2) may designate a person to act in his or her place as a member of the committee without the approval of the board.

(4) Only a person who is eligible to be appointed to the Committee under subsection (2) may be designated to act on the committee under subsection (3).

(5) **No member of the board may be appointed to a committee** under subsection (2) or designated to act on the committee under subsection (3). [emphasis added]

Section 26(1)(c) of the regulation provides that a parent may appeal an IPRC decision relating to the placement of the pupil. Section 27 of the regulation provides:

(1) The special education appeal board shall be composed of,

(a) one member selected by the board in which the pupil is placed;

(b) one member selected by a parent of the pupil; and

(c) a chair, selected jointly by the members selected under clauses (a) and (b) or, where those members cannot agree, by the appropriate district manager of the Ministry.

(2) Selections under clauses (1)(a) and (b) shall be made within 15 days of receipt of the notice of appeal by the secretary of the board.

(3) The selection of a chair under clause (1)(c) shall be made within 15 days of the last selection under clauses (1)(a) and (b).

> (4) **No member or employee of the board providing or purchasing the special education program and no employee of the Ministry may be selected under subsection (1)**. [emphasis added]
>
> (5) No person who has had any prior involvement with the matter under appeal may be selected under subsection (1).
>
> (6) The chair of the committee the decision of which is being appealed shall provide the special education appeal board with the record of the committee proceeding, including the statement of decision and any reports, assessments or other documents considered by the committee.
>
> (7) The board shall provide the special education appeal board with the secretarial and administrative services it requires and shall, in accordance with the rules and policies that apply to members of the board under section 191.2 of the Act, pay the travelling and other expenses incurred by the members of the special education appeal board while engaged in their duties.

Finally, section 5 of the regulation provides that a parent and/or pupil is entitled to be present at and participate in all IPRC discussions as well as in discussions held by the special education appeal board.

It is clear, first, that meetings held by either IPRC or the special education appeal board are not meetings of the Board or one of its committees since the regulation specifically excludes members of the Board from sitting on either one. Moreover, the regulation also makes it very clear that parents of exceptional students and the students themselves where they are over 16 years of age are to be included and allowed to fully and actively participate in the meetings of either body. In my view, such involvement by the parents should also entitle them to receive the minutes taken at any such meetings.

On the basis of all of the above, I conclude that the Board has not established the application of section 6(1)(b) to Record H2:a.

Absurd result

In most cases, the "absurd result" principle has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) of the *Act*. The reasoning in Order M-444 (referred to above) has also been applied in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288). In my view, this reasoning could similarly be applied to records for which section 6(1)(b) has been claimed.

In this case, even if the exemption in section 6(1)(b) did apply, based on the involvement of the parents in the meeting, I would find that withholding the minutes of such a meeting from them would result in an absurdity.

As no other exemptions have been claimed or apply to Record H2:a, it should be disclosed to the appellant.

LAW ENFORCEMENT

The Board claims that Record C2:a which is a form letter from the OHRC to the Board relating to the appellant's son's human rights complaint is exempt under section 8.

The Board does not specify on which subsection it relies, however, in its representations, the Board states:

> The record pertains to a law enforcement matter, one which has been on-going.

Section 8(1)(a) of the *Act* provides:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter.

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the *Act*, dealing with a variety of anticipated "harms." Previous orders of this Office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of the record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order P-373 and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

The use of the word "interfere" contemplates that the particular law enforcement matter is still ongoing. (Orders P-285, P-316, P-403, P-567, M-258, M-302, M-420, M-433). The purpose of the exemption contained in section 8(1)(a) of the *Act* is to provide the institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and second that disclosure of the records could reasonably be expected to interfere with the matter. (Order M-1067)

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*.

The Board's representations on this issue do not contain any further details relating to the OHRC matter than I noted above. I accept that this matter is on-going. However, the Board has not provided sufficient "detailed and convincing" evidence to establish a "reasonable expectation of probable harm." Accordingly, I find that the Board has failed to establish the application of section 8(1)(a) to Record C2:a. As no other exemption has been claimed or applies to this record it should be disclosed to the appellant.

THIRD PARTY INFORMATION

Section 10(1) of the *Act* reads, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> ...
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 10(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the party resisting disclosure, in this case, the Board and the affected parties, must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. In its decision upholding Order P-373, the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board)* cited above.

The Board's original representations regarding Records B2:1 and D:a regarding this issue simply state:

> We reviewed Order M-91. Based on the result of the subsequent judicial review therein, access was denied to the OACMHC Teacher Intake Form [Record B2:1] and the written results from the Woodcock Johnson Test [Record D:a].

Following receipt of the Board's submissions, I reviewed Order M-91 and the Court's decision in *Board of Education of Lincoln County v. Information and Privacy Commissioner (Ont.) et al.* (1995), 85 O.A.C. 23. I decided that the Board's representations did not provide sufficient information on this issue for me to be able to address it. As a result, I contacted the Board to determine the identities of the third parties whose interests the Board believed would be affected by disclosure of Record B2:a (as this was the only record for which section 10(1) had originally been claimed). I identified the publishers of the questionnaire and consent form in Record B2:a as

affected parties and the Board agreed that they should be notified. The Board identified a number of other parties and provided their addresses as well as the addresses of the parties I identified. Although alluding to certain identifiable individuals, the Board did not specify to which records it was referring and it was not apparent that these individuals had a connection with Record B2:a. However, in order to ensure that I canvassed all possibilities, I sent a Supplementary Notice of Inquiry to all of the parties identified by the Board. As well, I modified the Notice and asked specific questions relating to the issue of "supplied in confidence" and "harms." As I noted above, none of these parties provided representations in response to this Notice.

The Board attached a number of documents relating to special education programs and services and an article from *Test Publisher*, Vol. 2, No. 3 to its supplementary representations and made the following submissions:

> For information purposes, we attach a copy of the parent guides and our permission/authorization forms, used by our Psychology staff, as is our practice in dealing with parent(s)/guardian(s) of a student involved in psychological assessments and services.
>
> The Teacher Intake Form was part of the Psychological Services being provided to this student. Apart from the parent(s)/guardian(s), information from psychological assessments/services is shared only with those Dufferin-Peel staff members who are involved with the student's educational program. As staff was making inquiries for a program, outside of Dufferin-Peel, the Consent Form was specifically required in order for our psychology staff to share the information with staff at Peel Children's Centre. The consent form was not completed by the parent(s), and therefore, the results were not shared with Peel Children's Centre.
>
> Results and recommendations of our services is discussed, clearly and accurately explained and properly interpreted with the parent(s)/guardian(s) by the individual psychology staff. They are never just given to the parent(s)/guardian(s), as they could be misunderstood.
>
> The decision to exercise refusal of disclosure under section 10(1) was based on our reviewing Order M-91 and the subsequent judicial review. Based on this precedent, third party notice was not provided. As per the attached article, the American Association of Test Publishers call the court decision a major victory for test security and copyright protection.

In my view, the vast majority of the Board's representations do not address the requirements of the section 10(1) test. The manner in which the Board uses the results of psychological testing and its relationship with parents, particularly in the circumstances of this appeal, does not support a finding that disclosure of the records could reasonably be expected to affect the interests of third parties as contemplated by this section. Rather, as the Board indicates, the results of such testing, such as the information contained in Record D:a, is shared with the parents, albeit on the Board's terms.

Presumably, the actual assessment notes that are contained on Record B2:l are also shared with the parents. This is a factor that I will take into consideration in assessing the confidentiality requirement in the section 10(1) test referred to above.

With respect to the Board's reliance on the results of the judicial review of Order M-91, I find that the circumstances of this order and judicial review are distinguishable from the facts of the current appeal. In order to distinguish these two cases, I have outlined below the circumstances surrounding the Divisional Court's decision regarding Order M-91.

Order M-91 and subsequent judicial review

Order M-91 concerned a request for, among other things, the answer booklet for an intelligence test administered to a student. Assistant Commissioner Tom Mitchinson sent a Notice of Inquiry to the board of education, the appellants, the Canadian distributer of the intelligence test and the Ministry of Education. All parties except the Ministry of Education submitted representations. At some point during the appeal, the appellants narrowed the records at issue to include only the student's answers and scores and the examiner's comments, and not the test questions or the suggested correct answers.

In his decision, the Assistant Commissioner only considered the portions of the record remaining at issue and concluded that the information was not exempt under either section 11(h) which is a discretionary exemption allowing a head to refuse to disclose a record that contains questions that are to be used in an examination or test for an educational purpose, or section 10(1) as it did not contain the requisite type of information in order to qualify for either section.

On judicial review of this decision, the Divisional Court found that the Assistant Commissioner's decision was patently unreasonable for the following reasons:

> Both s. 10 and s. 11(h) empower the Board to refuse to disclose a record. In this case the record was 14 pages of a booklet. Section 4(2) permits a head to disclose as much of a record "as can reasonably be severed without disclosing the information that falls under one of the exemptions." In this case the information was questions (s. 11(h)), and trade secrets (s. 10). The deletion of part of the record raised a new issue as to whether the remaining part disclosed exempt information.
>
> With respect, we consider that the Commissioner approached the issues too narrowly. He looked at the amended record and determined that it contained neither questions nor trade secrets and accordingly there was no exemption. In our view he should first have considered whether the record (the booklet) contained questions (s. 11(h)) or revealed trade secrets (s. 10). If he found that it did, he should have gone on to consider whether disclosure of the amended record disclosed information that fell under the exemptions (s. 4(2)). In our opinion the Commissioner failed to consider relevant and important issues.

The Court also commented on the procedural steps which the Assistant Commissioner should have taken prior to making his decision on this issue.

> While it is not a basis for the decision to set his order aside, we are of the view that in this case the Commissioner ought to have invited representations on the issue that emerged when the record was amended as a result of the representations of the requester. The other parties should have been asked to make representations as to whether the answers, scores and comments alone would have disclosed exempt information.

The Court set aside the Assistant Commissioner's order and noting that the appellant did not appear in the judicial review proceedings, the Court concluded:

> In the circumstances we consider it appropriate not to remit the matter back to the Commissioner.

In commenting on the results of the judicial review, the Association of Test Publishers (the ATP) (in an article from *Test Publisher*) "...hails Canadian court decision as victory for test security and copyright protection." The article indicated that the ATP participated in the judicial review as an intervener and presented arguments before the Court relating to how tests are developed and validated, along with the need for security and copyright protection. The article also indicated that the ATP addressed the specific issues that arose in Order M-91 relating to the inter-relationship between the test answers and the test questions. The article concluded that "the impact of the decision is likely to be significant for publishers, as well as for other entities interested in 'test access' issues such as school boards and school psychologists."

Comments on Order M-91 and the results of the judicial review of this decision

Despite the comments made by the ATP, the Divisional Court decision says very little about the applicability of the exemptions in either section 11(h) or 10(1) to the record at issue in Order M-91. According to the published court decision, the basis for overturning the decision in Order M-91 was the Assistant Commissioner's failure to consider relevant and important issues insofar as he only based his decision on the narrowed record without considering the impact disclosure of this information may have on the complete record. However, it would not be unreasonable to infer from the Court's decision not to remit the matter back to the Assistant Commissioner that the Court accepted the possibility that disclosure of the answers may reveal the test questions and that the requisite element in section 11(h) and/or the harms in section 10(1) may have been established. Section 11(h) is a discretionary exemption which the Board in the current appeal did not claim. Therefore, I need not consider it. I have considered the requirements of the section 10(1) test below.

It is important to note that the Divisional Court did not make an explicit finding regarding the application of section 10(1) to the record at issue in Order M-91. Even if it did or if one can be inferred, any argument presented or reasoning of the court would only hold persuasive as opposed to

precedential value insofar as the record at issue in the current appeal is concerned because the records are not the same in key respects.

In this regard, it is my view that Order M-91 can be distinguished from the current appeal primarily on the basis of the records at issue. The record at issue in Order M-91 was an intelligence test and the student's answers to it. Intelligence tests generally contain a set of questions to which the answers are either correct or incorrect. They are used to determine the intelligence of an individual in relation to other people the same age. ATP indicates in its article that extensive research goes into developing a reliable and valid test and states that disclosure of the test questions would destroy the security of the test and thereby render it useless as a placement tool. By this, it appears that the validity of the test result is, in part, based on not having prior knowledge of the questions asked in it. It also appears that the value of a particular intelligence test is in its ability to be used with a large number of individuals for the purpose of comparing each individual's responses with an established baseline.

Record B2:l is a seven-page "Teacher Questionnaire." It contains a number of questions which the student's teacher completes. The questions elicit information from the teacher regarding her perceptions of the student. The questions are designed to elicit unique information about a single individual based on the observations of another individual who knows the student. The questionnaire also contains a section that identifies the tests taken by the student and the overall score obtained. In my view, the purpose, nature and value of this record is very different from the record at issue in Order M-91 and any rationale for a finding that the record in Order M-91 is exempt under section 10(1) (if that were the case) cannot be automatically applied to the record in the current appeal.

The attachment to record B2:1 is a blank consent form which is to be completed by the student's parents/guardians. In my view, this record is completely dissimilar to the record at issue in Order M-91.

Record D:a contains the notes made by a special education teacher/consultant regarding her assessment of the appellant's son. In particular, as the Board indicates, these notes pertain to the results from the Woodcock Johnson Test. The Board does not provide any particulars regarding the nature of this test and it is not among those records at issue in this appeal. However, even if I were to assume that it was of a similar nature to that at issue in Order M-91, the information at issue in this record does not contain specific references to answers or to test questions. Rather, it contains the percentages and/or grade level obtained with respect to the generally identified elements that this particular test is designed to assess.

In addition, in contrast to the circumstances of Order M-91, I not only notified the affected parties in the current appeal and invited them to address the issues relating to these records, but asked very specific questions pertaining to them. I did not receive representations that addressed these issues and my decision, therefore, must be made on what I have before me.

Part one: type of information

In order for a record to qualify for exemption under section 10(1) it must contain one or more of the following types of information: a trade secret or scientific, technical, commercial, financial or labour relations information.

The records clearly do not contain financial or labour relations information.

In the article provided by the Board with its representations, the ATP claims that the test materials at issue in that appeal qualify as trade secrets. In Order M-29, former Commissioner Tom Wright defined trade secrets as:

> "Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I do not have the benefit of the evidence that was presented either to the Assistant Commissioner in Order M-91 or that was presented to the Divisional Court on judicial review. The Board has not provided any evidence on this issue nor have the affected parties even though they were invited to do so. Accordingly, based on the evidence I have before me, I cannot conclude that the records contain trade secrets. Similarly, I have no evidence before me which would allow me to conclude that the record contains commercial information.

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. (Order P-454).

Although I do not have any evidence from the parties on this, I am prepared to accept, based on my review of the record, that the development of the Teacher Questionnaire would have involved research that was likely based on the observation and testing of specific hypotheses or conclusions undertaken by experts in the field of psychology as would the development of the Woodcock Johnson test. In my view, this would similarly apply to the application of the tests. Accordingly, I accept that the information contained in these two records falls within the scope of scientific information as it relates to the "social sciences."

Part Two - Supplied in Confidence

In order to satisfy the second requirement, the Board and/or affected parties must show that the information was supplied to the Board, either implicitly or explicitly in confidence. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (See, for example, Orders P-36, P-204, P-251, P-1105 and M-1143).

Supplied

I accept that both the Teacher Questionnaire and Consent form are documents that were created by sources outside of the Board and would, therefore, have been supplied to the Board. Similarly, I assume, without having any evidence on this, that the Woodcock Johnson test was developed and supplied to the Board by an outside source. As far as the notes in Record D:a that pertain to the Woodcock Johnson test are concerned, the Board has not explicitly identified who the author is. However, in the Parent Guide entitled "Psychological Assessment" that the Board attached to its supplementary representations, references are made throughout to "psychology staff" or "our psychology staff." In the absence of contrary evidence, I find that Record D:a was prepared by Board staff and was therefore not supplied to the Board.

In confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the

part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly (Order M-169). In Order M-169, some factors which were considered in determining whether an expectation of confidentiality is reasonable are whether the information was:

> (1) Communicated to the Board on the basis that it was confidential and that it was to be kept confidential.
>
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure prior to being communicated to the Board.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

(See also Order P-561)

In the Supplementary Notice of Inquiry that I sent to the Board and affected parties, I stated:

> In responding to the specific questions regarding explicit and/or implicit expectations of confidentiality which are set out below, the Board and the affected parties are asked to turn their minds to the following questions with respect to the two portions of the records at issue in this discussion, specifically, the "Teacher Intake Form" and the "Consent Form":
>
> For what purpose was each document created?
>
> Is each document part of a larger package of information about the child?
>
> Is the document intended to be used/seen by/signed by a parent or guardian of a child referred to in it? Or to any other person?
>
> Is there a confidentiality agreement between the Board and the authors of the Intake Form/Consent Form regarding disclosure of these forms to anyone outside the employ of the Board?
>
> What is the practice of the Board in dealing with parents/guardians generally with respect to assessment/services of a child attending a school in its jurisdiction insofar as the sharing of information with them is concerned?
>
> What steps have been taken to ensure the confidential use of these documents?

As I indicated above, the Board's only comments relating to these records indicates that information about the child's assessment is shared with the parents. This is supported by the document entitled "Special Education - Programs and Services" which is a parent guide and the parent guide on psychological assessment referred to above, both of which were attached to the Board's supplementary submissions. The Board also attached a copy of a permission form for psychological services. This document contains the following statement:

> ... The Psychology Department will not release any information concerning this student to any person outside the [Board] without your written permission.

It is apparent that the Board has gone to great lengths to assure parents that information relating to the psychological assessment of their children will not be disclosed beyond what is necessary for the Board to be able to provide services to these children without the parents' express permission. However, the interests being protected by these assurances of confidentiality are those of the children themselves. In my view, none of the information provided by the Board assists me in determining whether the suppliers of the records themselves had any expectation of confidentiality in providing them to the Board. The affected parties have elected not to respond to my invitation to participate in this inquiry. Moreover, none of the records themselves contain any indication that they were supplied to the Board in confidence.

As a result, I am unable to find that there existed either an explicit or implicit understanding between the Board and the affected parties that the information in the records was intended to be treated confidentially. On the contrary, there is some evidence that information pertaining to any psychological assessment of a child will be discussed with the parents. Moreover, as I noted above, pursuant to section 5 of O. Reg. 181/98, parents are permitted to attend and participate in all IPRC discussions as well as in discussions held by the special education appeal board. Viewed objectively, I am not satisfied that there is a reasonable basis for an expectation of confidentiality with respect to Record B2:l or D:a.

Part Three: Reasonable expectation of harm

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms." In the case of most of these exemptions, including section 10(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In the present appeal, the Board and/or affected parties must provide detailed and convincing evidence to establish a reasonable expectation of probable harm, in this case one or more of the harms outlined in sections 10(1)(a) (b) and/or (c) of the *Act*.

The Board's primary concern appears to be that providing the appellant with these records without explanation could result in her misunderstanding their content, although the Board has provided no evidence to support this assumption. Moreover, given the amount of information the appellant has already received relating to her son, it is unlikely that she would not be able to view these records in perspective. In my view, the Board's submissions do not address the harms in section 10(1) with any particularity and I have received nothing from the affected parties.

Clearly, based only on the Board's complete representations on this issue, the requisite evidentiary standard has not been met. In Order PO-1791, Adjudicator Sherry Liang made the following comments when faced with a paucity of evidence on the issue of harm in the context of section 17(1) of the provincial *Act*:

> ... As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a), (b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS [Management Board Secretariat, the institution in this case] which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

Similarly, in the current appeal, I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to make a finding that the records are exempt under section 10(1)(a), (b) or (c).

As a result, I find that Records B2:l and D:a do not qualify for exemption under section 10(1) of the *Act*, and they should be disclosed to the appellant.

Because of the findings I have made regarding sections 6(1)(b), 8 and 10, it is not necessary for me to consider the application of section 38(a) to the records.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which she is seeking and the Board indicates that further records do not 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 further 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 records responsive to the request.

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

In appealing the Board's decision, the appellant indicated that she has provided a great deal of information to her son's school regarding his "condition," but that none of this information was provided to her in response to her request. On this basis, she believed that the Board did not conduct a full and complete search for responsive records.

In responding to this issue, the Board states:

> ... we confirm that when the request for information was received, it did provide us with enough information as to what was required, having processed several such requests, and no further clarification, in our opinion, was required. We proceeded to process the request in the usual manner.

The Board attached affidavits to its representations sworn by (1) the Acting Superintendent for the Mississauga North Family of Schools, (2) the Principal of the elementary school at which the appellant's son was a student, (3) the Principal of the secondary school at which the appellant's son is a student, and (4) the Board's Associate Director of Instructional Services. In each respective affidavit, the affiant made the following statements relating to the search for responsive records:

(1) In response to a memo from the Superintendent of Employee Relations, the following staff member, who was directly involved with the education of [the appellant's son], was directed by me to search for responsive records that dealt with the request:

[named], Itinerant Special Education Resource Teacher.

All responsive records in our possession were forwarded to [the] Superintendent, as requested.

(2) There are no files containing personal information of [the appellant's son] at [the elementary school]. The Ontario Student Record of [the appellant's son] was transferred to the high school which he is attending...

(3) I received a memo dated September 28, 1999, from [the] Superintendent of Employee Relations, requesting records necessary to process the request for personal information

pertaining to [the appellant's son], in particular information about suspensions, which records are kept in my office.

A diligent search was conducted by my staff, and all responsive records were forwarded to [the] Superintendent.

(4) In response to a memo from the Superintendent of Employee Relations,... the following staff members, who were involved with the education of [the appellant's son], were directed by me to search for responsive records that dealt with the request:

[named], Vice-Principal; [named], Child Youth Worker; [named], Child Youth Worker; [named], Head of Academic Resources; [named] Social Worker; [named] Head of Guidance.

All responsive records in our possession were forwarded to [the] Superintendent as requested.

In April 2000, a further search was requested by the Superintendent of Employee Relations and conducted by myself and the above-mentioned staff members. At this time, [named], Child Youth Worker, located some anecdotal notes, which had not been previously located. On April 25, 2000, they were subsequently disclosed to the appellant.

While I do not dispute that "diligent" efforts were made to search for responsive records, the Board's submissions and affidavits provide me with no basis for concluding that the searches conducted by the various individuals referred to were reasonable. The appellant was similarly not satisfied with the Board's response.

In her representations, the appellant poses a number of questions, some of which cannot be dealt with in this order as they, for example, pertain to why something did not happen or to what process it followed. However, many of the questions serve to identify the types of records that the appellant believes should exist, for example, the appellant queries:

> What is the process for receipt of a letter of concern from a parent requesting assistance from a school board? Are notes generated, inquiries made: Is this process the same for a phone conversation?
>
> ...
>
> What is the process for IEP [Individual Education Plan] meetings, IPRC meetings, case conferences and appeals, are there meetings prior to these meetings if so should there not be notes/memo's?
>
> ...
>
> Are there notes from parent teacher interviews?

The appellant also makes specific reference (by date) to communications she had with various individuals. She asks where the records of these communications are. In addition, she attaches a copy of a letter from the Board addressed to her in which reference is made to records maintained by the Board in its "central file."

The remaining information provided by the appellant relating to records she believes should exist was similarly detailed. I sent the appellant's representations and a modified Notice of Inquiry to the Board and asked for it to provide submissions in reply. In the modified Notice of Inquiry I included the following:

> The appellant has set out in great detail, the records she believes should exist relating to her request. In addition, the appellant wrote to this office subsequent to the submission of her representations indicating that the Ministry of Education and Training has had numerous telephone conversations and meetings with the school board on her son's behalf. She believes records relating to these matters should have been included as responsive to her request. Further, the appellant states that she has called the secretary of the Board's superintendents to arrange meetings on numerous occasions, however, none of these records have been included as records responsive to her request.
>
> The Board is asked to specifically respond to the records that the appellant believes should exist as described above and in her representations. Further, the Board is asked to provide **specific details** of the searches that were undertaken in response to the appellant's access request. This would include information such as, where responsive records could reasonably be expected to be located, what files were searched, who conducted the searches and how many searches were conducted.
>
> I have set out below the questions that were asked of the Board initially. The Board is asked to review these questions and to provide answers to them in its reply representations.

The questions I originally asked the Board to respond to are:

1. Was the appellant contacted for additional clarification of his request? If so, please provide details including a summary of any further information the appellant provided.

2. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? I ask that you include details of any searches carried out to respond to the appellant's access request.

3. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

In its reply representations, the Board alluded briefly to the appellant's representations, commenting that "we will be reminding school staff, especially special services employees, of the importance of signing and dating anecdotal notes." The Board also mentions that it only searched for records that existed up to the date of the appellant's request. The appellant has confirmed that she is only looking for records up to that date and that all of the records she believes should exist would have been created prior to that date.

The Board clarifies that the terms "central file of the Board" and "Special Services files" were uses synonymously by various Board staff which it explains is why the appellant was told that the Board does not have one "central file" on students. In this regard, the Board explains that the Ontario Student Record (the OSR) is the main file of the student, and that each staff member who works with a student, would have his or her own file. The Board states that is why it needed to seek responsive records from all individuals who had contact with the appellant's son.

With respect for the search for responsive records, the Board indicates that its Freedom of Information and Privacy Co-ordinator (the Co-ordinator) routed the appellant's request to senior staff who, in turn identified the staff they felt would have responsive records. The Board states this was done "as per our procedures." The Board indicates further that it also contacted its counsel "for a briefing" and continues:

> The nature of the request was clear to the Co-ordinator, having processed other requests for student OSR and non-OSR school records. We proceeded to process the Access Request in the usual manner. Upon receipt of the requested records by the Co-ordinator, and throughout the process of reviewing, of severing, and of preparing the records for disclosure, several consultations were made with the individual staff members, in particular, with the special services personnel.

The Board states further that:

> Records retained in our Special Services files would include original IPRC records, psychology reports, speech and language reports, social work reports, etc., copies of which are retained in the student's OSR, ongoing. In responding to the within request, there would have been no need to request records from our "Special Services" file, as the student had an active OSR, and all such records would be retained in his OSR. No additional records, beyond those retained in the OSR and beyond those presently in use by Special Services staff, or by the Superintendents, or by Principals, are kept in the Special Services files.

The Board indicates that during the inquiry stage, "further consultations with Board staff were made by the Co-ordinator, which revealed that there existed no further records." The Board notes that these consultations included a staff member who is presently on leave and discussions with the Principal relating to the records of another staff member on leave. The Board reiterates its previous submissions on the results of the consultations.

Although asked to specifically indicate what files and/or locations were search, the Board's responses continually make reference to actions being taken in accordance with its usual procedures. Unfortunately, the Board's submissions do not enlighten me on what those usual procedures are.

The appellant makes reference to a number of communications she has had with various individuals. The Board does not address them. It is not clear whether every document created in relation to communications between Board staff and the parents are maintained in a student's file or whether the staff member has another location in his or her office where communications are kept. The Board's description of the Special Services files only identifies specific types of records such as "reports". What about working paper, and other notes, for example, of meeting or telephone conversations? The Board does not indicate what is contained in the OSR. Moreover, in my view, the Board's submissions lead me to wonder whether any location other than the OSR was searched.

In particular, the Board states that because it has searched for records relating to other requests for student OSR and non-OSR school records (presumably referring to Special Services files), it processed the request in the usual manner. What does this mean? Does it mean that the Board only searched through the son's OSR and Special Services files? Even this question cannot be answered by the Board's representations.

In this regard, the Board notes that because records "presently in use" that are contained in the Special Services files are also contained in the OSR, "there would have been no need to request records from our 'Special Services' files ..." Does this mean that these files were not searched?

Overall, the Board's representations are seriously deficient in detail as to the actual locations that were searched, whether there are other locations that responsive records might exist, for example, correspondence between the appellant and various staff members, and whether it even turned its mind to the particulars of this request as opposed to treating it simply as a routine request for the contents of the OSR and Special Services files.

I recognize that the Board has located and provided the appellant with a considerable amount of information (approximately 513 pages), not including the records which are at issue in this appeal. It may well be that the Board has fully searched all locations at which responsive records might be found. Unfortunately, the Board has simply not provided me with sufficiently detailed representations to enable me to reach such a conclusion.

On this basis, I find that the Board's search for responsive records was not reasonable in the circumstances. I will, therefore, order the Board to conduct a new search for records responsive to

the request as worded and as clarified in the appellant's representations, and to provide the appellant with a decision regarding the results of this search.

Requirements of a new search

In doing so, I will require the Board to contact the appellant to determine which Board staff she has had contact or attempted contact with and to then query these individuals as to whether they have any records relating to these contacts.

Further, I will require the Board to contact all staff members who have dealt with the appellant's son to determine whether they:

(a) have a file on or relating to the son;
(b) have search that file or files;
(c) have any responsive records in that file or files (other than what has already been located) including records provided by the appellant;
(d) maintain records in any other location relating to their own rough notes, memos of telephone or other conversations, records of telephone calls made to them, etc.

In addition, I have attached a copy of the appellant's representations to the copy of this order which I am sending to the Board, on which I have highlighted the types of records the appellant believes should exist. I will require the Board to include in its decision letter to the appellant an explanation of why any of these records, or any other record referred to above, does not exist, including whether it is possible that any such record may have been destroyed.

ORDER:

1. I uphold the Board's decision to withhold Records B2:f and C2:b in their entirety, Records B2:e and D:i as severed by the Board, and the portion of Record I:p that I have highlighted in yellow on the copy of this record that I am sending to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Board to disclose the remaining records and part of record to the appellant by providing her with a copy of these records and part of record by January 23, 2001, but not before January 17, 2001.

3. I order the Board to conduct a new search for responsive records in accordance with the directions outlined above under the heading "Requirements of a new search." The Board is to communicate the results of this search to the appellant by sending her a letter summarizing the search results within 30 days of this order. If additional responsive records are located, I order the Board to issue an access decision concerning those records in accordance with sections 19 and 21 of the *Act*, treating the date of this order as the date of the request.

4. I order the Board to provide me with a copy of the letter it sends to the appellant by sending a copy of it to me at this office, c/o Norma Thorney, Assistant Registrar.

5. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: December 14, 2000
Laurel Cropley
Adjudicator