



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-2046-I

Appeal MA-040046-2

Toronto District School Board



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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following records:

- [An identified school] Local School Team Meeting notes or records from 1997-2003 concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school kept and used by the principal.
- Records kept by teachers at the identified school from 1997 to the present concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school.
- Records resulting from their investigation into their son's educational history at the school.
- Records with respect to the Board's internal investigation as to what happened to their son, including recommendations resulting from that investigation.
- Records in response or reaction to an identified letter from the Minister of Health to the Board.

The request also included additional detailed information regarding the records requested.

Following a time extension decision and appeal, which was resolved by Order MO-1764, the Board issued a decision providing access to a number of records, and denying access to other records, in whole or in part. The decision stated:

We have located in excess of 100 records which are responsive to your request and we are granting access to you to all of those records except for the following listed records...

The Board then identified three categories of records to which access was denied in whole or in part on the basis of section 14(1) (invasion of privacy) with reference to the presumptions in sections 14(3)(a) and (d), section 12 (solicitor-client privilege), section 10(1) (third party information) and section 11(h) (examination questions).

The Board's response also stated:

I am enclosing copies of all records to which you have been granted access. Where only partial access has been granted, we have severed (not released) the exempted portions. ...

All persons named in the request who could be contacted were asked to search for the requested records. If no copy of a requested record is enclosed, then no such record exists or can be found.

The requesters (now the appellants) appealed the Board's decision. The appeal letter identified that the appellants were appealing the denial of access, and also took the position that additional responsive records exist.

During mediation the appellants confirmed that they were not interested in the names of other children (or the children's parents) contained in the records, and that these identifiers could be severed from the records. The appellants also indicated that they were not pursuing access to the records denied on the basis of sections 10(1) and 11(h). These records and exemptions are, therefore, not at issue in this appeal. Also during mediation, the appellants identified that they were concerned that the Board may have narrowed the scope of the request, and stated that there was a public interest in the issues raised in this appeal.

Mediation did not resolve this matter, and it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Board, initially, inviting it to address a number of issues raised in this appeal. However, I did not at that time invite the Board to address the issues raised by the appellants regarding the scope of the request or the possible public interest issue. In addition, at the request of the appellants, I sent the Board an edited copy of their appeal letter, which describes in detail their questions concerning the adequacy of the search conducted by the Board.

Finally, as some of the records at issue may contain the personal information of the requesters and/or their son, I decided to invite representations on the possible application of sections 38(a) and (b) in this appeal.

The Board responded to the Notice of Inquiry by providing representations on the issues, and also identified:

- that it would be providing additional records to the appellants;
- that it had located additional records which still required review; and
- that a supplementary decision letter would be issued to the appellants respecting access to these records.

I then sent a Notice of Inquiry to the appellant, along with the non-confidential representations of the Board, and invited the appellants to address the issues. I also invited the appellants to address the issues regarding the scope of the appeal and the possible public interest. The appellants themselves provided preliminary representations and subsequently, through their lawyer, provided additional representations on the issues.

One of the issues raised in this appeal relates to the reasonableness of the searches conducted by the Board for responsive records. As identified above, in the course of providing representations in this appeal, the Board located additional responsive records. The Board subsequently issued a new decision regarding access to those records. As the issues regarding access to those records and the reasonableness of the search for those records were raised after representations were received in this appeal, a subsequent appeal was opened to address the issues raised by the Board's new decision letter, and that appeal (MA-040046-4) is in the inquiry stage of the process. In the circumstances, I have decided to address the access issues relating to the records at issue in this appeal in this Interim Order, but to defer my review of issues relating to the reasonableness of the search for responsive records, in order to address that issue at the same time as the reasonable search issue is addressed in Appeal MA-040046-4.

Accordingly, this interim order only deals with issues relating to access to the identified responsive records in this appeal.

RECORDS:

The records at issue in this appeal consist of portions of seven pages of Local School Team Meeting minutes (Records 1-7), an email (Record 8) and an attached draft letter (Record 9).

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) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of “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].

The meaning of “identifiable”

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.)].

Representations and findings

The Board states that the records at issue relate to the appellants and/or their child. On my review of the records, I find that all of the records, with the exception of Record 8, contain the personal information of the appellants and/or their child, as they all contain their names along with other personal information relating to them (paragraph (h)). Some of the records also contain the child's date of birth (paragraph (a)) and information relating to the child's education (paragraph (b)). Record 8 does not contain any individual's personal information.

The Board takes the position that the severed portions of Records 1-7 also contain the personal information of identifiable individuals other than the appellants (or their child). The Board states:

The severed information is similar to the appellants' child's disclosed information in that it sets out the name, birth date, nature of the reason for the referral and Team recommendations for each student listed in those records. This is clearly “recorded information” about an identifiable individual ...

In addition, the names of the students appear with other personal information relating to them and the disclosure of the name would reveal that the student had been referred to the Team for assessment which is their personal information, all in accordance with paragraph 2(1)(h) of the *Act*.

In certain sections of the minutes, the views and/or opinions of another individual about the named student is recorded. This is the personal information of the named student pursuant to paragraph 2(1)(g) of the *Act*.

On my review of the severed portions of Records 1–7, I find that these records contain the personal information of identifiable individuals other than the appellants or their child as defined in paragraphs 2(1)(a), (b), (g) and (h) of the *Act*.

As a final matter, as identified above, in the course of this appeal the appellants stated that they were not interested in the names of other children (or the childrens' parents) contained in the records, and that these identifiers could be severed from the records.

In its representations the Board states:

... even if the names, birth dates and room numbers were severed, parents of these students would be extremely upset to think that another parent in the school, or any other individual for that matter, could obtain this information. In addition, based solely on the Team's recommendations and the date of the meeting, it is possible to figure out from that information alone who the student is, particularly if the [recipients of the information] are familiar with the students who attended [the named school] during the time in question.

I have reviewed the records to determine whether specific identifiers can be severed. As identified above, to qualify as personal information, it must be "reasonable to expect that an individual may be identified if the information is disclosed".

The severed portions of Records 1–7 consist of the names, dates of birth, grades and "concerns" regarding specific children. Following this information is a brief point-form summary of the issues and or the School Team recommendations relating to the child. In some instances these brief summaries identify an incident or issue involving the child, and in most instances they also include a proposed course of action to follow regarding the child.

On my review of the severed portions of the records, I am satisfied that in many instances the disclosure of portions of the information at issue, even if the personal identifiers of the child and/or the parents were removed, would allow the child to be identified based on either the incident or issue described involving the child and/or the proposed course of action to be followed. Although small portions of some of these records may be disclosed without disclosing the personal information of identifiable individuals, I find that in the circumstances it is not reasonably possible to sever these portions of Records 1-7, as to do so would reveal only "disconnected snippets", "meaningless" or "misleading" information [see Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102

O.A.C. 71 (Div. Ct.)]. Accordingly, I am satisfied that the severed portions of Records 1-7 contain the personal information of identifiable individuals other than the appellants or their child.

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

General principles

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

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

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. Thus, I will first consider whether section 38(b) applies and then whether the Board properly exercised its discretion under this section.

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).

Representations and findings

The Board takes the position that the presumptions in section 14(3)(a), (d) and (g) apply to the personal information, and provides representations on the application of the factors listed under sections 14(2)(a), (b), (f) and (h). Those sections read:

(2) 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;
- (b) access to the personal information may promote public health and safety;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

With respect to the application of the presumption in section 14(3)(a), the Board states:

In the case of certain students ... there is a reference to behaviour issues; the need for counselling; psychiatric assessments; assessments for learning disorders; hearing assessments; speech pathology assessments; and occupational therapy, all of which are medical, psychiatric or psychological history, diagnosis, condition, treatment and/or evaluation ...

Concerning the application of the presumption in section 14(3)(g), the Board states that the severed portions of the records "...clearly consist of personal recommendations and/or evaluations for the named student".

The Board also provides detailed representations in support of its position that the personal information contained in the records is highly sensitive information.

All of the information relating directly to the appellants and/or their child was disclosed to the appellants by the Board. On my review of the undisclosed information in Records 1-7, I am satisfied that some of this information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. I find that its disclosure is presumed to constitute

an unjustified invasion of privacy under section 14(3)(a). Other portions of Records 1-7 consist of personal recommendations or evaluations about an identifiable child. I find that this personal information falls within the ambit of the presumption in section 14(3)(g). I also find that the undisclosed information can be considered to be “highly sensitive” for the purpose of section 14(2)(f).

Accordingly, I find that the disclosure of the severed portions of Records 1-7 would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellants or their child. Since the records also contain the personal information of the appellants and/or their child, I find that they qualify for exemption under section 38(b) of the *Act*. I will review the Board’s exercise of discretion below.

DO THE DISCRETIONARY EXEMPTIONS AT SECTIONS 12 AND/OR 38(a) APPLY TO THE RECORDS 8 AND 9?

General principles

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

Under section 38(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. Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 12, the Board must nevertheless consider whether to disclose the information to the requester.

Here, the Board relies on section 38(a) in conjunction with the solicitor-client privilege in section 12 of the *Act*. As I have found that Record 8 does not contain the personal information of the appellants, I will review whether it qualifies for exemption under section 12. Record 9, which contains only the personal information of the appellants, will be reviewed under section 38(a), in conjunction with section 12.

SOLICITOR-CLIENT PRIVILEGE

The Board claims that section 12 applies to Records 8 and 9, which consist of an e-mail and draft letter respectively. 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. 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.*].

Branch 2: statutory privileges

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

- solicitor-client communication privilege
- litigation privilege

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

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.”

Representations

The Board takes the position that the two records for which it claims solicitor-client privilege qualify for exemption under the solicitor-client communication privilege in section 12. The Board describes the records as a confidential email communication from the Board’s in-house legal counsel to certain Board employees attaching the other record, which is a draft letter prepared in response to inquiries made of the Board by the Minister of Health.

The Board states that the records constitute “a communication between the Board and its in-house legal counsel for the purpose of obtaining legal advice, specifically, the advised appropriate response to correspondence received from the [Minister of Health]. These records were created and communicated for the purpose of providing that legal advice.”

The Board then proceeds to identify in some detail the circumstances surrounding the creation of the records. The Board states:

Specifically, by letter dated ... [the Minister of Health] wrote to [the Director of the Board], making certain inquiries concerning the appellants’ son Upon receiving [the] letter, [the Director] forwarded the correspondence to [an identified individual], in-house legal counsel for the Board, for legal advice and counsel on the appropriate response to be given.

In the course of advising the Board of the appropriate legal response ... [the individual] prepared and sent [the confidential email communication], to ... the central Co-ordinator of Support Services of the Board, and ... the Co-ordinator of Psychological Services, South West. By his email, [the individual] attached ... the draft letter he proposed to send to [the Minister of Health]. The email was signed by [the individual] as “Counsel, Legal Services, Toronto District School Board.” The email was intended to be confidential; it claimed privilege and confidentiality and advised that “the sender does not waive any related rights and obligations”.

Upon receiving [the] email, [the Central Co-ordinator of Support Services of the Board] forwarded the email to ... the Executive Superintendent – Special Education and Support Services of the Board. In turn, [the Executive Superintendent] forwarded the email to [an identified] Superintendent with the Board. A revised version of the draft letter ... was subsequently sent to [the Minister of Health] by [the identified individual] on behalf of the Board.

The email and its attachment constitute confidential and privileged legal advice between Board staff and its legal counsel.

The Board also provides representations which review the circumstances in which a communication between a client and his or her solicitor is privileged, and refers to a number of cases in support of its position. In particular, the Board refers to a decision of the Divisional Court [*Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)*] 70 O.R. (3d) 680 (2004)] in which the Court reviewed the application of the solicitor-client privilege, and held that:

The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically. In *Balabel and another v. Air India*, [1988] 2 W.L.R. 1036, [1988] 2 All E.R. 246 (C.A.), the English Court of Appeal stated:

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

The Board's representations on the application of section 12 were shared with the appellants, who provided representations in support of their position that the records do not qualify for exemption under that section.

The appellants begin by stating that it is unclear under which branch of the solicitor-client privilege the Board is claiming the privilege. The appellants then refer to a number of American cases in support of the position that “corporate dealings are not made confidential merely by funnelling them routinely through an attorney”, and in support of the view that each document should be carefully scrutinized to determine in-house counsel’s precise role in formulating it. The appellants then refer to the Supreme Court of Canada case of *R. v. Campbell* [1999] 1 S.C.R. 565, in which the court discussed the application of the solicitor-client privilege in circumstances where a lawyer may have multiple responsibilities, and refer to the following quotation from that decision:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. [...] No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer.

The appellants also identify the circumstances surrounding the creation of the letter sent from the Minister of Health – that it was simply signed by the Minister but that its immediate purpose was to set up a meeting with certain stakeholders. The appellants state that there was no obvious reason to refer it to legal counsel, and that the letter was not generated by legal counsel or addressed to the Board’s legal counsel.

The appellants then state that, if the recipient of the letter had requested advice on how to respond to the letter from the identified in-house counsel, and if counsel had provided the recipient with advice, that advice may have constituted solicitor-client privilege. However, the appellants take the position that having the identified in-house counsel respond directly to the letter changes the nature of the advice given by the identified counsel, and counsel, in responding to the letter, is acting as a “Board functionary”, and not a lawyer, notwithstanding that he has a law degree. The appellants support this position by referencing the fact that the identified individual prepared the draft letter and circulated it to other senior Board members to “solicit strategic or other advice” from these members. Furthermore, the appellants take the position that, as one of the recipients of the letter forwarded it to another Board employee, who was not an original recipient of the letter from the lawyer, “clearly her views were being canvassed ... simply as a senior officer of the Board, not as one directly involved in the communication and the response to it”.

The appellants also identify that the email and draft letter were forwarded by the recipients to others for their input, and the appellants question how this could be covered by solicitor-client privilege. They state that, “in addition to our argument that no solicitor-client privilege can be

claimed for ... the original email and draft, we assert still more emphatically that the subsequent forwarding of that material between [Board] staff, having thereby removed any pretence of “confidentiality”, cannot be claimed as withheld under solicitor-client privilege either”.

Finally, the appellants identify in some detail what they believe to be the background of the author of the draft letter. Although they concede that he is lawyer, they identify that he was employed for a number of years in “various non-legal capacities”, including in a senior position with the Board. The appellants state that it is only recently that the Board employed in-house counsel, and that the author of the draft letter worked in that capacity. Accordingly, the appellants identify the concern that correspondence and advice that may in the past have been provided by this individual in an administrative position should not change its nature simply because the individual is currently employed as an in-house lawyer.

Analysis and findings

Record 9 is a draft letter prepared by the Board’s in-house counsel in response to a letter sent to the Board by the Minister of Health. Although the Board’s in-house counsel was not the original recipient of the letter from the Minister, the Board identifies that the letter was forwarded to in-house counsel “for legal advice and counsel on the appropriate response to be given”. In-house counsel prepared the draft letter (Record 9) and eventually sent the final response letter to the Minister.

I have carefully reviewed the draft letter which constitutes Record 9, and I am satisfied that it contains legal advice prepared by counsel employed by the Board. The content of the letter includes references to legal issues and legislation, and I am satisfied that the letter, prepared by in-house legal counsel for the Board and provided to Board members for their input, is a direct communication of a confidential nature between a solicitor (in-house legal counsel) and his client (the Board, through its employees), made for the purpose of giving professional legal advice.

I have carefully reviewed the representations of the appellants. I accept their position that not everything done by in-house legal counsel will necessarily attract solicitor-client privilege, and that advice given by lawyers on matters outside the solicitor-client relationship is not protected by the solicitor-client privilege. However, I am satisfied based on my review of the Record 9 and the representations of the Board that the Board, upon receipt of the letter from the Minister of Education, chose to seek legal advice relating to the appropriate response to the Minister’s letter. I find that the draft letter which constitutes Record 9 was prepared by legal counsel and constitutes legal advice, thereby qualifying for exemption under section 12 of the *Act*.

With respect to Record 8, an email sent by in-house counsel to certain specified Board employees, and subsequently forwarded to other specifically identified Board employees, I am satisfied that this email meets the solicitor-client communication privilege test as set out above. This record is an internal Board communication between in-house counsel and his client, made for the purpose of seeking, formulating and/or giving legal advice with respect to the matters addressed in the draft letter attached to it. Although Record 8 itself does not contain legal advice, I find that this communication falls within the ambit of the solicitor-client

communication privilege on the basis that it forms part of the "continuum of communications" passing between the Board's employees and its in-house legal counsel, as contemplated in *Balabel*.

The fact that a recipient of the email chose to forward it to another employee for input does not negate the solicitor-client privilege. There is no suggestion that the email was shared with any individuals not employed by the Board, and I am not satisfied that the privilege that exists in the record or its attachment was waived or otherwise lost by the Board at any time.

Finally, the fact that the in-house counsel who prepared Records 8 and 9 had in the past been employed by the Board in a capacity other than as counsel does not affect my finding that Records 8 and 9 qualify for exemption under section 12 of the *Act*. The author of the records was clearly employed as in-house counsel at the time the records were created, and Record 9 contains legal advice provided by him.

Accordingly, I find that Records 8 and 9 are subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*. Because Record 9 also contains the personal information of the appellants, it is also, therefore, exempt from disclosure under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

EXERCISE OF DISCRETION

As noted, sections 12, 38(a) and 38(b) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

With respect to Records 8 and 9, which qualify for exemption under sections 12 and 38(a), the Board provided me with submissions on the factors it considered in deciding to exercise its discretion to withhold access. Upon review of all of the circumstances surrounding this appeal, including the Board's representations on the manner in which it exercised its discretion, I am satisfied that the Board has not erred in the exercise of its discretion not to disclose the Records 8 and 9, which were withheld under sections 12 and 38(a).

However, with respect to Records 1 through 7, the Board indicated in its representations that it has not exercised its discretion in deciding to withhold these records from the appellant. The Board takes the position that, notwithstanding the fact that Records 1 through 7 contain the personal information of the appellants or their child, by disclosing all of the information relating to the appellants or their child, the Board is not required to exercise its discretion under section 38(b) of the *Act*. I do not accept the Board's position on this point.

Previous orders have clearly identified that the proper approach to take in dealing with records that contain the personal information of a requester is to take a record-by-record approach. This approach was clearly articulated by Senior Adjudicator Higgins in Order M-352, where he stated:

The Commissioner's office has taken the view that, because Part II of the *Act* (in particular, sections 36, 37 and 38) sets out a complete procedure to deal with requests for an individual's own personal information, the provisions of Part I do not apply to records which contain the requester's own personal information.

This position is based on the scheme of the *Act* as a whole, and gives effect to the intent of Part II of the *Act*, which is to confer a higher right of access on an individual seeking his or her own personal information.

The fact that the *Act* accords greater rights to an individual who seeks access to a document containing his or her personal information is made clear by the different wording found in sections 14(1) and 38(b) of the *Act*.

The exemption provided by section 14(1) (in Part I of the *Act*) is mandatory; if disclosure of a record containing only the personal information of an individual or individuals other than the requester would be an unjustified invasion of personal privacy, it must not be disclosed unless certain limited exceptions apply.

On the other hand, the exemption provided by section 38(b) (in Part II of the *Act*) is discretionary; if disclosure of a record containing the personal information of the requester and another individual or individuals would be an unjustified invasion of the personal privacy of that other individual or individuals, the institution may refuse disclosure. However, in this situation (in contrast to the absolute prohibition against disclosure in section 14), the institution has the power to grant access in appropriate circumstances.

This distinction emphasizes the special nature of requests for one's own personal information, and the desire of the legislature to give institutions the power to grant access in situations where responsive records also contain the personal information of another individual or individuals.

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I

or Part II of the *Act* applies. In that approach, the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.

This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of IPC Practices entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal *Act* oblige[s] institutions to consider whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the *Act*. For records which do not contain the requester's own personal information, the decision would be under Part I.

Senior Adjudicator Higgins also identifies in Order M-352 additional reasons for taking a record-by-record approach, and confirms that issues relating to severing and privacy protection are adequately addressed in the record-by-record approach.

The Board has indicated in its representations that it has not taken the record-by-record approach to Records 1-7, and that it has not exercised its discretion in applying section 38(b). In the circumstances, I am not persuaded that the Board has exercised its discretion in denying access to those portions of Records 1 through 7 that I have determined qualify for exemption under section 38(b). Accordingly, I will include a provision in this interim order requiring the Board to do so.

ORDER:

1. I uphold the Board's decision to deny access to Records 8 and 9.
2. I order the Board to exercise its discretion regarding the application of section 38(b) to the responsive parts of Records 1 through 7, and to provide me with an outline of the factors considered in exercising discretion in this context by May 15, 2006.

3. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the Board, as well as with the outstanding issues relating to the reasonableness of the Board's search for records.

Original Signed by _____
Frank DeVries
Adjudicator

_____ April 24, 2006