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

ORDER MO-1952

Appeal MA-020309-1

Toronto District School Board

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NATURE OF THE APPEAL:

The appellants are the parents of a student who was registered at a school operated by the Toronto District School Board (the Board). On behalf of themselves and their son, the appellants submitted a request to the Board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> copies of notes, telephone messages, faxes, telephone logs, and any other type of transcription that was provided between Board lawyers in particular [a named lawyer] of [a named law firm] from the years December 2000 to August 26, 2002, and all copies of the above mentioned data from another Board lawyer in particular [a second named law firm] and [two named lawyers] from the year 2000 to August 26, 2002 that relate to the appellant and his family.

Initially, the Board issued a decision stating that the request was frivolous or vexatious, citing sections 4(1)(b), 19 and 20 of the *Act*. It claimed in the alternative, however, that the requested records would fall under section 12 (solicitor-client privilege) of the *Act*.

The appellants appealed the Board's decision.

During mediation, the Board issued a revised decision letter reiterating its position that the request is frivolous or vexatious, and added a number of other alternative exemption claims as the basis for withholding the information (sections 7, 10, 11, 13 and 38(b)). These additional exemptions were added within this office's 35-day deadline. The Board was notified of this office's 35-day policy when it received its confirmation of appeal.

Also during mediation, the Board took the position that it does not have custody or control over some of the records, raising this as an issue in the appeal.

This appeal was not resolved through mediation and has now been forwarded to adjudication.

As a result of its initial and subsequent decisions, the following exemptions/issues remain to be adjudicated:

- Whether the request is frivolous or vexatious – sections 4(1)(b), 19 and 20 of the *Act*;
- In the alternative to the above, whether the following exemptions apply to the requested records;
    - advice or recommendations – section 7;
    - third party information – section 10;
    - valuable government information – section 11;
    - solicitor-client privilege – section 12;
    - danger to safety or health – section 13; and
    - invasion of privacy – section 38(b) (based on the factors and presumptions in section 14 of the *Act*)

- Whether the Board has custody and/or control over some of the records the records – section 4(1) of the *Act*;

Since it appears that any responsive records are likely to contain the appellants and their son's personal information (individually or collectively), I have added the possible application of the discretionary exemption in section 38(a) (discretion to refuse requester's own information) as an issue.

This office sought representations from the Board, initially. The Board provided representations in response. As the appellants' son was under sixteen years of age at the time of the request, the Board, in its representations, added section 54(c) as an issue in this appeal.

This office then sought further representations from the Board regarding records that the Board argues are not in its custody or control. The Board provided further representations.

I then sought representations from the appellants. The appellants also provided representations in response.

RECORDS:

Records the Board claims are **in** its control include:

Index A - handwritten notes by various individuals, facsimiles from the appellant to school officials, medical notes, report cards, e-mails, Individual Education Plans, correspondence between appellant to school personnel, correspondence from Board lawyers to school officials, computer printouts, transcriptions of messages, memoranda, affidavits, and a CD containing phone messages

Index B – e-mails from the appellant to the Board's lawyers

Index C – memoranda and a copy of a cheque

Index D – handwritten notes by various individuals, TDSB Individual Education Plan, reports, and various facsimile

Index E – agreement contract, handwritten notes, doctor's notes, TDSB Individual Education Plan, correspondence from the appellant to school officials, e-mails from Board lawyers to the appellant, a drawing, a form, reports and other correspondence

Index F - chronology, agreement contract, handwritten notes, correspondence from appellant to school officials, e-mails between appellant, Board lawyers and school officials,

Index G – handwritten notes by various individuals, memoranda

Index H – draft affidavits, copies of affidavits

Index I – correspondence from school officials to the appellant

Index J – correspondence between various individuals and Board lawyers, correspondence between appellant and Board lawyers

Index K – chronology, correspondence from appellant, e-mails from appellant, phone messages, correspondence of Board lawyers

Index L – handwritten notes, agreement contract

Records that the Board claims are **not** in their custody or control include: handwritten notes by Board lawyers, copies of e-mails between Board lawyers and the Board, facsimiles, correspondence, and memoranda.

DISCUSSION:

CUSTODY OR CONTROL

General principles

Section 4(1) reads in part,

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution, unless…

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors relevant to determining "custody or control"

Based on the above 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 [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trace, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

Board's Representations

The Board submits:

> ...At page 9 of the Notice of Inquiry, various factors are set out for consideration when determining whether documents are within the custody and control of the institution. In this case:
>
> (a) many of the records at issue were not created by an officer or employee of the Board…
>
> (b) The records are not in the possession of the [Board] and are not being held by an employee or officer of the institution.
>
> (c) The records held by the Board's law firms are not integrated with other records held by the [Board]; and
>
> (d) The [Board] does not have the authority to regulate the use of or dispose of many of the records.

The Board further submits:

> Since the records at issue are physically held in the files of the [Board's] law firms…The question then becomes whether the records at issue are within the "control" of the [Board], despite being physically held in the files of the law firms.
>
> The law relating to control and ownership of a lawyer's file
>
> …
>
> In *Aggio* v. *Rosenberg et al.* (1981, Ontario Supreme Court (Master's Chambers)), the plaintiff had been represented by the defendant law firm but changed counsel prior to trial. A direction was forwarded to the defendants requesting that they deliver their file contents to the new counsel. The defendants denied the plaintiff's entitlement to correspondence, memoranda of law, counsel's notes and copies of documents and cases. The plaintiff applied for a replevin order. In granting the application, the Court held that the documents sought to be retained by the defendant law firm came into existence by reason of the plaintiff's retainer of the defendants and at the expense of the plaintiff. Such documents included letters sent by and delivered to the solicitors to and from third parties respectively as well as vouchers for disbursements. The Court found that the law is as set forth in Corderley, Law Relating to Solicitors, 6th ed., pp. 118-9:

"As to what the law in Ontario is, I adopt the law as set out in Corderley, supra, as follows:

> **D. AUTHORITY OVER DOCUMENTS ON TERMINATION OF RETAINER**
>
> Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since the ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on the termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs – see pp. 416 *er seq., post*) as the client or third party may direct.
>
> Documents which only came into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:
>
> (i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for [by] the client, belong to the client.
>
> (ii) Documents prepared by the solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
>
> (iii) Documents sent by the client to the solicitor during the course of the retainer, the property of which was intended at the date of dispatch to pass from the client to the solicitor, e.g. letters, belong to the solicitor.
>
> (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g., letters, belong to the client.

From these broad categories, specific propositions are then laid down at p. 119 as follows:

> Cases, instructions and briefs prepared by the solicitor and delivered to counsel belong to the client within category (i).
>
> Drafts and copies made by the solicitor of deeds or other documents in non-contentious business belong to the client within category (i).
>
> Copies made by the solicitor of letters received by him, if paid for by the client belong to the client under category (i).
>
> Copies made by the solicitor of letters received by him, if not paid for by the client belong to the solicitor under category (ii).
>
> Copies made by the solicitor of letters written by him to third parties, if contained in the client's case file and used for the purpose of the client's business belong to the client under category (i).
>
> Copies made by the solicitor of letters written by him to third parties, if contained only in a filing system of all letters written in the solicitor's office belong to the solicitor, under category (ii).
>
> Entries of attendance, tape recordings of conversations, etc., inter-office memoranda, partner to partner, partner to staff, entries in diaries, office journals and books of account belong to the solicitor under category (ii).
>
> Letters and authorities and 'instructions written or given' by the client to his solicitors belong to the solicitor under category (iii).
>
> Letters received by the solicitor from third parties belong to the client under category (iv).

> Vouchers for disbursements made by the solicitor on behalf of his client belong to the client under category (iv).
>
> In (1981) 15 L.S.U.C. Gaz. 103, there is to be found a helpful article prepared and published at the suggestion of the Committee of Professional Conduct of the Law Society of Upper Canada entitled 'A Lawyer's Authority Over Documents on Termination of Retainer'…The article then details what documents, letters, vouchers and notes are the property of the client and which are the property of the solicitor, following the law laid down in Corderly, supra,…"

And, in *Spencer* v. *Crowe* (1986, Supreme Court of Nova Scotia – Trial Division), the plaintiff had retained the defendant legal aid solicitor in connection with a custody matter; she subsequently terminated the retainer and executed a consent to the release of information in the former solicitor's file on her case. The solicitor released all of the contents of the file except for her own notes of comments and conversations with a social worker. The Court held that the working notes prepared by the solicitor were the solicitor's property and were not available to the plaintiff. In discussing the issue of ownership of files, the Court cited *Aggio* and the Law Society article, and concluded that ownership in the content of a solicitor's file depends on the nature of the documentation as set forth by Corderley. The Court further commented:

> "In support of the defendant's contention that notes prepared by the solicitor in this instance are the property of the solicitor, reference was made to the following cases: *Chantrey Martin* v. *Martin* [1953] 2 Q.B. 296; and *Leicestershire County Council* v. *Michael Faraday & Partners, Ltd.* [1941] 2 K.B. 205.
>
> At page 293 of the *Chantrey* decision, Jenkins, L.J. stated:
>
> > Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connection with work done for clients.

Further at p. 49-87 in the *Leicestershire* case, MacKinnon, L.J. stated:

> If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents, and the principal can claim that the agent should hand them over. This, however, is emphatically not a case of principal and agent. It is a case of a client and a professional man to whom the client resorts for advice. I see no reason at all (and I think that it would be entirely wrong) to extend to such a relationship what may be the legal result of the quite different relationship of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to counsel for the plaintiffs during the argument, than his solicitor clients or his lay client could assert that his notes of the careful and strenuous argument which he addressed to us here could be claimed to be delivered up by him when the case is over, either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, but they are not documents brought into existence by an agent on behalf of his principal, and, therefore, documents which it can be said are the property of the principal.

While these two cases involved working notes of chartered accountants and valuers, the same principal should apply to solicitors. They are all professional people rendering services to clients.

I find that the working notes or memos in this instance prepared by the defendant solicitor are in the category of solicitor property and not available to the plaintiff. I agree with counsel for the defendants that to decide otherwise would 'create an intolerable situation for the legal practitioner'."

The Board goes on to conclude the following:

> Thus according to the statements of law as found in the Law Society article, *Aggio*, and *Spencer*, the following documents are not within the TDSB's custody or control but rather are within the control of its law firms:
>
> - letter sent by the[Board] to its lawyer during the conduct of the matter at hand and intended by the [Board] to pass to the lawyer (including letters of authorization and instruction);
> - copies of letters sent by the lawyer to the [Board]
> - notes made by the lawyer of interviews, preparation for trial, entries of attendances, inter office memoranda, office journals, and books of account;
> - documents prepared by the lawyer for his/her own benefit or protection, the preparation of which is not regarded as an item chargeable against the [Board];
> - documents sent by the [Board] to its lawyer during the course of the retainer, the property in which was intended at the date of dispatch to pass from the [Board] to its lawyer.
>
> Index – Documents NOT Within the Custody or Control of the [Board]
>
> The Index entitled "Documents NOT Within the Custody or Control of the [Board]" was sent to you…
>
> All of the documents listed in this Index are within the custody and control of the law firms…It is clear from the description of the documents on the face of the Index that they fall within the categories of documents that are the property of the lawyer, as referenced in the caselaw above. These documents are not subject to MFIPPA.
>
> The documents listed in the Index can be grouped as follows:
>
> 1. Handwritten notes of the lawyer;
> 2. Correspondence received by the lawyer from the client;
> 3. Copies of correspondence sent by the lawyer to the client;
> 4. Memoranda to file by the lawyer or his/her assistant.

Analysis

This Office has cited and applied the approach taken by the Court in *Aggio* in Orders M-315 and M-796. In Order M-796, former Inquiry Officer Holly Big Canoe also cited with favour the decision in *Spencer*. Regarding the issue of control, Inquiry Officer Big Canoe further states:

> Section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:
>
> > Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. [emphasis added]
>
> This section indicates that records which **belong** to the client must (unless there are unpaid fees) be delivered to the client on demand, or otherwise disposed of as the client directs. Accordingly, in my view, ownership of documents constitutes "control" for the purposes of section 4(1) of the *Act*.

I agree with the approach taken by this office that ownership is a strong indicator of control and will apply the principles set out in both *Aggio* and *Spencer* to the records at issue.

The Board has provided me with an index of the records of which it claims not to have custody or control and an affidavit of an individual employed by the Board's lawyer who has reviewed the records listed on the index. The records in the index can be described in general as follows:

- Notes made by the Board's lawyer during interviews, telephone conversations
- Memoranda to file created by the Board's lawyer
- Letters, emails and facsimiles of instruction sent by the Board to its lawyer regarding incidents between the Board and the appellants
- Letters, facsimiles and e-mails sent by the lawyer to the Board

From my review of the representations, the description of the records listed on the index, and the affidavit evidence, I accept the Board's submissions that the documents listed on the index are all in the custody and control of the Board's lawyers and not with the control of the Board. The Board cannot be said to have "ownership" of these particular records and I am satisfied that the records are in the lawyers' control.

As such, there is no right of access under section 4(1) to the records listed on the index and the supplementary index both entitled, "Documents NOT within the TDSB's Custody or Control".

IS THE REQUEST FRIVOLOUS OR VEXATIOUS?

General principles

Section 4(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850].

An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850].

In this case, the Board submits that the appellant's request is part of a pattern of conduct that amounts to an abuse of the right of access and that the appellant's request is made for a purpose other than to obtain access.

I will first examine whether the appellant's patter of conduct amounts to an abuse of the right of access.

Pattern of conduct that amounts to an abuse of the right of access

Board's representations

The Board submits that the appellant's pattern of behaviour which amounts to an abuse of the right of access includes:

> (a) a series of legal proceedings initiated over a period of approximately 3 years;
> (b) the increasingly broad scope of the requests, including a request for the entire contents of the files of the Board's legal counsel;
> (c) the timing of the requests in retaliation for the Board taking steps to protect its staff from the [appellant];
> (d) the continuation of the requests of a pattern of harassment, including numerous phone calls, and continued contact despite requests to stop;
> (e) the repetition of requests in the [named] Appeal that had already been requested in the Original Appeal; and
> (f) the [appellant's] history of opposing attempts to assist [appellant's son] by any means possible, and in this instance by way of the Act.
>
> These circumstances also support a finding that the [appellant] [is] acting to continue a pattern of harassment against the Board and its personnel, rather than for the purpose of obtaining access.

The Board elaborates on the proceedings with the appellant and his family as follows:

> At about the same time the "no trespass" letter was served in mid-January 2001 – approximately a month after the [appellants] were notified of the report to Catholic Children's Aid Society – [the appellants] submitted his first request pursuant to the Act with the Board, followed by a series of additional requests. The response to these requests was appealed to the Commission in or about September 2001. That matter, the "Original Appeal" (Appeal MA-010272-2) remains outstanding, as the Board has applied for Judicial Review of the Commission's Order therein. [Orders MO-1574-F and MO-1595-R upheld on judicial review by the Divisional Court in *Toronto District School Board* v. *John Doe*, [2004] O.J. No. 2587.]
>
> The Original Appeal concerns requests for records relating to the [appellants] kept by [named Principal], [named staff], [named Diagnostic Centre] and Safe Schools Office, the last of which relates specifically to the service of the no trespass letter.

As described above, in response to ongoing "threats and intimidating statements" made toward Board employees, in December 2001, Board counsel served the cease and desist notice upon the Appellants prohibiting them from entering Board property or directly contacting Board personnel. A second cease and desist letter was sent at the end of January 2003.

The [appellant] responded by filing two more requests dated April 8, 2002 and April 10, 2002. The first of these requests relates to records kept by the Principal and staff at [named school], Community Alternative Program for Suspended Students and Supervised Alternative Learning for Excused Pupils, as well as the Safe Schools Office, [named Superintendent] and the Chair of the Board (…being Appeal No. MA-020157-2.

The second of these requests relates to the Board's Safe Schools Manual and records kept by the Safe Schools Office, [named Diagnostic Centre], [two named Superintendents], and all other Board staff, and any records relating to the Catholic Children's Aid Society report and to the no trespass letter (…being Appeal MA-020161-2)…The repetitive nature of some of these requests was canvassed in detail in our submissions to Adjudicator Liang dated March 19, 2003 in relation to Appeal MA-020161-2.

At about the time it appears the [appellants] were seeking enrolment for [the appellants' son] with the Toronto Catholic District School Board in 2002, a fourth request dated August 26, 2002 was received from the [appellant] requesting all records relating to the [appellants] held by the Board's legal counsel, [two named law firms]…being the appeal herein (…Appeal MA-020309-1). [Named law firm] had issued the cease and desist letters on behalf of the Board, and our firm had represented the Board with respect to the access requests.

On January 14, 2003, the Board received a Notice of Privacy Complaint dated January 9, 2003 being [specified privacy complaint], which the Commission subsequently advised related to a telephone conversation the previous September 13, 2002. The [appellants] had attempted to re-enrol [appellants' son] in September 2002 with the Toronto Catholic District School Board ("TCDSB") at [named school]. The [appellants] had determined that someone from [named school] had contacted [named school #2] "In attempt to determine whether they could meet the special education needs of [appellants' son]. The [appellants] alleged the Board had breached their privacy when speaking to person calling from [named school].

On May 20, 2003, the [appellants] filed a Human Rights Complaint pursuant to the Ontario *Human Rights Code* with the Ontario Human Rights Commission. Amidst a litany of complaints, the [appellants] rejected [named school #3] again…

Analysis

The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*

  Is the number excessive by reasonable standards?

- *Nature and scope of the requests*

  Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

- *Purpose of the requests*

  Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?

- *Timing of the requests*

  Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?

[Orders M-618, M-850, MO-1782]

The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding [Order MO-1782].

Other factors, particular to the case under consideration, can also be relevant in deciding whether a patter of conduct amounts to an abuse of the right of access [Order MO-1782].

The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access. [Order MO-1782]

I will now proceed to apply the factors stated above to the facts set out by the Board in this appeal.

Number of Requests

Based on the Board's representations, the appellants have made four requests for information over a period of approximately two years.

The Board in its representations also sets out the background of the relationship it has had with the appellants and their son and the numerous contacts (emails, telephone, meetings and correspondence) between the Board and the appellants. While I agree that the contacts between the appellants and the Board have been extensive, I am unable to find that the appellants' four requests made under the *Act* to be an excessive amount by any reasonable standard.

Nature and scope of the Requests

The Board submits that the appellants' requests have become increasing broad in scope and later requests have been repetitive of earlier requests. In particular, the Board refers to records that were requested in Appeals MA-010272-2 and MA-020161-2. The issue of the same records being dealt with in two appeals was addressed by Adjudicator Sherry Liang in Order MO-1907.

While I agree that there appears to be some repetition in two of the appellants' requests I do not agree that all of the appellants' requests can be described as broad in scope. While many of the appellants' requests ask for a variety of types of records, the appellants limits their request to information about themselves and their son and are specified in time. In addition, the appellants' requests appear to arise from or relate to certain events in the family's relationship with the Board. As a result, I do not characterize the appellants' requests to be excessively broad in scope nor unusually detailed.

And while there is some repetition in the appellants' requests, I would not characterize the appellants' four requests as identical or similar in nature such that it could be said that the appellants are asking for the same information in each of their requests.

Purpose of the requests and *Timing of the Requests*

The Board submits that the appellants have made their requests in retaliation to the Board's actions to protect its staff. As proof of this, the Board recites the chronology of the appellants' requests, as set out above. I find the Board's allegation is unfounded. The timing and nature of the appellants' requests are insufficient evidence that the appellants were acting in a retaliatory manner by making their requests.

Finally, the Board also argues that the requests in addition to the appellants' phone calls were part of a pattern of harassment by the appellants. Again, I find the Board's assertions are not established by the evidence provided.

Other factors

The Board has also set out additional factors that it wishes me to consider in its argument that the appellants' request is part of a pattern of conduct that amounts to an abuse of the right of access. Namely, the Board wishes me to consider the fact that the appellants have initiated a series of legal proceedings with the Board over a period of approximately 3 years, which culminated in both a privacy complaint and a Human Rights complaint against the Board.

From my review of the history and circumstances between the Board and the appellants, and the "legal proceedings" referred to by the Board, I am unable to find that the factor of the "legal proceedings" advanced by the Board supports its position that the appellants' request is part of a pattern of conduct that amounts to an "abuse of the right of access" under the *Act*. In my view, the appellants are seeking to advance their family's interests, and to obtain information under the *Act*. Furthermore, the commencement of a Human Rights complaint can not be considered an abuse of the right of access under the *Act* as it relates to a different forum.

Summary

The Board provided an extensive background of its relationship with the appellants and their son in its representations. The appellants, who were given an opportunity to respond to the Board's representations, also set out their view of their family's relationship with the Board.

From the representations of the parties, I understand that the parties have an acrimonious relationship based on years of disagreements about the proper care and education of the appellants' son.

I am cognizant of my need to take into consideration other factors in a finding of whether there is a pattern of conduct that amounts to an abuse of the right of access. Furthermore, I have considered the context in which the appellants' requests have been made within the history of the Board's dealings with the appellants and their son. Based on the representations of the parties and in particular the background and evidence presented by the Board, I find that the Board has not established a "pattern of conduct" that amounts to an "abuse of the right of access" such that the appellants' request for access is frivolous or vexatious under section 4(1)(b) of the *Act*.

Request is made in bad faith or for a purpose other than to obtain access

The Board's representations set out above also refer to fact that it believes that the appellants' requests are for a purpose other than to obtain access, namely to harass Board staff.

As stated above, the Board has set out its history with the appellants and their son. Included in this discussion is reference to the fact that, in the past, the Board has served the appellants (the male appellant in particular) with a "no trespass" letter and two cease and desist letters. However, from the nature and scope and the number of the appellants' requests, I am unable to

find that the appellants' requests were for the purpose of harassing the Board. In Order M-860, on a related issue, Senior Adjudicator John Higgins stated:

> Moreover, if the appellant's purpose in making requests under the Act is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access and use the information in connection with a complaint.

I agree with the Senior Adjudicator's finding and find that the situation is similar here. The appellants' purpose in making requests under the *Act* was to obtain information regarding the Board's treatment of their son and to advance their position in regard to the schooling and care of their son. This does not indicate to me that the appellants' requests were for a purpose other than to obtain access.

I wish to reiterate that I have considered the full history of the parties including the past proceedings between the parties and the numerous affidavits submitted by the Board.

As such, I find that the appellants' request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act*.

In summary, I find that the appellants' request to be neither part of a pattern of conduct that amounts to an abuse of the right of access, nor a request for a purpose other than to obtain access. The appellants' request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act*.

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

At the time of the request, the appellants' son was 15 years of age. Section 54(c) of the *Act* permits the exercise of rights 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 submits that even where it is accepted that a parent has lawful custody of a child, it is incumbent on the adjudicator to determine whether the parent is exercising the right in the child's best interest. The Board submits that affidavit evidence and portions of the record demonstrate that the appellants may not be acting in their child's best interest.

In Order MO-1907, Adjudicator Liang dealt with a similar argument on the part of the Board and held the following:

> 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 the appellant. 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*, above). 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 appellant and the Board in relation to the education and treatment of his son by the Board. Although it may be that, as found by Adjudicator Hale, there is a high degree of animosity between the appellant and the Board's administration, this does not establish that the appellant is 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 appellant is entitled to exercise the access rights of his son under section 54(c).

I agree with Adjudicator Liang's findings and based on the affidavit evidence and records before me, I also find no reason to reach a different conclusion than Adjudicator Liang. I find that the appellants are entitled to exercise the access right of their son under section 54(c).

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 where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

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 did not make representations on this issue.

I find the records contain the personal information of the appellants and their son, and various other individuals (other students) including:

- information relating to the age and marital or family status of an individual (paragraph (a) to the definition of "personal information" in section 2(1))
- information relating to the education or medical…history of the individual (paragraph (b) to the definition of "personal information" in section 2(1))
- identify number assigned to the individual (paragraph (c) to the definition of "personal information" in section 2(1))
- the address of telephone number of the individual (paragraph (d) to the definition of "personal information" in section 2(1))
- the views or opinions of another individual about the individual (paragraph (g) to the definition of "personal information" in section 2(1))
- the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual (paragraph (h) to the definition of "personal information" in section 2(1))

There is also information in the records relating to Board employees. I find that this information relates to the employees in their professional capacity with respect to the appellants' and their son. I find that this information is not the Board employees' personal information for the purposes of section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/OTHER EXEMPTIONS

Introduction

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Since the appellant is exercising the rights of his son under section 54(c), section 36(1) also gives him a general right of access to his son's personal information. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information 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.

In this case, the Board relies on section 38(a) in conjunction with sections 7, 10, 11, 12 and 13.

I will proceed to analyze whether the records at issue are exempt under section 12 first as the Board claims that section 7, 10, 11 and 13 apply in the alternative to section 12.

SOLICITOR-CLIENT PRIVILEGE

General principles

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 as described below. The institution 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

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.)].

Waiver

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

> [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Representations

The Board submits that all of the records at issue are subject to section 12 and states in its representations:

> The documents at issue in this appeal were summarized … as follows:
>
> (a) The Board's documents and information, which were provided or communicated to us for the purpose of obtaining our legal advice;
>
> (b) The various materials obtained or created by us in order to provide the Board with legal advice;

(c) All representations, materials and other communications between our firm, the Information and Privacy Commission, the Ontario Human Rights Commission and the [the appellant]; and,

(d) Communications between our firm and the Board in order to provide legal advice.

The Board further submits:

> Indexes A through L were sent to you … These indexes detail the documents found within the files of the law firms… which are in the control of the [Board].
>
> …
>
> A communication between a client and his/her solicitor is privileged if said communication was made or prepared further to the client obtaining legal advice (solicitor-client privilege) or to be used in connection with litigation, existing or apprehended ("work-product" privilege).
>
> - R. D. Manes and M. P. Silver, Solicitor-Client Privilege in Canadian Law, (Toronto: Butterworths, 1993), at p. 25 and pp. 89 – 90
>
> - M. N. Howard, P. Crane & D. A. Hochberg, Phipson on Evidence, 14th ed., (London: Sweet & Maxwell, 1990), at p. 519 of 20 – 32
>
> - *Susan Hosiery Ltd.* v. *Minister of National Revenue* (1969), 69 D.T.C. 5278 (Exch. Ct.), at pp. 5281 and 5283
>
> - *Re Sokolov* (1968), 70 D.L.R. (2d) 325 (Man. Q.B.), at pp. 330 – 31
>
> …
>
> The range of privileges identified in section 12 of MFIPPA for exemption from disclosure include:
>
> (a) documents subject to solicitor-client privilege, as traditionally understood at common law;

(b) records prepared **by** counsel employed or retained by an institution

(i) for use in giving legal advice
(ii) in contemplation of litigation
(iii) for use in litigation

(c) records prepared for counsel employed or retained by an institution

(i) for use in giving legal advice
(ii) in contemplation of litigation
(iii) for use in litigation

Accordingly, the requester is not entitled to access to:

(a) any document constituting a confidential communication between the [Board] and its legal counsel;
(b) any document sent to the [Board's] legal counsel for the purpose of obtaining legal advice;
(c) any document prepared by or for legal counsel for use in giving legal advice; or
(d) any document prepared by or for legal counsel in contemplation of or for use in litigation.

All of the records at issue in the appeal were either forwarded by the [Board] to its law firms or relate to or were prepared for the purpose of providing legal advice to or legal representation for the [Board] by its law firms. Privilege attaches to all of the records and that privilege has never been waived.

The Board further asserts that there has been no waiver of its privilege.

The appellants submit that the litigation privilege cannot apply as they never contemplated litigation against the Board. The appellants further submit that the Board has waived its privilege relating to the records at issue when the Board's lawyers released pertinent documents to him. The appellants do not provide further details of the document(s) that were disclosed to them by the Board's lawyers.

Analysis and finding

Recently in Order PO-2405, Senior Adjudicator John Higgins dealt with records for which the institution had claimed section 19 [the provincial equivalent to section 12]. In particular, the records consisted of correspondence and memoranda exchanged between an institution's outside counsel and an affected party's counsel concerning the negotiation, drafting and implementation of the settlement. With respect to these records, the Senior Adjudicator found that the solicitor-client communication privilege in section 19 did not apply for the following reasons.

> The fact that a record was either created by or sent to opposing counsel provides a clear indication that it was not intended to be confidential as between solicitor and client, and therefore such records cannot normally be subject to solicitor-client communication privilege. Accordingly, even where a copy of a letter to opposing counsel is sent by fax from solicitor to client, or where correspondence to opposing counsel is copied to the client by the solicitor, I find that in the absence of any added confidential communication, such records cannot be found to be privileged, even as part of the "continuum of communications". This finding also applies to transcribed voicemail messages from opposing counsel.

I agree with the Senior Adjudicator's approach and apply it here. A number of the records in the Board lawyer's files contain information that the Board or the lawyer received from the appellant and his family, in addition to information sent from the Board or the Board's lawyer to the appellant. From my review of these records and the Board's representations, I am not satisfied that these particular records were confidential as between the Board and their lawyer. Therefore, it cannot be said that records which either originated with the appellants or were sent to the appellants are confidential for the purposes of the section 12 solicitor-client communication privilege. Nor, am I able to find that these records fit within the "continuum of communications" aspect of the solicitor-client communication privilege. Accordingly, in the absence of any added confidential communication, these records cannot qualify under the solicitor-client communication privilege. Thus, these records are not exempt under section 12 and as such do not qualify for exemption under section 38(a) of the *Act*.

On the other hand, I do find that the other records which originate with the Board or the Board's lawyers to fit within the "continuum of communications" and as qualify for exemption under section 12 as solicitor-client communication privilege. These records can be characterized as:

- Board documents relating to Board policies and procedures
- Reports made by Board employees
- Handwritten and typed notes made by Board employees
- Emails, facsimiles and correspondence between Board employees
- Letters from Board's lawyers to other parties (not the appellants or their son)
- Computer print-outs

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

Regarding the Board's claim that the section 12 litigation privilege may apply, I find that it does not. Based on the appellant's representations I am satisfied that there was no existing or reasonably contemplated litigation at the time the records at issue were created.

In the alternative to section 12, the Board claimed the exemptions at section 38(a) in conjunction with sections 7, 10, 11, and 13 and section 38(b). I will now proceed to analyze whether these exemptions apply to the records which I found not to be exempt under section 38(a).

ADVICE TO GOVERNMENT

General principles

Section 7(1) states:

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

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913, June 30, 2004)]

Analysis

The Board did not make representations on the application of the section 7 exemption.

The records which remain at issue include correspondence, faxes and e-mails between the Board, its lawyers and the appellants. I am unable to conclude that disclosure of these records would reveal the advice or recommendations of an officer or employee of the Board or a consultant retained by the Board. These records do not disclose a course of action that will ultimately be accepted or rejected by the person being advised. I find that section 38(a) in conjunction with section 7 does not apply to the records at issue.

THIRD PARTY INFORMATION

General principles

Section 10(1) states:

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

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Analysis

The Board did not provide representations on the application of the section 10 exemption.

As stated above, the records remaining at issue includes correspondence, faxes, notes and other documents exchanged between the Board and the appellants. I am unable to find that these records contain the type of information which is protected under section 10. Specifically, the records do not include trade secret, commercial, financial, scientific or labour relations information which was supplied to the Board in confidence. Accordingly, 38(a) in conjunction with section 10 of the *Act* does not apply.

ECONOMIC AND OTHER INTERESTS

General principles

Section 11 states:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;
>
> (h) questions that are to be used in an examination or test for an educational purpose;
>
> (i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party, municipality or other body before the matter is resolved.

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams

Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Analysis

The Board did not provide representations on this issue.

From my review of the records remaining at issue, I find that the records do not contain the type of information that is protected under section 11 of the *Act*. Nor am I able to discern how disclosure of these records could reasonably be expect to harm the Board's financial or economic interests. Accordingly, I find that section 11 does not apply to the records remaining at issue.

THREAT TO SAFETY OR HEALTH

General principles

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.)].

Analysis

While the Board claims that section 13 applies to exempt all of the records at issue, because I have found that a number of records are exempt under section 12, it is only necessary to consider whether this section applies to the records remaining at issue.

The Board accepts the test referred to in *Ontario (Minister of Labour)* and submitted affidavits on behalf of various Board employees in support of its position that disclosure of the record could reasonably be expected to seriously threaten the safety or health of an individual. The

Board submissions regarding the application of section 13 have been raised before this office in prior appeals, namely appeals MA-010272-2 (Order MO-1574-F and MO-1595-R, upheld on judicial review in *John Doe*, cited above), MA-020157-2 (Order MO-1836) and MA-020161-2 (Order MO-1907). In all of these prior appeals, the adjudicators found that section 13 did not apply to exempt the applicable records from disclosure. The Divisional Court found this conclusion to be reasonable in the *John Doe* case cited above.

Adjudicator Liang in Order MO-1907 provides a summary of the past findings with respect to the appellant and his son under section 13. She states:

> 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 this appellant. 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. On the potential for harm by the appellant, the court stated:
>
> > In our view it was not unreasonable for the adjudicator to conclude that the Board failed to discharge the burden of providing that the disclosure of the records would create a serious threat of harm to the safety and health of anyone on the part of the father.
>
> With respect to the son, the court stated:
>
> > It must be noted that notwithstanding the worst of the incidents involving threats made by the son when 13 years old toward an individual in January and February of 2001, no disciplinary action was taken nor is there any evidence of any specific fear of the son expressed by the object of the threats. The only evidence of any fear of the son is expressed by an educator who was not the object of the threats, but who on reviewing the records formed an opinion. However, there is no psychiatric evidence of a propensity to carry out threats nor has the adjudicator made his decision in the face of evidence "pointed toward the opposite result" as in the Big Canoe case. The absence of extensive reasons does not detract from the reasonableness of the adjudicator's conclusion on this evidentiary record.

Following this court decision, in Order MO-1836, I considered much of the same evidence, in the context of another request for records by this appellant. In that order, I stated:

> 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 appellant's son, as there is the possibility that any information obtained by the appellants will be shared with him.
>
> Accepting the Board's evidence, the appellant's 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 find much of the above analysis applicable to the circumstances of this appeal, particularly given the high degree of overlap in the facts of the two appeals. As in Appeal No. MA-020157-2, in relation to the appellant, the Board's evidence at its highest is that he has been aggressive and confrontational with Board staff, but there is no evidence of threats made to physical safety. There is still no psychiatric evidence showing a concern about the appellant carrying out acts of violence.
>
> As to the appellant's son, if I accept the Board's evidence, he has engaged in threatening and abusive behaviour toward other individuals, including Board employees. A factual difference between the two appeals is that in the one before me, some of the information at issue relates to a Board employee against whom it is alleged the appellant's son made threats. It should be noted that some of the information in relation to this individual is exempt under section 38(b)/14 in any event (see my findings above). Further, as I indicated in the above order, no disciplinary action was taken against the appellant's son as a result of the threats and the appellant's son no longer attends the school in question. As in Appeal No. MA-02157-2, the most serious allegations against the son are not in relation to Board employees, but to other individuals. Finally, the events described by the Board occurred between three and four years ago.
>
> Taking into account all of the above, and even given some factual differences between the various appeals, I see no reason to reach a different conclusion on the application of section 13 as that reached by both this office and the Divisional Court in the other appeals involving this appellant.
>
> I conclude that disclosure of the information at issue could not reasonably be expected to seriously threaten the safety or health of any individual. Section 13 does not apply to exempt Record 1, nor does section 38(a) in conjunction with section 13 apply to the other records at issue.

In the present appeal, several of the same records which are at issue were also at issue in Appeal MA-020161-2.

From my review of the records, the Board's evidence and submissions, I make the following findings.

Regarding the appellants, and as stated by Adjudicator Liang, the Board establishes a pattern of confrontational behaviour. The Board's evidence also points to aggressive and verbally abusive behaviour towards Board employees. The Board has not provided evidence of threats made to the physical safety of Board staff. Once again, there is no indication of any psychiatric evidence as in *Ontario (Minister of Labour)*, showing a concern about the appellants carrying out acts of

violence. I am not satisfied that the Board has met the burden of proof to show that disclosure of the records could reasonably be expected to seriously threaten the safety or health of anyone.

My findings are again reinforced by the conclusions of the Divisional Court in *John Doe*.

Furthermore, the records remaining at issue originated with the appellants or were sent to the appellants, so the appellants would already have knowledge of these records. I am unable to accept that disclosure of these records would incite the appellants such that they could reasonably be expected to seriously threaten the safety or health of the Board employees.

Regarding the appellants' son, I again reiterate the finding of Adjudicator Liang and the Divisional Court . The Board's evidence establishes that the appellant's son has engaged in threatening and abusive behaviour towards other individuals, including Board employees. However, no disciplinary action was taken against the appellant's son as a result of the threats and the appellant's son no longer attends the school in question. In fact, the appellant's son is no longer enrolled in a Board school. Furthermore, the events set out in the Board's submissions and affidavit evidence occurred more than four years ago.

And as stated above, the records remaining at issue originated with the appellants or were sent to the appellants, and I am unable to accept that disclosure of these records would incite the appellants' son such that he could reasonably be expected to seriously threaten the health or safety of anyone.

I conclude that disclosure of the information remaining at issue could not reasonably be expected to seriously threaten the safety or health of any individual. Section 38(a) in conjunction with section 13 does not apply to exempt the records at issue.

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

As stated above, section 36(1) gives individuals a general right of access to their own personal information held by an institution. Since the appellant is exercising the rights of his son under section 54(c), section 36(1) also gives him a general right of access to his son's 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 Board 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 to access to his or her own personal information against the other individual's right to protection of their privacy.

Analysis

The Board did not provide representations on this issue.

The records remaining at issue all relate to the appellants, their son and various Board employees only. As stated above, the information relating to the Board employees is not personal information for the purposes of the *Act*. The records containing the personal information of other students I have already found to be exempt under section 12.

From my review of the records, the records do not include the personal information of anyone except the appellants and their son. As disclosure of the record would not constitute an unjustified invasion of another individual's personal privacy I find that section 38(b) does not apply.

ORDER:

1. I uphold the Board's decision that it does not have custody or control over the records described in the index and supplementary index, both entitled "Documents NOT within the TDSB's Custody or Control".

2. I do not uphold the Board's decision that the appellant's request is frivolous and vexatious.

3. I order the Board to disclose the following records to the appellants by sending them copies of the records on or before **September 8, 2005**.

   Index A - 2, 7, 8, 9, 10, 11, 12 ("To Be Done Today" sheet, letters from appellant to Board employees, letters from appellant's son "To Whom It May Concern")14, 25, 26, 27, 28, 31 (provincial report card), 33, 35, 36, 37, 38, 39, 40, 41(faxes only), 42 (letter only), 45 (doctor's letter, assessment, audiological assessment, session sheet, and medical note only), 46, 47, 48, 53, 54, 59, 60, 61, 63, 65, 66, 67, 69, 70 (faxes from the appellant only), 71 (faxes from the appellant only with no handwritten note) 76, 77, 78, 79, 80, 81, 82, 84, 85, 86 (letter and faxes from appellant or appellant's lawyer) 87, 90, 91, 97, 98, 99, 100, 101, 103, 105, 113, 114, 115, 116, 118, 120, 131

   Index B - 1 – 14

   Index C - 2, 3, 4

   Index D - 2, 7, 9, 11

   Index E - 4, 5, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28

Index F - 2, 8, 9, 35, 36, 37, 38, 39

Index G - 3, 55

Index I - 1 (letter only), 2 (letter only), 3 (letter only), 4 (letter only), 5 (letter only), 6, (letter only)

Index J - 1, 3, 6, 11, 12, 17, 19, 20, 26, 27, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 51, 52, 53, 54, 55, 56, 58, 61

Index K - 2, 3, 4, 5, 6, 7, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

Index L - 4, 7

4. I uphold the Board's decision to deny access to the following records:

Index A – 1, 3, 4, 5, 6, 12 (Notes, Agreement Contract and Agreement Contract Tracking Sheet), 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, 30, 31(Individual Education Plan only), 32, 34, 41, 42, 43, 44, 45 (Meeting Agenda and handwritten note), 49, 50, 51, 52, 55, 56, 57, 58, 62, 64, 68, 70 (facsimile cover sheet only), 71 (facsimile cover sheet and 6:59pm letter with handwritten note), 72, 73, 74, 83, 86 (facsimile and letter from lawyer to Board employee), 88, 89, 92, 93, 94, 95, 96, 102, 104, 106, 107, 108, 109, 110, 111, 112, 117, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

Index C – 1, 5

Index D – 1, 3, 4, 5, 6, 8, 10, 12

Index E – 1, 2, 3, 6, 7, 9, 10, 11, 21, 22

Index F – 1, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 41, 42

Index G – 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63

Index H – 1, 2, 3, 4, 5

Index I – 1 (Suspension Report Form), 2 (Suspension Report Form), 3 (Suspension Report Form), 4 (Suspension Report Form), 5 (Suspension Report Form), 6 (Suspension Report Form)

Index J – 2, 4, 5, 7, 8, 9, 10, 13, 14, 15, 16, 18, 21, 22, 23, 24, 25, 28, 33, 34, 35, 43, 44, 45, 49, 50, 57, 59, 60

Index K – 1, 8, 9, 10

Index L – 1, 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

5. In order to verify compliance with Order Provision 3, I reserve the right to require the Board to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: August 17, 2005
Stephanie Haly
Adjudicator