ORDER MO-1770

Appeal MA-020170-2

Toronto District School Board

NATURE OF THE APPEAL:

The appellant wrote to the Toronto District School Board (the Board) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the following information pertaining to her son (who is less than 16 years of age, and of whom the appellant has lawful custody):

> 1. The computer printed notes that were read aloud from at [my son's Identification, Placement and Review Committee (IPRC)] meeting on Dec 05/01 by [named school vice-principal] and [named school teacher].
>
> 2. Any & all printed papers pertaining to my son within the [Board] from every person, department, right on up to the Director of Education.

The Board wrote to the appellant advising that it had not located a record fitting the description of "computer printed notes" and, with respect to the second part of the request, stated:

> By "any and all printed papers" we conclude your request relates to communications and not to official files, such as the Ontario Student Record, a copy of which you may request from the principal at your child's current school.
>
> Additionally, the Board is only required under the *Act* to make reasonable efforts to locate records relating to your son. With thousands of employees, it is not possible to make inquiries to each and every employee. However, we have made inquiries to every location within the Board which in our opinion would be likely to have the records described in the foregoing paragraph.
>
> Under separate cover, we are providing you with a number of records that have been located in response to your request.
>
> There are records located in response to your request which are not being provided to you pursuant to ss. 1, 2, 4(1), 12, 14, 32(a)(b), 36 and 38(a)(b) of the *Act*. The Board's position is that these records variously are not in the custody and control of the Board or, alternatively, are either privileged or the personal information of others the release of which would constitute an unjustified invasion of privacy.

By separate letter, the Board provided copies of 40 records to the appellant, some of which were severed pursuant to section 4(2) of the *Act*.

The appellant appealed the Board's decision to this office. In her appeal letter, the appellant stated the following with respect to the first part of her request:

> . . . I know that the Vice-Principal & Classroom Teacher sat down together to co-ordinate their notes for the IPRC meeting.

> I requested verbally in front of everyone at the IPRC meeting for a copy of their notes. There is specific content in those notes that I never became aware of until that IPRC meeting plus incorrect information. The request was ignored & they simply left the meeting.
>
> In a meeting with the Principal . . . on Dec 14/01, I again requested the computer printed notes. He replied "The only way you will get those notes are through a subpoena. I won't give them to you."
>
> Upon returning from this meeting, on Dec 14/01, I phoned @ 10:30 a.m. . . . Manager Senior Administrative Services for the [Board]. He advised me to file a form under the [*Act*].
>
> My position is & has always been, that these notes that were read aloud in public at his IPRC meeting are 100% related to my son. They contain supposed actions they took on their part and neglected to inform me. It was impossible to take notes due to the situation & problems myself & [my son's] father were having to deal with at this meeting . . .
>
> All of the documents that were sent to me on July 9/02 were all already in my possession. They were simply correspondence letters & official documents contained within my son's Ontario Student Record (O.S.R.) for which I already had replicated many months ago (there were still many letters missing too for which they didn't send me!).

The appellant went on to explain in detail, with reference to specific Board employees and specific meetings and dates, the types of records she feels exist that the Board has not identified in response to the second part of her request.

The appellant also stated that she believes the Board should not be able to withhold any of the records it claimed were exempt under the *Act*.

During the mediation stage of the appeal, the Board wrote to the Mediator and the appellant, stating the following with respect to part 1 of her request:

> Both [the Vice-Principal] and [the Teacher] prepared, on their own initiative, briefing notes for their own reference and assistance during the meeting. [The Teacher's] notes were handwritten; [the Vice-Principal's] notes were composed on a computer, but were not saved on the computer. After the meeting, both [the Teacher and the Vice-Principal] destroyed their notes. For each, this was her standard practice with respect to preparation for an IPRC [meeting].
>
> Accordingly, it appears the records referred to by the Appellant no longer exist.

The appellant does not accept this explanation, and maintains that these records must still exist.

Mediation was not successful in resolving all of the issues in the appeal, and the Mediator issued a Mediator's Report setting out the issues in the appeal to the appellant and the Board. After receiving the Mediator's Report, the Board sent an index of records to the Mediator, which described each record and indicated the provisions of the *Act* the Board relies on for each. Later, the Board sent an amended copy of its index, and in its covering letter stated:

> As it is pertinent to consideration of the Appellant's reliance on s. 17 of the [*Act*], we suggest that the Mediator's Report refer to the [Board's] interpretation of the [appellant's] request, as communicated in the Board's letters dated July 2 and July 3, 2002. In particular:
>
> 1. The request did not refer to official files, such as the [OSR], relating to the education of the Appellant's child; and,
>
> 2. The Board did not inquire as to each and every employee of the Board, but made inquiries for communications relating to the education of the Appellant's child to every location within the Board likely to have such records.
>
> . . . . .
>
> It is stated that the Board agreed during mediation that the sections of the *Act* upon which it intended to rely are "sections 12, 14, 38(a) and 38(b)." As indicated in my letter dated November 13, 2002, in discussions with you, I had agreed to "streamline" the Board's Index for the ease of reference of the Commission, as follows:
>
> > As you requested, I have not included references to various statutory provisions specified in the Board's response letter of July 2, 2002 – such as s. 2(1) (definition of personal information) or s. 4(2) (severance) – which are not strictly speaking "exemptions" under the *Act*. This is further to my understanding that the Board may nevertheless cite and rely upon these provisions in the course of any representations which are to be made.
>
> However, as I believe I shared with you during our brief telephone conversations, the Board has in the past cited s. 4(1) of the *Act* to represent the Board's intention to raise the issue of "custody and control" of the records. As you know, should the records not be within the custody and control of the Board (or another institution governed by the *Act*), the *Act* would not apply to them – and therefore there would be no question of "exemption" from the jurisdiction of the *Act*. Accordingly, the Index provided to you by the Board includes s. 4(1).

> As for your reference to s. 14 of the Act, it would appear not to apply to a request made pursuant to Part II of the Act. Rather, the Board's assertion that disclosure constitutes an unjustified invasion of another person's privacy would fall under s. 38(b). Accordingly, I have not included s. 14 in the Index . . .
>
> Additionally, I did not intend to restrict those sections of the Act referable to s. 38(a) to s. 12. The Board also relies upon s. 7 of the *Act*.
>
> . . . . .
>
> . . . In accordance with the foregoing, s. 7 of the Act ought to be added to the issue "Denial of Access". "Custody and control", or s. 4(1), ought also to be added.
>
> The Mediator's report notes that some of the typed records also contain handwritten notes. It is the Board's position that all handwritten references on the records ought therefore to be severed. This issue is referred to as "scope of the request" in the Board's index.
>
> In particular, Records 4, 11, 15, [16], 20, 25 and 26 ought not to be at issue – all these records have been released to the [appellant] with only handwritten notes severed. These Records were included in the Board's Document Brief to avoid confusion and as a courtesy to the Commission.
>
> Upon review of the Index, I noted that "scope of the request" had inadvertently been referred to for a number of records which do not contain handwriting. Accordingly, I attach an amended Index for your reference.
>
> With respect to s. 17, we would ask that the Board's letter to you dated October 23, 2002 and copied to the [appellant] be brought to the attention of the Adjudicator . . .

I sought and received written representations from the appellant and the Board. In its representations, the Board advised that it is no longer relying on the exemption at section 7 in conjunction with section 38(a).

RECORDS

The 31 records at issue in this appeal, and the basis for the Board's decision to withhold them, are described in the following table:

Record	Description	Withheld in full or disclosed in part	Reason for denial of access
1	Notes dated September 20, 21 and 24, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request

2	Notes dated October 31, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
3	Notes dated November 29, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
4	Letter from the appellant to the Board dated November 30, 2001	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request
5	Notes dated December 4, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
6	E-mails dated December 14, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
7	E-mails dated December 14 and 17, 2001	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
8	Letter dated December 19, 2001	Withheld in full	Exempt under ss. 38(b)/14
9	E-mail dated December 20, 2001	Withheld in full	Exempt under ss. 38(b)/14
10	E-mails dated January 11 and 14, 2002	Withheld in full	Exempt under ss. 38(b)/14
11	Letter from the appellant to the Board dated January 11, 2002	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request
12	E-mail dated January 15, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
13	E-mails dated January 15, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
14	E-mail dated January 16, 2002	Withheld in full	Exempt under ss. 38(b)/14
15	Letter from the appellant to the Board dated January 16, 2002	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request

16	Letter from the appellant to the Board dated January 18, 2002	Disclosed in part	Handwritten portions outside scope of request
17	Facsimile cover sheet with notes dated January 22, 2002	Withheld in full	Exempt under ss. 38(b)/14
18	E-mail dated January 23, 2002	Withheld in full	Exempt under ss. 38(b)/14
19	Facsimile cover sheet with notes dated January 29, 2002	Withheld in full	Exempt under ss. 38(b)/14
20	Letter from the Board to the appellant dated January 29, 2002	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request
21	Facsimile cover sheet with notes dated January 31, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
22	Letter from an individual to the Board dated January 24, 2002	Withheld in full	Exempt under ss. 38(b)/14
23	Notes, undated	Withheld in full	Exempt under ss. 38(b)/14
24	E-mail dated February 7, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
25	Letter from the Board to the appellant dated February 8, 2002	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request
26	Letter from the appellant to the Board dated February 8, 2002	Disclosed in part	Handwritten portions exempt under ss. 38(b)/14 Handwritten portions outside scope of request
27	E-mail dated February 11, 2002	Withheld in full	Exempt under ss. 38(b)/14
28	Facsimile cover sheet with notes dated February 13, 2002, with attached letter from an individual to the Board dated January 24, 2002 (see Tab 22), and attached e-mails dated February 13, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
29	E-mails dated April 11, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request

30	Facsimile cover page dated May 1, 2002	Withheld in full	Exempt under ss. 38(b)/14 Handwritten portions outside scope of request
31	Notes dated April 9, 2002	Withheld in full	Exempt under ss. 38(a)/12 (last 4 paragraphs only) and ss. 38(b)/14 Handwritten portions outside scope of request

DISCUSSION:

CUSTODY OR CONTROL

The *Act* applies only to records that are in the custody or under the control of an institution (see section 4(1)). The Board takes the position that all of the records at issue are outside its custody or control and that, therefore, the *Act* does not apply to them.

The courts and this office have applied a liberal and purposive approach to the custody or control question. As stated by the Federal Court of Appeal under the federal access to information scheme in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 at 244-245:

> The notion of control referred to in subsection 4(1) of the *Access to Information Act* … is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

The Federal Court of Appeal continued (at p. 245):

> It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* … "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature" . . . It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the *Act* which indicates that the word should not be given its broad meaning . . . On the contrary, it was Parliament's

> intention to give the citizen a meaningful right of access under the *Act* to government information . . .

The Court of Appeal for Ontario adopted this approach under the Ontario *Act* in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 (at p. 6, para. 34).

Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows (see Order 120):

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

> These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

In similar circumstances to those in this case, in Order MO-1574-F, Adjudicator Donald Hale found as follows:

> Addressing the applicable factors outlined in Order 120, I find that the records at issue consist, in the main, of handwritten notes taken by educators and administrators within the schools attended by the appellant's son. These notes were intended to document the son's progress and his activities throughout the period for which they were kept. The records were maintained by Board staff on the Board's premises, regardless of the fact that they were not incorporated into the son's OSR and other permanent records. In addition, the records relate directly to the professional employment responsibilities of the staff person, recording the writer's observations and perceptions of the behaviour and progress of the son. As such, I find that the records relate directly to the mandate of the Board and the professional duties of their creators, which is the education and social development of the appellant's son.
>
> In my view, the records are not the personal records of the individuals who prepared them, but rather, were intended, as the Board concedes, as a "memory aid" to assist these individuals in their evaluation and treatment of the appellant's son and to assist in addressing the problems identified in them. They are, moreover, directly related to the work responsibilities of its employees and have been integrated into the workplace record-holdings of each of the individuals who created them, who are Board employees.
>
> Taking into consideration all of the indicia of control outlined by former Commissioner Linden in Order 120, I find that the records at issue are all in the Board's custody and that it also exercises the requisite degree of control for the purposes of section 4(1).

The Board submits:

> As set out in numerous decisions of the [IPC], the terms "custody" and "control" in s. 4(1) of the *Act* requires an investigation of a number of factors to determine whether the records at issue were in the custody and control of the institution. (See, for example, the summary of Commissioner Linden's Order 120, in *Toronto District School Board*, Final Order MO-1574-F ("MO-1574-F"), at 4.) It is necessary to consider all aspects of the creation, maintenance and use of particular records to determine whether the records are in the custody or under the control of the Board.
>
> In a British Columbia Supreme Court decision, it was determined that if the record is created during employment with the institution, so long as the record was not created in fulfilment of any employment duty and was not intended to be used for any purpose related to employment, such records are not in the custody or control of the institution. (See *Minister of Small Business, Tourism and Culture et al. v. Information and Privacy Commissioner of British Columbia et al.* (2000), 7 C.P.R. (4th) 301 at 6). In this case, the employee had kept her diary of

encounters with a man who was stalking her. The notes relate to her personal encounters with this man. The court considered the following facts in concluding that the diary was not in the custody or control of the institution:

(a) the diary was an aide memoire relating to her personal involvement with this man;

(b) the diary was never used or intended to be used for any purpose related to her employment;

(c) the diary was not used for preparation of entries in the Store Log;

(d) the decision to keep the diary was entirely of her own choosing;

(e) the institution did not have authority to regulate or control her use or disposition of the diary (See *Minister of Small Business, Tourism and Culture et al., supra* at 6).

An application for judicial review has been filed with respect to [Order MO-1574-F]. It is submitted that the [IPC] had interpreted the words "custody" and "control" incorrectly. Since the determination of "custody" and "control" are essential in determining whether the *Act* applies to the records, the [IPC] must be correct in its interpretation. The Board submits that the following factors support the determination that the handwritten and personal records at issue in MO-1574-F are not in the Board's custody and control:

(a) there are no statutory, Ministry or Board requirements that any of the records at issue were required to be made or kept;

(b) the records were kept in confidence and separate from the Board's official records, including [the appellant's son's] Ontario School Record;

(c) the Board was not aware of the records being kept and the employees of the Board kept these notes entirely of their own choosing;

(d) the records were kept on Board property only temporarily and by the determination of the administrators and staff involved in creating the records;

(e) the administrators and staff involved in the creation of the records believed that they were themselves able to decide when the records

> were to be destroyed or removed from Board property without any authorization or notification of the Board;
>
> (f) the records were made for the personal use of the authors and, in some cases, other staff with whom they worked as memoirs of personal involvement with [the appellant], not for the instruction of [the appellant's son]; and
>
> (g) the records have not been relied upon by the Board, except insofar as the Board is required to make submissions on this appeal.
>
> Therefore, the Board submits that the [IPC] exceeded its jurisdiction in MO-1574-F, by improperly interpreting "custody" and "control". The same factors set out above in support of the Board's position in MO-1574-F are present in this case and are equally applicable.

I see no reason to depart from Adjudicator Hale's findings in Order MO-1574-F, since the circumstances are very similar. In addition, case law in British Columbia reinforces a finding that the records at issue in this case are within the Board's control. In *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.), a parent sought access to notes made by a counsellor (who was a school employee) during interviews with students. The court stated (at paras. 31, 35):

> The [counsellor] argues that she is not required by the Principal, the School District, or the Minister of Education, to maintain her raw notes. However, as a counsellor and as a teacher within the School District, she is required to write reports in respect of the children she counsels. Presumably, such reports are prepared in part by relying on the notes she keeps and therefore the notes are implicitly required to be taken and retained.
>
> . . . . .
>
> In my view, the facts in this case support the correctness of the Commissioner's finding that the counsellor's disputed notes are under the control of the School District as contemplated by the [British Columbia *Freedom of Information and Protection of Privacy Act*]. The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes are created by an employee of a public body and used to make periodic reports, possession of which is held by the public body.

The Court of Appeal for Ontario approved of and applied *Neilson* in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (cited above).

In my view, although the facts are not identical, the same reasoning applies in this case. The records were created by Board employees during the course of, and for the purpose of, their employment responsibilities. This case can be contrasted with other cases where individuals create records for reasons other than the fulfillment of an employment duty, such as where an employee had personal concerns that someone was stalking her [see *British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commission)*, [2000] B.C.J. 1494 (S.C.)].

Therefore, I find that all of the records at issue are within the Board's custody or control, and the *Act* applies to them.

RESPONSIVENESS OF PORTIONS OF THE RECORDS

As has been noted in many orders, the determination by an institution of which records are relevant to a request is a fundamental first step in responding to a request under the *Act*. Further, as was stated in Order P-880, it is the request itself that "sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request." In applying the notion of "responsiveness", prior orders have generally looked to whether information in the records is "reasonably related" to the request. Further, it is well established that a record may contain information that is responsive to a request alongside information which is non-responsive, the latter which may properly be withheld (Order P-880).

I agree with this analysis and adopt it for the purposes of this appeal.

The Board takes the position that any handwritten notes on the records are not responsive to the appellant's request, and submits:

> . . . The handwritten notes are not "reasonably related' to the request, and therefore are not responsive or relevant to the request.
>
> The Appellant requested "any and all *printed papers* pertaining to my son within the [Board] from every person, department, right on up to the Director of Education." The term "printed papers" does not include "handwritten notes" which may be found on those papers.
>
> Further, the handwritten notes . . . are not "within the [Board]" as specified in the Appellant's request. As explained above, the handwritten notes were the personal notes of the individual author for their confidential, personal use, and were not required pursuant to any statutory requirement. Consequently, they are not records within the Board and not within the scope of the request.
>
> Further, section 4(1) of the *Act* – which provides the requester with the right of access to a "record or part of a record" (*subject to restrictions*) – contemplates that some portions of a document may be responsive to a request, while other

> portions of the same document may not. See Inquiry Officer Fineberg's Order in *Ministry of the Attorney General*, Order P-880, at 10, wherein it is noted that the "legislation recognizes that only portions of a document may be responsive to requests for general information." In this case, the Board disclosed to the Appellant as much as possible in accordance with the requirements of the *Act*, while excising those portions of the records which were not responsive or which were exempt.

The appellant submits:

> This might be rather simplistic but when I looked up the word "printed" in my dictionary it states "a mark made in or on a surface by pressing or hitting with an object." Is a pen or pencil or whatever was used to mark the surface of paper not an object? Do they not make a mark on paper? There is a direct correlation of the handwritten portions being pertinent to my request. They should display an attitude or perception toward my son and/or myself of discrimination based on my son's disability. The records directly have [my son] at issue in them – no one else. Why would the Board not consider the handwritten notes to be "reasonably related" or "responsive" to my request? They all *pertain* to my son . . . It certainly was never my intention to have them excluded as I thought my request was quite clear. I believe the Board instead, wilfully applied their own interpretation and narrowed the scope of the request unilaterally in order to withhold from me whatever they could. How hard would it have been to ask me for clarification, even though I contend my request was broad and all encompassing in order to capture as much as possible? . . .

I find little merit in the Board's position. The Board's narrowing of the appellant's request is overly technical, given that the appellant obviously was seeking all records relating to the appellant's son, regardless of the particular method by which the information was recorded. The handwritten portions clearly relate to the Board's interactions with the appellant and her son and concern the son's education; therefore, they are "reasonably related" and responsive to the request. This finding is consistent with previous orders of this office in similar circumstances [see Orders P-970, P-1564].

I also agree with the appellant that the Board ought to have consulted with the appellant to determine whether she in fact was seeking handwritten notes contained on the responsive records [see section 17(2) which speaks to an institution's duty to offer assistance to a requester in reformulating a request]. This would have been a reasonable course of action and would have eliminated any ambiguity, given that the appellant, not having seen the records, would not likely have been aware that the records contained handwritten notes.

PERSONAL INFORMATION

The first issue for me to decide is whether the records contain personal information and, if so, to whom it relates. The term "personal information" is defined in section 2(1) to mean, in part, recorded information about an identifiable individual.

The Board submits that all of the records contain the appellant's son's personal information. The Board also submits that the records contain personal information relating to other individuals, including Board employees:

> Records 1-3, 5, 21, 25 and 31, being handwritten notes concerning interactions between various staff at [the school] and [the appellant] as well as regarding [the appellant's son's] behaviour towards the Principal and teachers [at the school]. The typewritten notes make reference to [the Principal] and other staff at the Board. Therefore, these records contain recorded information about identifiable individuals.
>
> . . . [T]he majority of the remaining records include e-mail and facsimile correspondences. These correspondences contain names of individuals, and e-mail addresses or other identifiable information. As such, these records constitute personal information, pursuant to s. 2(1)(d) [which refers to the address, telephone number, fingerprints or blood type of the individual].
>
> . . . Record 22 is private correspondence sent from a third party parent, containing information which constitutes personal information of that parent . . .
>
> The Notice of Inquiry requests that we provide submissions on whether the information outlined above qualifies as "personal information" in light of the personal/professional distinction addressed in various Orders. In particular, *Ministry of the Attorney General*, Order P-1538.rec (Reconsideration Order R-980015) ("*AG*") and *Ministry of Health*, Order P-80 are cited.
>
> At page 6 of *AG*, Senior Adjudicator Goodis acknowledged a number of cases in which the names, addresses, telephone numbers and other information relating to professionals or employees were found to be personal information, and not a record associated with an individual in the normal course of performing his or her duties.
>
> . . . [T]he decision of the Senior Adjudicator in *AG* is consistent with the recent Ontario Court of Appeal decision in *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355. There, in considering the interpretation of the *Act*, the Court of Appeal found that words ought not to be imported into the text of the statute when doing so would subvert the intention of the legislature (at 369).

> . . . [T]he words "except when provided in a professional capacity" do not appear in the *Act* and, with respect, the personal/professional distinction in previous Commission decisions can no longer stand.

The appellant agrees with the Board that all of the records contain her son's personal information. However, the appellant states as follows with respect to Board employees:

> . . . The records do not contain other people's personal information rather they contain professional dealings, opinions, and views on [my son] directly pertaining to their employment and mandate by the Board. Each employee was furthering the objectives of the Board and was not acting in a personal capacity. The only things I can think of that might be considered personal information of the creators of the records are e-mail addresses and fax #'s which could easily be blacked out.

Prior decisions of the Commission have drawn a distinction between information relating to an individual in a personal and professional capacity, so that "information associated with a person in his or her professional or official government capacity will not be considered to be about the individual . . . within the meaning of 'personal information.'" A Commission adjudicator in Reconsideration Order R980015 provided the rationale for this distinction, when he stated that:

> > the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

The above decision was not varied and has been cited extensively by the Commission in decisions pertaining to the status of information relating to an individual in a professional capacity.

The appellant then refers to and quotes from Order R-980015, and continues:

> I can in no way see how the records pertain to the creators as personal information given that *the records were created solely in a professional capacity pertaining to [my son]*. I also submit that many of these records were used beyond being a "memory aid" and were in all likelihood used towards suspensions and eventual expulsion.

The appellant also takes issue with the Board's submission that the Court of Appeal's decision in *Ontario (Solicitor General)* supports the view that the definition of personal information excludes professional or official information.

I do not accept the Board's submission regarding the impact of *Ontario (Solicitor General)*, a case dealing with the interpretation of an entirely unrelated provision of the *Act*. I see no reasonable basis on which I should depart from this office's long-standing interpretation of the limits of personal information and the exclusion of certain professional or official information from the definition. Contrary to the Board's submission, this office has not read in any words to the section 2(1) definition; the limitation at issue stems directly from the opening words of the definition which require that the information be "about an individual" as opposed to being about an organization or something other than an individual.

The parties are in agreement, and I so find, that all of the records at issue contain the personal information of the appellant's son.

The information at issue in Records 1, 2, 3, 5, 21, 25 and 31 that is associated with Board employees is strictly of an official government nature as opposed to a personal nature. These records document discussions taking place in the normal course of Board business and interactions with Board staff and the appellant and her son. I see nothing in these records that could be said to "cross the line" into the personal realm that would thus trigger the application of the definition of personal information. Therefore, none of the records at issue contain personal information relating to Board employees.

However, Record 3 contains a passage relating to another individual in a personal capacity (part of the 3rd last line, and the last two lines). This information constitutes personal information of an identifiable individual.

Therefore, only Record 3 contains personal information of an individual other than the appellant and her son, and only this information may be exempt under section 38(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

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

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

Sections 14(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of another individual's privacy under section 38(b).

The appellant submits that the factors at section 14(2)(a) and (d) weigh in favour of disclosure of personal information. Those sections refer to, respectively, the interest of subjecting the activities of the institution to public scrutiny, and the interest of obtaining information that is relevant to a fair determination of rights.

In my view, neither of these factors is applicable to the small passage of personal information in Record 3, which contains information that is incidental to the main issues between the appellant and the Board.

In addition, I find that the factor weighing against disclosure at section 14(2)(f) applies here, since in this context the information is highly sensitive.

Therefore, I find that the relevant portion of Record 3 qualifies for exemption under section 38(b). In addition, I find no error in the Board's exercise of discretion in withholding this information.

To conclude, only the identified portion of Record 3 qualifies for exemption under section 38(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

The Board relies on section 38 in conjunction with section 12 to withhold portions of Record 31.

As stated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access, including where the section 12 solicitor-client privilege exemption applies. Section 12 reads:

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

Section 12 contains two branches as described below. The Board must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

The Board takes the position that the last four paragraphs of Record 31 are exempt under the litigation privilege aspect of section 12.

Common law litigation privilege

Common law litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The Board submits:

> . . . [L]itigation privilege protects records created for the "dominant purpose of existing or reasonably contemplated litigation". In order to determine whether a record or portion thereof was created for such a dominant purpose, the record must have been created with the "particular or general" purpose of "using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect."
>
> Record 31 relates to the Appellant's appeal of the suspension of her son . . . from [the school] . . .
>
> Sections 306 and 307 of the *Education Act* . . . provide mandatory and discretionary grounds for which a Principal must or may suspend a pupil from his or her school. Section 308 of the *Education Act* provides for a review and an appeal process which may be pursued by a parent who objects to a suspension . . .
>
> [The appellant's son] was suspended . . . from [the school] . . .
>
> The Appellant requested an appeal of the suspension . . . After a review of the suspension by [the Superintendent], as required by the *Education Act*, a Notice of Hearing . . . was served on the Appellant . . . which set a date for the appeal hearing to take place before a Board of Trustees . . .
>
> . . . [T]he Appellant requested an adjournment of the . . . hearing date as she required more time to prepare. On . . . [named individual] . . . contacted the Board advising that she was representing the Appellant and her son. [The named individual] also requested the appeal be adjourned. The adjournment was granted by the Board.
>
> It is the Board's understanding that the Appellant will be contacting the Board to reschedule the hearing date at some future time. Accordingly, the appeal hearing remains outstanding.
>
> Additionally, the Appellant has filed a Human Rights Complaint with the Ontario Human Rights Commission against the Board [and other school and Board officials] claiming, *inter alia*, that the Board has discriminated against [the appellant's son] because of a disability in violation of ss. 1 and 9 of the Ontario *Human Rights Code* . . . [The appellant's son's] suspensions from school, including the suspension which is the subject of the suspension appeal described above, are alleged to be examples of the Board's discrimination . . .
>
> The Board filed a Response . . . and amended Responses . . . The Board has requested that the Complaint be dismissed pursuant to s. 34 of the *Code*, in part

> because there is a fulsome suspension appeal process, including provision for considering students' special needs, provided by the *Education Act*.
>
> The Board has not yet received a determination of the s. 34 application. Accordingly, this complaint remains outstanding.
>
> Though the Complaint itself had not yet been filed at the time Record 31 was created, it was within the Board's contemplation generally that the Appellant was about to engage in legal proceedings against the Board regarding the suspensions, whether in one or more forums.
>
> As the litigation matters between the Board and the Appellant are ongoing, there is no need to address whether the adversary system of justice would be harmed through disclosure of the specific records notwithstanding the termination of litigation . . .
>
> Record 31 is dated April 9, 2002 and was therefore created in between the appeal of [the appellant's son's] suspension and the service of the Notice of Hearing . . . [The typewritten note is addressed to the Superintendent responsible for the school] and the individual responsible for reviewing a suspension for that school in accordance with the *Education Act* and the Board's Safe Schools Policy.
>
> [Named individual], whose message is being conveyed to [the Superintendent] in Record 31, is one of the Safe Schools Advisors for [the school]. [The named individual's] responsibilities include organizing suspension and expulsion appeal hearings and communicating with parents in this regard.
>
> The first two paragraphs of [the Safe School Advisor's] message inform [the Superintendent] of the outcome of his discussions with the Appellant, and that the Appellant wanted to proceed with the appeal hearing.
>
> The last four paragraphs of [the Safe School Advisor's] message, for which privilege is being claimed, relate to the appeal process itself . . .
>
> The last four paragraphs are clearly in contemplation of litigation and go so far as to identify the need for legal advice in relation to that litigation. The purpose of this communication was to discuss how that litigation would proceed.

The appellant makes no specific submissions on the application of section 12.

In my view, Record 31 was not prepared or created for the dominant purpose of actually being used in existing or reasonably contemplated litigation. In my view, the dominant purpose for which Record 31 was created was simply to keep Board officials informed as to what possible procedural steps lay ahead in future litigation. This is not the type of record that could

reasonably be expected to be used by counsel in the litigation. Further, I am not convinced that the purpose of litigation privilege, which is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial, would be undermined in any way by disclosure of the portions of Record 31 at issue. Therefore, I find that the last four paragraphs of Record 31 do not qualify for exemption under Branch 1 litigation privilege.

However, the last paragraph in Record 31 reveals discussions had or to be had with counsel for the Board who was to have been retained in the litigation. In my view, this information clearly qualifies for common law solicitor-client communication privilege, since it forms part of the "continuum of communications" between a lawyer and client [see *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) and Order PO-2154].

Branch 2: statutory privilege

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Clearly none of the three remaining paragraphs of Record 31 qualify for exemption under Branch 2 solicitor-client communication privilege, since they were not prepared by or for counsel employed or retained by the Board for use in giving legal advice.

Turning to Branch 2 litigation privilege, for reasons similar to those above under Branch 1, I find that Record 31 was not prepared by or for counsel employed or retained by the Board in contemplation of or for use in litigation.

Conclusion

Only the final paragraph of Record 31 qualifies for exemption under section 12 of the *Act*.

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Board has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in

the circumstances, I will uphold the Board's decision. If I am not satisfied, I may require further searches.

Where a requester provides sufficient detail about the records that 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 that 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 order to properly discharge its obligations under the *Act*, the Board must provide me with sufficient evidence to show that they have 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 exist.

In its initial representations, the Board submits:

> The Appellant requested the release of any and all printed papers pertaining to the Appellant's son from within the Board from every person, department, right on up to the Director of Education. When the request by the Appellant had been made, the Board determined that it would be reasonable to make inquiries to every location within the Board that, in its opinion, would likely have the records . . . The Board did not, however, feel that it was reasonable to make inquiries to each and every employee, which would amount to approximately 27,000 individuals.
>
> The Commission has held that the search for responsive records does not have to be exhaustive to the extent that the institution is able to prove with absolute certainty that the responsive records are not in its custody or under its control. (See Senior Adjudicator Goodis' Order in *Waterloo Regional Police Services Board*, Order MO-1490, at 4.) The institution must have simply conducted a reasonable search by knowledgeable staff in locations where the records in question might reasonably be located. (See Inquiry Officer Cropley's Order in *Peel Regional Police Services Board*, Order M-909, at 2.)
>
> When the request was received, the Board made inquiries to every location where the Board believed requested records would exist. A senior administrator of the Board . . . sent a request to [the] Superintendent of Schools . . . , a copy of which is attached . . . advising of the Appellant's request . . .
>
> [The Senior Administrator] requested that [the Superintendent] co-ordinate the search for the records . . .

Inquiries were made by [the Superintendent] of the various individuals within the Board who were known to have contact with [the appellant's son] or may have been expected to have contact with the parties.

[The Senior Administrator] received a response from:

(a) the Office of the Director of Education
(b) [named individual]; Special Education Department
(c) [named individual], Safe School Administrator
(d) [named individual]
(e) [named individual], Principal [of the school]
(f) [named individual]; Executive Officer – Community and Student Services
(g) [named other school]
(h) the Office of [the Superintendent]

The Board located approximately 71 records, 40 of which were disclosed to the Appellant, and 31 records which were withheld and/or released with severances … The Board staff who were contacted to conduct the search, and the Board staff who responded with records, were knowledgeable in respect of [the appellant's son's] records . . . [T]he search was extended to personnel in all of the areas at the Board who may reasonably be in possession of records pertaining to [the appellant's son].

The information provided by the Appellant on pages two and three of the Notice of Inquiry regarding documents which she suspects may be in the Board's possession were only provided to my client in the Notice of Inquiry. Accordingly we are in the process of making further inquiries in this regard, and will advise the OIPC within the week as to whether there are any further documents that arise as a result of the information which we have now received.

. . . [I]t was discovered by [the Senior Administrator] that the IPRC Notes had been destroyed. It was customary for the Vice-Principal and the teacher involved to create briefing notes prior to an IPRC meeting for their own reference and assistance during the meeting. Following the IPRC meeting, it was also standard practice of the individuals to destroy the notes they made for the IPRC meeting. This is what took place in this situation.

. . . [T]he Board determined that there was no need to clarify the Appellant's original request, as the records sought were not difficult to identify and the Appellant was clear in her request. Furthermore, the Appellant was advised by letter . . . that the Board was dealing with her request by searching for all printed papers (non-official files) relating to [her son]. [The Appellant] did not dispute this. The scope of the Appellant's request was not, in fact, narrowed by the Board's decision to inquire of its employees who would likely be in possession of

> the requested information, rather than making inquiries of all of the Board's almost 27,000 employees.
>
> The affidavit of [the Senior Administrator] (to follow) sets out the details of the search conducted by the Board in response to the Appellant's request, as explained above.

At the same time, the Board submitted an affidavit from the Senior Administrator [more specifically the Manager, Senior Administrative Services, and Assistant Secretary], which states:

> I was contacted by the Appellant in or about April 2002 by telephone. The Appellant was requesting information regarding [her] son, but it was not clear exactly what she required. I told her I would be pleased to assist her but that it would be helpful if she could write down specifically what she was seeking.
>
> Ultimately, I received a formal written request from the Appellant pursuant to the [*Act*] . . . the request included "any and all printed papers" related to her child from "every person, department, right on up to the Director".
>
> By memorandum dated May 2, 2002, I wrote to [named individual], Superintendent of Schools for [identified family of schools], stating the nature of the Appellant's request and asking that [the] Superintendent . . . co-ordinate the search for records . . .
>
> I sent the request to [the] Superintendent . . . because she was the Supervisory Officer responsible for [the school] . . . The request was also copied to three Board employees:
>
> (a) an Executive Officer, [named individual], to whom [the] Superintendent ... reported;
> (b) the Executive Superintendent of Schools Services – Special Education, [named individual], as it was clear that the Appellant's child may have "special needs", the nature of which is described in paragraph 7 of the Board's representations; and,
> (c) the Superintendent, Student and Community Services, [named individual], who was responsible for all student community services other than those provided through Special Education.
>
> By addressing the memo to these individuals, I was ensuring that the Board's inquiries were as broad as possible.
>
> Further inquiries were made by [the] Superintendent . . . of the various individuals within the Board who were known to have contact with the Appellant's child or may have been expected to have had contact with him.

[The] Superintendent provided me with responses from various sources including:

> Office of the Director of Education
> [named individual], Central Co-ordinating Principal, Special Education
> [named individual], Safe Schools Administrator
> [named individual], Supervising Principal – East Education Office
> [named individual], Principal [of the school]
> [named individual], Executive Officer
> [named school]
> Office of . . . [the] Superintendent of Schools, [named family of schools]

By letters dated July 2 and 3, 2002 . . . I informed the Appellant that we understood her request to refer to communications relating to the education of her son, and not official files, such as the Ontario Student Record. I also advised the Appellant that, with thousands of employees at the Board, it is not possible to make inquiries to each and every employee, as the Appellant had requested. I stated that "we have made inquiries to every location within the Board which in our opinion would be likely to have the records described".

In addition, I advised the Appellant that we had been unable to locate a record fitting the description provided by the Appellant concerning notes of [the] Vice-Principal . . . and [a named] teacher . . .

. . . . .

I am advised by [named individual], the Board's legal counsel, that, out of an abundance of caution, she made further inquiries regarding the notes. On July 11, 2002, during the summer holidays, [legal counsel] spoke with [the Principal] at his home. [The Principal] informed [legal counsel] that the notes had been destroyed by [the Vice-Principal] and [the teacher], which explained why the notes had not been discovered through the Board's search.

It was determined in the fall of 2002 that the Appellant had verbally amended her request to include her child's attendance information, which had inadvertently not [been] provided to the Appellant. By way of letter . . ., counsel provided the Appellant with this information.

On October 7, 2002, [legal counsel] contacted [named IPC mediator] to explore possible solutions in this matter. [The mediator] inquired regarding the existence of the notes, and [legal counsel] agreed to confirm the information previously provided to her. On October 10 and 15, 2002, [legal counsel] spoke directly with [the teacher] and [the Vice-Principal].

> By letter dated October 23, 2002 . . . [legal counsel] confirmed to the Mediator in writing that she had spoken directly to [the Vice-Principal] and [the teacher]. Both advised that they had prepared, on their own initiative, briefing notes for their own reference and assistance during the meeting. After the meeting, both destroyed their notes. For each, this was her standard practice with respect to preparation for an IPRC meeting. Only [the Vice-Principal's] notes were composed on a computer; [the teacher's] notes were handwritten. [The Vice-Principal] did not save a copy of her notes on her computer or in any other way.
>
> Moreover, out of an abundance of caution, the Board has advised in its representations . . . of its willingness to make further inquiries in response to additional particulars provided by the Appellant and only received by the Board by way of the Notice of Inquiry.

In supplementary representations, the Board states:

> *Items a and c: a School Support Team meeting in October 2000 and a School Support Team meeting in October 2002*
>
> As was described in the Board's representations . . . the Ministry of Education encourages boards to establish a "team" within the school for each exceptional pupil, the purpose of which [is] to "collaborate, consult and share information and knowledge to identify strategies that may increase the student's learning success", as well as to support the parent.
>
> We presume that the "School Support Team meetings" referred to by the Appellant are informal or formal meetings of this nature in relation to the Appellant's son . . .
>
> [The Appellant's son] began attending [the school] on February 25, 2002. The Appellant decided to home school [her son] for the academic year 2002/2003. Accordingly, there was no School Support Team meeting with respect to [her son] in October 2002.
>
> We are still making inquiries with respect to a School Support Team meeting in October 2000 when [the Appellant's son] was attending Kindergarten at [named school].
>
> *Item b: Guidance personnel from 1999*
>
> The Board has no information as to the "Guidance personnel' referred to. In particular, at the beginning of the academic year in 1999, [the Appellant's son] would have been 4 years old and attending Junior Kindergarten at [named

> school]. It is not common for guidance personnel to be consulted with respect to children of this age.
>
> *Item f: [Named individual], Supervising Principal*
>
> Supervising Principal [named individual] responded to the Board's inquiries for records, as described in the Board's representations . . . and [affidavit]. Nevertheless, as the Appellant had made specific inquiries regarding records relating to the provision of an "Education Assistant" for [her son], further inquiries were made to [the Principal].
>
> [The Principal] confirmed that a Special Needs Assistant ("SNA") was assigned to [the Appellant's son] during the academic year of 2002. We are making further inquiries into any records related to this process.
>
> *Items g, h, i, j, k, n, o, p: [list of named Board staff]*
>
> A search for records from the above-noted Board employees was conducted in response to the Board's initial inquiries for records, as described in the Board's representations . . . and the Affidavit . . . The Director's Office responded on behalf of both the current Director and the former Interim Director. [The] Principal . . . responded on behalf of both himself and [the] Vice-Principal . . . [Named individual] responded on behalf of the Special Education Department, including [two named individuals].
>
> Except in respect of supplementary inquiries in response to specific information provided by the Appellant, further general inquiries to these individuals would be redundant.

In further representations, the Board states:

> With respect to allegations set out at page 2 of the Notice of Inquiry in relation to the notes referred to by [the Vice-Principal and the teacher] at the IPRC for the Appellant's son . . . we can now advise as follows:
>
> 1. The Board's representations describe the nature of an "IPRC" . . .
> 2. An IPRC does not take place "in public", as alleged by the Appellant. Rather, the IPRC consists of three or more individuals, one of whom is the Superintendent or Principal. The individuals present are those who are entitled to be present by right, such as the parent of the child, and those who are invited to provide information to the IPRC, such as medical professionals who have assessed the child.

3. There was no direct response to the appellant's "request" for notes at the IPRC meeting in December 2001 because the Appellant was extremely agitated, standing and yelling at Board staff. Her own advocate, [named counsel], took her by the arm in an attempt to have the Appellant sit down. The Appellant's various demands in the circumstances were not meaningful inquiries.
4. When the Appellant subsequently requested copies of the notes from [the Principal], he advised that the notes were made for the personal and confidential use of the authors. [The Principal] does not recall referring to a subpoena. In any event, the notes were destroyed prior to or about the time of the request.
5. For the record, as stated in [the Board's affidavit], the Appellant was not advised by [the Manager, Senior Administrative Services, and Assistant Secretary] to file a form pursuant to the *Act*, but was simply asked to provide the request in writing because it was difficult to understand precisely what the Appellant was seeking.

Regarding the records specified by the Appellant as described at page 3 of the Notice of Inquiry, we can advise as follows:

> *Item a, c: School Support Team meetings in October 2000 and 2002*
>
> [Named individual], the Special Education Teacher for [the school], retained a Student Profile Form, dated October 1, 2000, a copy of which is enclosed . . . Additionally, we enclose at the same Tab a Student Profile Form dated October 23, *2001*, which may relate to the meeting described by the Appellant as having taken place in *2002* (at which time [her son] was no longer attending school). The Board will release these to the Appellant on a without prejudice basis.
>
> *Item d: [named individual], Itinerant Resource Teacher – Special Education*
>
> The Notice of Inquiry makes reference to a report by [this individual]. We understand a copy of [her] report may have been placed in [the appellant's son's OSR]. We are obtaining a copy of the OSR and will provide same under separate cover to the Appellant.
>
> [This individual] advises that she has no records relating to [the appellant's son].

Item e: [named individual], Special Education Consultant

[This individual] has advised that she has no records relating to [the appellant's son].

Item f: [named individual], Supervising Principal

The Notice of Inquiry refers to funding for [the appellant's son's] Education Assistant. We are enclosing the Board's official file with respect to special education funding for [the appellant's son] … These records will be released under separate cover to the Appellant.

Item l: [named individual], Safe Schools Administrator

As indicated in the Board's representations and [affidavit, this individual] responded to the Board's initial request for records. Records produced by [this individual] have either been released to the Appellant or are included in the records provided to the Commission. There are no additional records relating to the suspensions of the Appellant's son.

Items m and q: [named individual], SEAC Chairperson; [named individual], Trustee

[Named individual] was the Chairperson of the SEAC, which is a statutorily mandated advisory committee for special education. [Named individual] is a member of the Board of Trustees. Neither are employees of the Board and, therefore, their records are not subject to the *Act*. We note, however, that Record 18 includes an e-mail from [the Trustee] to Board staff, amongst others. This record was included in the Board's Document Brief because one or more of the recipient staff members had it in their possession.

In response, the appellant submits:

> I do not dispute the Board not asking each of its 27,000 employees one by one or even by District, that makes sense. What I do dispute is how the search was conducted with regards to each source. I would certainly like to know exactly who was contacted and by whom and what files in the course of the search. If [the Superintendent] was conducting the search then this is a clear case of conflict of interest. [She] is part of the problem and is also named in the Ontario Human Rights complaint. How could she possibly conduct an unbiased and fair search? [The Superintendent's] records are notably absent from the Record Index along

> with many other personnel that had daily or frequent contact with [my son] plus personnel who were known to have interacted with or for [my son] (I will list these further on). The Record Index is self-evident of this point.
>
> Exactly when did [the Vice-Principal and the teacher] destroy their notes? As of December 14, 2001 as per my meeting with [the principal] they still existed. The Board knew I wanted [the Vice-Principal's and the teacher's] notes, yet no attempts were made by [the Principal and the Superintendent] to retain them – why? Was the information contained in them so incorrect, so inflammatory? I believe they were counselled by [the Principal] to not release them – to just say they no longer existed. All people involved knew there would be a subsequent IPRC meeting, since the IPRC *decision* (not the meeting as the Board incorrectly contends in their February 14, 2003 submission) had been deferred pending further assessments requested by the IPRC on December 5, 2001 and myself in prior November, 2001 letters. The Board was aware of my request for these notes as per my January 11, 2002 letter to [the Superintendent]. All my letters to the [the Superintendent and the Principal] went unanswered – they were all ignored. As per [the Principal] in the December 5, 2001 IPRC meeting when asked why my letters were left unanswered – "I won't start a letter writing campaign." Yet my questions were still left unanswered. When a letter is sent to a Board employee it is their duty and mandate to reply to the questions put forth. It is not a prerogative to ignore and by so doing was dereliction of duty. The reason I asked for everything in writing was because they would not answer me when verbally requested and the response could not be denied afterwards plus to ensure proof and accuracy. At that point in time when [the teacher] allegedly destroyed her notes, how many IPRC's had she been to in order for this to become a 'standard practice' since she had not been teaching all that long? Do you honestly believe that these notes would be destroyed knowing that they would be required again? It defies logic that here is a child she works with daily but yet would destroy notes she read aloud from at such a critical meeting (IPRC), this also applies to [the Vice-Principal]. What were they going to do – create a complete set of new notes again? How would they be able to re-create what they did without these notes? Common sense dictates they would have simply added on to the existing notes. Is it mere co-incidence that both people destroyed their notes?

The appellant also states that despite the Board's submissions, she has not received the attendance records she requested.

In addition, the appellant provides a lengthy and detailed list of the individuals who she believes would have records relating to her son, and a description of the types of records that she claims should exist.

In my view, the Board has provided a reasonably detailed explanation for the searches it conducted for responsive records, and has made reasonable efforts to respond to the appellant's

concerns about the existence of additional records. In my view, the Board has acted reasonably in identifying the Board employees that are likely to have obtained or created records in the context of being involved in some way with the appellant's son, and taking steps to have those employees look for relevant records. The appellant continues to believe that certain named individuals must have additional records, yet it is clear that those individuals have been asked to, and have, searched for responsive records and have not been able to locate additional material.

The appellant maintains that she has still not received her son's attendance records as promised by the Board. Also, the Board indicates in its representations that it intends to disclose certain records to the appellant, but it is unclear whether it has done so. In the circumstances, I will order the Board to disclose these records to the appellant.

DESTROYED RECORDS

Although the Board has acted reasonably in making efforts to locate responsive records, I have concerns regarding the Board's destruction of the IPRC notes made by the Vice-Principal and the teacher. As is the case with the diary records referred to above under the "custody or control" issue, the IPRC notes appear to have been created by Board employees during the course of, and for the purpose of, their employment responsibilities. Since the notes also likely would have contained personal information of the appellant's son (and possibly others, including the appellant), it is possible that the Board breached its duty to retain personal information as set out in Regulation 823, section 5 under the *Act*. That provision states:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom it relates consents to its earlier disposal.

Although this issue is outside the scope of this appeal, it is an issue that may warrant further consideration by this office.

ORDER:

1. I order the Board to disclose the attendance records requested by the appellant, the student profile forms dated October 1, 2000 and October 23, 2001, and the Board's official file with respect to special education funding for the appellant's son no later than **April 29, 2004**, unless it has already done so.

2. I order the Board to disclose all of Records 1-31 to the appellant, with the exception of portions of Record 3 (the 3rd last line and the last two lines) and Record 31 (the last paragraph) no later than **April 29, 2004**.

Original signed by: March 25, 2004
David Goodis
Senior Adjudicator