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

ORDER MO-1836

Appeal MA-020157-2

Toronto District School Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). It arises out of a request for access to the following information:

> (i) copies of all statements that were taken by Board staff on September 21, 2001 and after September 21, 2001 relating to the arrest of the requester's son;
>
> (ii) all letters, statements, phone logs, e-mail transmissions, faxes and a voice copy of the telephone voice messages that were left on voice mail for a named school principal on or about November 2 to November 5, 2001 and December 6 to December 8, 2001 by the requester's wife; and
>
> (iii) all copies of letters, faxes, telephone logs, e-mail transmissions that relate to the requester's family in the possession of staff at [named school], three named Board employees/officials and staff of two specified programs, within a specified time frame.

It should be noted that the requester's wife has co-signed the request, and can thus also be considered as a requester for the purposes of this appeal. As well, the request states that it is made on behalf of the requesters' son.

In its decision, the Board granted access to some records in their entirety, denied access to others in their entirety, and granted partial access to others. The Board indicated that it relied on sections 2(1) (personal information), 4(1) (custody or control), 4(2) (severances), 54(c) (exercise of rights on behalf of a minor), 12 (solicitor-client privilege), 13 (danger to safety or health), 14 (unjustified invasion of personal privacy) and 38(a) and (b) (discretion to refuse requester's own information).

The requesters appealed the Board's decision. During mediation of the appeal through this office, certain matters were narrowed or clarified. The requesters (now the appellants) state that they believe more records should exist, and the reasonableness of the Board's search for records is therefore an issue in the appeal. The Board took the position that certain information in the records is not covered by the scope of the request, and this is also an issue in the appeal.

The appeal was referred to me for adjudication. I sent a Notice of Inquiry to the Board, initially, inviting it to submit representations on the appeal. As a result of those representations, the application of section 4(1) is no longer an issue. The Board raised the application of section 12 to some additional records in its representations, and the issue of whether it is entitled to claim this discretionary exemption for additional records at this stage was added to the issues in the appeal.

A revised Notice was then sent to the appellants along with the Board's representations (with the exception of confidential portions), and they were also invited to submit representations.

At issue before me is whether the appellants are entitled to exercise rights of access under the *Act* on behalf of their son, whether the Board conducted a reasonable search for records, whether certain information in the records is covered by the scope of the request, whether the Board may raise the application of section 12 to additional records, whether the information withheld by the Board is exempt from disclosure, and whether the section 16 "public interest override" applies.

RECORDS:

The records at issue consist of interview notes, other handwritten notes, a cassette tape, transcriptions of telephone logs, fax cover sheets, email messages, telephone messages and correspondence.

PRELIMINARY ISSUES:

CAN THE APPELLANTS EXERCISE ACCESS RIGHTS ON BEHALF OF THEIR SON UNDER SECTION 54(c)?

Section 54(c) permits the exercise of rights under the *Act* on behalf of minors, in the following terms:

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

The Board does not dispute that the appellants' son was under the age of sixteen at the time of the request. However, the Board states that even where it is accepted that a parent has lawful custody of a child, it is incumbent upon the adjudicator to determine whether the parent is exercising that right in the child's best interests. The Board submits that the affidavit evidence and portions of the records themselves suggest the contrary.

In Order P-673, on which the Board relies, former Assistant Commissioner Irwin Glasberg found that the disclosure of records maintained by the Office of Child and Family Service Advocacy responsive to a request from a custodial parent for records relating to his son would not be in the best interest of the child. The records related to a custody and child protection dispute involving the father and his former spouse. The former Assistant Commissioner found that the requester father was seeking the information contained in the records in order to "meet his personal objectives and not those of his son." As a result, he held that the father was not entitled to exercise the access rights of his son in accordance with the provincial equivalent provision to section 54(c).

I find the circumstances of this appeal to be very different from those discussed in Order P-673, which arose out of a custody and child protection dispute. This argument was also previously raised by the Board in Appeal MA-010272-2, in relation to one of these appellants (the father).

Adjudicator Donald Hale rejected the Board's position, finding no basis for its contention that the request was made for some improper or collateral purpose (see Order MO-1574-F, upheld by the Divisional Court on judicial review in *Toronto District School Board v. John Doe* [2004] O.J. No. 2587). The request in that appeal and the one before me arise out of the same set of circumstances, and can be viewed as part of ongoing issues between the appellants and the Board in relation to the education and treatment of their son by the Board. Although it may be that, as found by Adjudicator Hale, there is a high degree of animosity between the appellants and the Board's administration, this does not establish that the appellants are attempting to use the access provisions under the *Act* for improper or collateral purposes. I see no basis to reach a different conclusion from Adjudicator Hale, and I find that the appellants are entitled to exercise the access rights of their son under section 54(c).

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

It should be noted that the reasonableness of the Board's search with respect to one part of this request (relating to records in the possession of staff at the named school) has already been dealt with during the course of Appeal MA-020157-3 and it is not necessary for me to review that part of the request here.

The Board described its search for records in its representations. It sets out its understanding as to the nature of the request and lists the Board staff and officials who were contacted and asked to search for records covered by the request. The search for records is also described in the affidavit material filed by the Board.

The appellants submit that they have evidence to establish that further records exist. They have provided a copy of an email communication from a Board trustee to one of them (the mother) in November of 2001, responding to an earlier communication from this appellant to the trustee. Despite the existence of this communication, I am not convinced that it provides a reasonable basis for concluding that more records exist. It does not appear that the communication between this appellant and the trustee continued beyond November of 2001, and given that the request was made in April of 2002 and the search was conducted in May, it is not surprising that the search for records by the trustee did not reveal the existence of this email exchange. Further, to

the extent that the email message refers to some form of communication between the trustee and a Board employee, it does not by itself establish a reasonable basis for concluding that any record of this communication exists.

The appellants also refer to portions of handwritten notes of a principal, to which they were given access, to support their position that more records exist. I have reviewed those portions and am not satisfied that they provide a reasonable basis for such a conclusion.

The appellants submit that there should be notes relating to their son's attendance in a Board program during October and November of 2001, asserting that it is "prudent to assume" that a named Board employee was in constant contact with another named employee during this period. I have reviewed the records located and released to the appellants authored by one of these employees, and I am not convinced that the appellants' submissions establish a reasonable basis for concluding that more records exist.

The appellants believe that the Board and its lawyers have in their possession documents that disprove certain allegations made against their son, and that the Board has documents "which they were assembling to get him falsely arrested". I have reviewed the evidence the appellants submit in support of these contentions, and do not find that they establish a reasonable basis for concluding that such additional records exist.

The appellants refer to a tape submitted with their representations in Appeal MA-010161-2, which they state supports their contention that more records exist. I have listened to this tape and am not satisfied that it provides a reasonable basis for such a conclusion.

In sum, I am satisfied that the Board conducted a reasonable search for records responsive to the request. The Board contacted the individuals or programs named in the request, requesting searches of their record holdings based on a reasonable interpretation of the request, and I find that this was a reasonable and sufficient effort to locate responsive records.

SCOPE OF THE REQUEST

The Board severed certain information from Record B2 (a cassette tape), on the basis that it was not responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise

> definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

The appellants have been clear and specific in their request. Part of the request was for access to a copy of the voice messages left by the one of the appellants for a named Principal. The Board located a cassette tape containing these, during the time frame specified. The cassette tape also contained other information that was not covered by the appellants' request. I am satisfied that the information severed by the Board is not responsive to this request and is accordingly not at issue in this appeal.

LATE RAISING OF THE SECTION 12 EXEMPTION

In its representations, the Board states that it is relying on section 12 with respect to additional records or portions of records for which it was not earlier cited.

The *Code of Procedure for Appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The Board submits that the new exemption claim does not result in any prejudice to the appellant or any inconvenience to the IPC. In responding to this issue, the appellants submit that this entire appeal should have been dealt with long ago, and I should therefore not consider section 12 in relation to the additional records.

Although it is true that the processing of this appeal has been somewhat protracted (in large part due to court proceedings which have been abandoned), I find that the additional section 12 exemption claim does not cause any further delay in the resolution of the appeal. Further, I am not convinced that there is any prejudice to the appellants in allowing this additional claim, in the circumstances of this appeal. From the outset, the Board applied section 12 to the majority of records at issue in this appeal. Whether or not section 12 exempts records from disclosure is not a new issue in this appeal, only its application to additional records.

In conclusion, I will permit the Board to raise the application of section 12 to the additional records.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) to mean recorded information about an identifiable individual, including the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis

The Board acknowledges, and I find that the records contain the personal information of the appellants and their son. The Board submits that the records also contain the personal information of a number of other individuals, including but not limited to Board employees.

With respect to the specific records at issue, the Board submits that Record A1, handwritten notes of a vice-principal, contains personal information of a number of individuals. I have reviewed this record and I accept the position of the Board.

Record B1, a principal's handwritten notes, has been released with severances. The Board states that this record consists almost entirely of the principal's handwritten notes of statements made by one of the appellants during telephone conversations. Severed from the notes are the names of certain individuals mentioned in the conversations, as well as some incidental information about some of the individuals. I find that Record B1 contains the personal information of some of these individuals. Information in relation to other individuals, however, who are Board employees, is not their personal information (and the Board does not assert otherwise).

The Board submits that Records C6 to C20 contain the names of Board employees, their telephone numbers, fax numbers, email addresses, titles and other identifying information. In relation to these portions of the records, the Board submits that this constitutes the personal information of these Board employees. The Board asserts that the words "except when provided

in a professional capacity" do not appear in the *Act* and that the personal/professional distinction in previous IPC decisions cannot stand.

I do not accept the position of the Board on Records C6 to C20. The interpretation of section 2(1) is well established and consistent with the Legislature's use of the term "*personal* information" [my emphasis]. I find that the information of Board employees in Records C6 to C20 is about them in a professional or official capacity, and not in a personal capacity. Further, I find that the information does not reveal anything of a personal nature about these individuals: see, for instance, Order PO-2225. I am satisfied, therefore, that the information of these individuals in Records C6 to C20 does not qualify as their "personal information".

On my review of the records, I note that Records C18 and C19 contain personal information of two individuals who are not specifically referred to in the Board's representations. The information about these individuals consists of references to them in a telephone conversation between one of the appellants and a member of Board staff.

As Records A1, B1, C18 and C19 contain the personal information of the appellants as well as of other individuals, I will turn to consider whether they are exempt from disclosure under section 38(b). Based on my findings above, it is not necessary to consider the application of section 38(b) to Records C6 to C17 and C20 to C24 as they contain the personal information of the appellants only.

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

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Since the appellants are exercising the rights of their son under section 54(c), section 36(1) also gives them a general right of access to his personal information. 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.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 38(b). Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

It was not asserted, and I find that none of the presumptions in section 14(3) apply to this appeal. The Board relies on sections 14(2)(e), (f) and (h) to justify withholding the personal information in the records. In their representations, the appellants referred to section 14(2)(a). These sections provide:

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

I am not persuaded that section 14(2)(a) is relevant to this appeal. As regards this section, the appellant submits that the Board ought to disclose its Safe Schools Policy Manual so that the public can be assured that it is being followed. That record, however, is not at issue in this appeal.

I find that section 14(2)(e) is a relevant consideration weighing against the disclosure of the personal information in Record A1, based on information found in this record as well as in the representations of the Board. In particular, the past history of the son establishes a concern that disclosure of the information will expose the individuals whose personal information is in the record to unwanted and potentially aggressive contact.

I am also satisfied that sections 14(2)(f) and (h) apply, and are significant factors weighing against the release of the personal information of other individuals in Record A1. Prior orders have established that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual: see Orders M-1053, P-1681 and PO-1736. I find that the information in the record itself and the circumstances under the information was provided demonstrate that disclosure of the information could reasonably be expected to cause excessive personal distress

to the individuals whose personal information is contained in the record. Given the circumstances, it is also a reasonable conclusion that the information was provided to the Board in confidence.

The appellants assert that they are the ones who would suffer harm by the non-disclosure of the documents. They are convinced that they and their son have been treated unfairly by the Board, and that the records will establish this. Among other things, they seek access to the records to show that cease and desist letters issued to them were based on false premises and that false allegations were made against their son. Further, they state that the Board has caused excessive stress to their family by not disclosing the records.

I am satisfied that the appellants have shown some considerations in favour of disclosure of the personal information in the records. Certain allegations have been made by the Board against the appellants and their son. The allegations have the potential to bear consequences, whether judicially or otherwise. However, with respect to Record A1, I am not satisfied that these considerations outweigh the factors that favour non-disclosure of the personal information of others. The appellants have not pointed to any particular proceedings for which they require disclosure of the information in order to vindicate their rights. It appears that criminal charges against their son were withdrawn. Other than the appeal processes before this office, there does not appear to be any existing or reasonably contemplated litigation arising out of the relationship between the appellants and the Board.

While I appreciate the appellant's interests in obtaining all the information they can about the Board's interactions with them and their son, I find on balance that it would be an unjustified invasion of personal privacy to disclose the personal information in Record A1.

In relation to Records B1, C18 and C19, I find that there are no factors supporting a conclusion that disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the individuals to whom it pertains. From a review of the records themselves and the representations of the Board, I find that the information about these individuals came directly from one of the appellants during telephone conversations with Board employees, and is thus known to the appellants. Based on this, I conclude that disclosure of the information of these individuals in Records B1, C18 and C19 would not constitute an unjustified invasion of their personal privacy.

I have found that disclosure of the information in Record A1 would be an unjustified invasion of personal privacy. Because this record also contains the personal information of the appellants or their son, I must consider whether the Board exercised its discretion under section 38(b) appropriately in deciding not to release it to the appellants. Having reviewed all of the circumstances relied on by the Board, I am satisfied that its discretion was exercised in accordance with proper principles and without bad faith. Record A1 is therefore exempt under section 38(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

In addition to section 38(b), under section 38(a), the Board has the discretion to deny the appellants access to their own personal information (or that of their son) where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, **13** or 15 would apply to the disclosure of that information.

The Board relies on section 38(a) in conjunction with sections 12 (in relation to Records C8, C12 to C20 and C22 to C24) and 13 (in relation to all of the records). Section 12 is the "solicitor-client privilege" exemption, and section 13 the "threat to safety or health" exemption.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* 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, a common-law privilege and a statutory privilege. It is unnecessary to discuss the two branches separately in this decision.

The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

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.)].

Representations

The Board submits that Records C8 to C9, C13 to C17, C20, C22, C24 and the highlighted portion of C19 are communications between counsel and the Board related to obtaining legal advice in relation to the appellants.

The Board submits that Records C12, C18, C23, C24 and the non-highlighted portions of C19 are subject to litigation privilege, in that they were prepared in contemplation of litigation. To support its claim of existing or reasonably contemplated litigation, the Board refers to a "no trespass" letter sent to one of the appellants (the father), and two "cease and desist" notices prohibiting the appellants from entering Board property or contacting Board personnel. The Board also relies on the appellant's requests for information, four appeals and a privacy complaint filed by the appellants under the *Act*, all of which were outstanding at the time of its representations.

The Board states that the purposes of Records C12, C23, C24 and the non-highlighted portion of C19 was to give effect to the Board's cease and desist orders and the no trespass letter. Records C18 and C24 are comprised, it is said, of "statements" prepared by Board staff at the request of other Board staff in order to properly inform counsel.

The appellants submit that as they do not know what is in these records, they cannot determine whether solicitor-client privilege applies.

Analysis

I have reviewed the records for which the solicitor-client communications privilege has been claimed and I find that they constitute direct communications between Board employees and its counsel, as part of a continuum of communications aimed at keeping both informed within the context of the giving or receiving of legal advice. Accordingly, I am satisfied that these records (Records C8 to C9, C13 to C17, C20, C22, C24 and the highlighted portion of C19) are covered by the solicitor-client communication privilege and qualify for exemption under section 12.

I am not convinced that litigation privilege applies to exempt the records for which it has been claimed. As indicated above, the Board describes the purpose of the records at issue as giving effect to the Board's cease and desist orders and the no trespass letter and to properly inform counsel. It describes the potential legal consequences of the no trespass letter and cease and desist notices. Having regard to the Board's submissions, I am not satisfied that the issuance of a no trespass letter and two cease and desist notices from the Board to the appellants constitutes "litigation" in itself, or establishes a reasonable prospect of litigation. Although such communications have the potential to form the basis for some type of litigation, or to be used in litigation, there is nothing to suggest that such litigation either existed, or was reasonably contemplated. Further, the Board acknowledges that the records at issue were not actually sent to its counsel.

In support of its claim of litigation privilege, the Board also relied on the appellants' requests and appeals under the *Act*, and a privacy complaint. The purpose of the records for which the litigation privilege is claimed, however, and as described by the Board, is unrelated to addressing these processes under the *Act*. I am therefore not satisfied that it has been established that the records at issue were produced for the dominant purpose of aiding in the conduct of appeals or a privacy complaint under the *Act*.

I therefore find that Records C12, C18, C19 (non-highlighted portion), C23 and C24 are not subject to litigation privilege. I have, however, found above that Record C24 is subject to solicitor-client communication privilege.

In conclusion, Records C8 to C9, C13 to C17, C20, C22, C24 and the highlighted portion of C19 qualify for exemption under section 12. Although the appellants claim that solicitor-client privilege was waived, the circumstances they rely on do not demonstrate waiver.

Because these records contain the personal information of the appellants, once section 12 is found to apply, section 38(a) provides the Board with discretion to either release or deny access to them. I have reviewed the Board's decision to deny access to them and find nothing inappropriate in its exercise of discretion under this provision. These records are exempt under section 38(a).

THREAT TO SAFETY OR HEALTH

Section 13 states:

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

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

The Board claims that section 13 applies to exempt all of the records at issue from disclosure. Because I have found some records or portions of records exempt under sections 12 and 14(1), in conjunction with sections 38(a) and (b), it is only necessary to consider whether this section applies to the information severed from Records B1 and C3, Records C6 to C7, C10 to C11, C12, C18, C21, C23 and the non-highlighted portions of C19.

In support of its assertions, the Board filed four affidavits. Based on the information in these affidavits, which were not shared with the appellants, the Board submits that disclosure of the information in the records could reasonably be expected to seriously threaten the safety or health of an individual. The Board refers to the decision of the Ontario Court of Appeal in *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560, in which the court drew a distinction between the requirements for establishing "health or safety" harms under the provincial equivalents to sections 8(1)(e) and 13, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) [the provincial equivalent to section 8(1)(e)] requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly section 20 [the provincial equivalent to section 13] calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes 14(1)(e) or 20 to refuse disclosure.

Despite this distinction, the party with the burden of proof under section 13 still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated: see Orders MO-1262 and PO-1747.

I accept the above analysis, and adopt it for the purposes of this appeal.

In *Ontario (Minister of Labour)*, the court had evidence before it establishing that the requester had made threats to employees of the office whose records were at issue and that the requester had been legally restrained from entering certain premises of the Workers' Compensation Board (WCB). Further, there was evidence of medical and psychiatric reports which expressed concerns that the requester would act out past threats of violence against staff of the WCB.

The material submitted by the Board establishes a pattern of confrontational behaviour by the appellants in their dealings with Board employees and officials. Accepting the Board's evidence, the appellants have been aggressive and even verbally abusive to Board staff. There is no evidence, however, of threats made by the appellants to the physical safety of Board staff. Further, unlike the circumstances in the *Ontario (Minister of Labour)* case, there is no psychiatric evidence showing a concern about the appellants carrying out acts of violence. On balance, I am not satisfied that the Board has met the burden of proof to show that disclosure of the records would create a serious threat of harm to the safety and health of anyone on the part of the appellants.

I must also consider whether the harm under section 13 has been established in relation to the appellants' son, as there is the possibility that any information obtained by the appellants will be shared with him.

Accepting the Board's evidence, the appellants' son has engaged in threatening and abusive behaviour to other individuals, some of whom include Board employees. The most serious allegations in relation to Board staff concern threats made by him when he was 13 years old in January and February of 2001. While disturbing, there is no evidence that any disciplinary action was taken against him as a result of these threats, although prior misconduct by the appellants' son had been the subject of Board discipline.

On my review, I also note that the records before me do not involve any of the Board staff against whom the threats were made in January and February of 2001. Further, the appellants' son no longer attends the schools where those individuals are located.

The appellants' son is also alleged to have made threats against certain individuals (who are not Board employees) in September of 2001, leading to criminal charges which were ultimately withdrawn. Based on the information before me, if the records remaining at issue under section 13 involved any of these individuals, I might have reason to apply this exemption to this information. However, they do not.

I also note that some of the information was conveyed by one of the appellants in telephone conversations with Board employees (the severed information in Records B1, and some of the information in Records C18 and C19). Given this, I am not convinced that disclosure of this information could reasonably be expected to seriously threaten the safety or health of any individual. Other records record the observations or actions of Board employees in relation to the appellants or their son, or discussions with the appellants (the severed information in Record C3, Records C6, C7, C18 and C19). Some are simply fax cover sheets with no substantial information (Records C10, C11 and C21). Finally, Records C12 and C21 record instructions given to Board staff. None of these records has any direct relationship to the events in January, February and September of 2001. None can reasonably be viewed as inflammatory in itself. Again, I am not convinced that disclosure of any of this information, even given these events, could reasonably be expected to seriously threaten the safety or health of any individual.

It should be noted that the evidence submitted by the Board in this appeal is substantially the same as that before Adjudicator Donald Hale in Appeal MA-010272-2, also involving these appellants. Additional evidence filed in the present appeal relies on the same incidents described in the evidence before Adjudicator Hale. Although each case must be determined on its own facts, and on consideration of the particular records at issue, I am supported in my conclusions by the findings of Adjudicator Hale in that appeal (in Orders MO-1574-F and MO-1595-R) that section 13 did not apply to exempt the records before him. These conclusions were upheld by the Divisional Court in *Toronto District School Board v. John Doe*, above, which reviewed the evidence and found Adjudicator Hale's conclusions reasonable.

In sum, I find that the information severed from Records B1 and C3, Records C6 to C7, C10 to C11, C12, C18, C21, C23 and the non-highlighted portions of C19 do not qualify for exemption under section 13.

PUBLIC INTEREST OVERRIDE

In their representations, the appellants submit that section 16 of the *Act* supports their request for access to the records. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 16 does not apply to records exempt under sections 6, 8, 8.1, 8.2, 12 or 15. Therefore, it cannot override the application of the section 12 solicitor-client privilege that I have upheld above. In this appeal, the only potential application of section 16 is to Record A1, which I have found exempt under section 14(1), in conjunction with section 38(b).

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption. In submitting that section 16 applies to this case, the appellants emphasize their desire to obtain access to the Board's Safe Schools Policy Manual. This document is not, however, at issue in this appeal. In any event, I am not convinced that the appellants have shown a compelling public interest on the facts of this case. I find that the appellants' interest in the records at issue is predominantly a private one, resting on their own concerns and those on behalf of their son, rather than a public one.

I therefore conclude that section 16 does not override the application of sections 14(1)/38(b) on the facts of this appeal.

To summarize my conclusions, I find that section 14(1), in conjunction with section 38(b) applies to exempt Record A1 from disclosure. Section 12, in conjunction with section 38(a), exempts Records C8 to C9, C13 to C17, C20, C22, C24 and the highlighted portion of C19. I have also found the severed portions of the cassette tape to be not reasonably related to the request.

The remaining records or portions of records at issue are not exempt and I shall order them disclosed.

ORDER:

1. I order the Board to disclose the information severed from Records B1 and C3, the entirety of Records C6 to C7, C10 to C11, C12, C18, C21, C23 and the non-highlighted portions of C19.

2. Disclosure is to be made by sending the appellants copies of the records ordered to be disclosed by November 1, 2004 but not before October 25, 2004.

3. In order to verify compliance, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellants pursuant to the above provisions, upon request.

Original Signed by: September 24, 2004
Sherry Liang
Adjudicator