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

ORDER MO-2239

Appeal MA06-285-2

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a seven-page request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the requester's child and family. The request referred to numerous specific types of records, as well as many other documents, including various Board policies and procedures.

Following the issuance of a time extension decision (which was appealed and ultimately resolved), the Board issued a decision letter in which it stated that over one hundred responsive records had been located, and that it was granting access to all of them except for "a string of emails to … the Board's in-house legal counsel" and "two emails among Board staff", on the basis of the exemptions found in section 38(a) (discretion to refuse requester's own information), section 12 (solicitor-client privilege) and section 7 (advice or recommendations).

In addition, the decision letter stated:

> Any federal or provincial legislation or regulations you have requested may be obtained off of the website at [two named websites]. The Ontario Code of Conduct may also be obtained off of the Ministry of Education website at [a named website].

Furthermore, the decision stated:

> [A]ll 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. If any such record should subsequently be located, we will issue a supplementary decision letter advising you whether or not access to the record will be granted or denied.

The requester, now the appellant, appealed the Board's decision. She identified that she was appealing the decision that the identified exemptions applied to the records, and that she was referred to various websites. She also took the position that additional responsive records ought to exist.

During mediation, the Board issued a second decision, in which it identified that additional responsive records were located. The Board then stated that it was providing access to a number of these additional records, but denying access to some information under sections 38(b) and 14(1) (invasion of privacy), 38(a), 7, 12 and 6 (closed meetings). In this decision letter the Board reiterated its position that the requested legislation and regulations could be obtained from three websites, and that no additional records exist.

The appellant appealed this decision as well, and it was incorporated into this appeal.

Also during mediation, certain records were removed from the scope of the appeal. Because those records were the only ones for which sections 38(b) and 14(1) were claimed, those sections are no longer at issue. In addition, the appellant stated that although the original request sought records relating to her child and family, she was narrowing the scope of this appeal to include records relating to only her child and herself.

In addition, during mediation the Board confirmed that it was denying access to the requested legislation and regulations under section 15(a) (information published or available) of the *Act*. As well, the appellant confirmed that she was also appealing the Board's decision that no additional responsive records exist, thereby raising the issue of whether the Board's search for responsive records was reasonable.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Board, initially, and the Board provided representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the Board's representations, to the appellant. The appellant provided brief representations in response, and subsequently provided some attachments to her representations.

In addition, the Notice of Inquiry confirmed that the appellant had narrowed the scope of her request to records relating to only her child and herself. Because the appellant's child is a minor, this appeal will proceed on the basis that the appellant is also exercising the rights and powers of her child in this appeal, on the basis of section 54(c) of the *Act*.

RECORDS:

The following records and exemptions remain at issue in this appeal:

Record #	Description	Withheld in full or severed	Section
A2	String of emails to Board's in-house legal counsel	Withheld in full	38(a), 12, 7
B4	Undated staff email	Severed	38(a), 7
B7	Notes for Board meeting, private session	Withheld in full	38(a), 6

In addition, the Board takes the position that the following requested records qualify for exemption under sections 38(a) and 15(a) of the *Act*:

> Federal or provincial legislation or regulations relating to Community Base Resource Model (CBRM), the Medical Management Plan, the Safe Schools Act, the Ontario Code of Conduct, the Student and Community Services, and Peer Tutoring System and Peer Mediation Committee.

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].

In this appeal the Board states that the records at issue contain the personal information of the appellant or her child. On my review of the three records specifically referred to above, I find that all three of these records contain the personal information of the appellant and/or her child, as they all contain their names along with other personal information relating to them (paragraph (h)). Some of the records also contain information relating to the child's education (paragraph (b)).

However, the appellant also requested the following records:

> Federal or provincial legislation or regulations relating to Community Base Resource Model (CBRM), the Medical Management Plan, the Safe Schools Act, the Ontario Code of Conduct, the Student and Community Services, and Peer Tutoring System and Peer Mediation Committee.

The Board takes the position that these records are publicly available, and qualify for exemption under section 15(a). On the basis of the nature of the records responsive to this portion of the request, I find that these records do not contain the personal information of the appellant and/or her child.

DO THE DISCRETIONARY EXEMPTIONS AT SECTIONS 6, 7, 12, 15(a) AND/OR 38(a) APPLY TO THE RECORDS?

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 the listed sections, the Board must nevertheless consider whether to disclose the information to the requester.

Here, the Board relies on section 38(a) in conjunction with sections 6, 7, 12 and 15(a) of the *Act*. As I have found that the records for which the Board claims section 15(a) do not contain the personal information of the appellant or her child, I will review whether those records qualify for exemption under section 15(a). With respect to the other three records listed above, which contain the personal information of the appellant and/or her child, I will review whether those records qualify for exemption under section 38(a), in conjunction with sections 6, 7 and 12.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

The Board claims that section 38(a), in conjunction with section 12 applies to Record A2. 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 states that Record A2 is confidential e-mail communications among Board staff and Board in-house legal counsel, and takes the position that it qualifies for exemption under the solicitor-client communication privilege in section 12. The Board states:

> In order to understand the string of e-mails, it is helpful if one reads the e-mails in reverse order commencing from the bottom of the second page of record A2.
>
> Record A2 … constitutes a confidential communication between the Board staff and its in-house legal counsel for the purpose of obtaining legal advice.

The Board then reviews the manner in which the solicitor-client privilege has been found to apply in other instances, reviews 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. … 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.
>
> [emphasis added by the Board]

The Board then states:

> Record A2 by implication was made in confidence by Board staff to Board in-house legal counsel. There is no evidence that it was shared with anyone outside of the Board or with anyone inside of the Board except those staff listed in the e-mail who were involved with the Appellant's [child].

With respect to whether the solicitor-client privilege was ever waived, the Board states:

> All of the individuals copied with the original confidential email communications to … (legal counsel) were in the employ of the Board (client), and involved in some manner with the Appellant's [child]. Accordingly, the privilege attaching to

> the email has not been waived or lost. The Board is not aware of any evidence that record A2 has been disclosed to "outsiders".

The Board's representations on the application of section 12 were shared with the appellant, who did not provide representations on this issue.

Analysis and findings

Record A2 is a string of emails between various Board staff, including legal counsel. These emails all relate to the same issue. Although the earlier emails in the string were not initially directed to legal counsel, the Board identifies that the string of e-mails was communicated to legal counsel, and it is clear from the record that legal counsel was the recipient of the emails. Furthermore, on my review of the record, I am satisfied that portions of the email string were created for the purpose of obtaining legal advice. The content of the emails includes references to legal issues and advice, and I am satisfied that this email string meets the solicitor-client communication privilege test as set out above. The 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 discussed in the emails. Although the earlier emails do not contain legal advice, I find that this email string falls within the ambit of the solicitor-client communication privilege on the basis that the email communications form part of the "continuum of communications" passing between the Board's employees and its in-house legal counsel, as contemplated in *Balabel*.

Accordingly, I find that Record A2 is subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*. Because this record also contains the personal information of the appellant and/or her child, 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.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

The Board takes the position that the discretionary exemption in section 7(1) applies to the undisclosed portion of Record B4.

Section 7(1) states:

> A head may refuse to disclose a record if 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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

[See Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines), supra*]

Representations and findings

The undisclosed portion of Record B4 is the last line from an email sent from a school superintendent to other Board employees. The Board takes the position that the disclosure of this last line in Record B4 would reveal the advice or recommendations given by the school superintendent. The Board also notes that it does not contain any of the referenced facts or materials set out in the exception to section 7(1) found in subsection 7(2) of the *Act*, and that the exception in section 7(3) also does not apply.

The appellant did not provide representations on this issue.

I have reviewed the last line of Record B4, and am satisfied that it contains a specific recommendation for the purpose of section 7(1) of the *Act*. Accordingly, I find that the undisclosed portion of Record B4 is exempt from disclosure under section 7(1) of the *Act*. Because this Record also contains the personal information of the appellant and/or her child, it is therefore, exempt from disclosure under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/CLOSED MEETING

The Board relies on the exemption in section 6(1)(b), in conjunction with section 38(a), to deny access to Record B7. Section 6(1)(b) reads:

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

Previous orders have held that, for this exemption to apply, the Board must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting;

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

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.

[Orders M-64, M-102, MO-1248]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

I will now review each part of this three-part test, to determine whether Record B7 qualifies for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting

In support of its position that Record B7 qualifies for exemption under section 6(1)(b) of the *Act*, the Board states that on a specifically identified date, the Board held a regular meeting, but that during that meeting, a resolution was made that "the regular meeting be resolved into Committee of the Whole (Private Session) to consider matters on the private agenda of the Committee of the Whole". The Board identifies the Trustees who both made and seconded the motion to proceed to a private session, and the Board also refers to the public minutes of the Committee of the Whole (private session) which indicates that the matters referred to in Record B7 were considered during the private session of the Committee of the Whole (Private Session). In

support of its position, the Board also attaches to its representations copies of the minutes of the regular Board meeting and the public minutes of the Committee of the Whole (private session).

The appellant does not dispute that the meeting was held.

In the circumstances, I am satisfied that the meeting did, in fact, take place, and that Part 1 of the three part test under section 6(1)(b) has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

The Board states that the meeting was held in the absence of the public under the authority of section 207(2)(b) of the *Education Act*. It refers to that section, which provides:

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

The Board then states:

> The subject-matter under consideration involved the "personal" information in respect of the appellant, [her child] and another student. It is for this reason that the meeting was closed to the public.

The appellant did not provide representations on this issue.

Based on the Board's representations, I am satisfied that the Board was authorized by section 207(2)(b) of the *Education Act* to hold a closed meeting to consider the contents of Record B7. As identified above, based on my review of Record B7, I am satisfied it contains the personal information of a pupil or his or her parent or guardian, sufficient to satisfy the requirement in section 207(2)(b), which allows for a meeting to be closed to the public. In the circumstances, I find that the Board was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

In addition, previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

In support of its position that disclosure of Record B7 would reveal the actual substance of the deliberations of the meeting, the Board states:

> Record B7 are the notes of [a named superintendent] for the Board. The notes were intended for her personal use as a reference when presenting her report to the Committee of the Whole.
>
> Record B7 sets out the issues to be deliberated by the Committee of the Whole and the recommendations of [the named superintendent] to the Committee in order for the Committee to arrive at a decision on the matters recommended which decisions would then be recommended to the Board.

The appellant did not provide representations on this issue.

Based on the information provided to me, including the representations of the Board and my review of Record B7, I find that disclosure of Record B7 would reveal the substance of the deliberations at the closed meeting. Accordingly, I conclude that the third part of the test has also been met.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt Record B7 from disclosure, and it is therefore exempt under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

INFORMATION PUBLISHED OR AVAILABLE

The Board takes the position that records responsive to the following portion of the request are publicly available:

> Federal or provincial legislation or regulations relating to Community Base Resource Model (CBRM), the Medical Management Plan, the Safe Schools Act, the Ontario Code of Conduct, the Student and Community Services, and Peer Tutoring System and Peer Mediation Committee.

The Board takes the position that the responsive records accordingly qualify for exemption under section 15(a). That section reads:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

In order for a record to qualify for exemption under section 15(a), the information contained in the record must either be published or available to members of the public generally, through a regularized system of access. (See Orders P-327, P-1316, P-1387 and PO-1655.)

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

In its representations in support of its position that section 15(a) applies to these requested records, the Board states:

> As indicated in the Board's decision letter in this matter, if any such legislation exists, the requester may obtain this legislation free of charge off of [certain identified websites].
>
> Statutes and regulations are also available to the public through public libraries or a government publication centre for a small fee. The foregoing e-mail site also indicates how hard copies may be purchased.
>
> *The Safe Schools Act* as it was at the time of the date of this request is contained in the *Education Act* which is available to the public as stated … above.
>
> … the Ontario Code of Conduct may also be obtained off of the Ministry of Education website at [an identified website] free of charge.

The appellant does not address this issue in her representations.

Based on the representations of the Board, I am satisfied that section 15(a) applies to the requested records for which it is claimed in this appeal. The requested records consist of statutes and regulations, as well as an identified Code of Conduct. Previous orders have confirmed that statutes and regulations are available to the public generally, through a regularized system of access (see Orders P-170 and P-1387). The Board has also identified that the requested Code of Conduct is publicly available, and where it can be obtained. In the circumstances, I am satisfied that the requested records fall within the exemption at section 15(a).

EXERCISE OF DISRETION

As noted, sections 6, 7, 12, 15 and 38(a) 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)].

The Board's representations

In response to the issue of whether the Board properly exercised its discretion in the circumstances of this appeal, the Board has provided representations identifying why it chose to exercise this discretion to apply the exemptions.

With respect to its application of section 12 to Record A2, the Board reviews the purposes of the solicitor-client exemption, identifies that it considered the competing interests of access and privacy protection, and balanced those interests in favour of protecting the solicitor-client privilege and the deliberative process which occurred in this case. It also states that it took the particular circumstances of this case into account in exercising its discretion in this manner. It then states that, in exercising its discretion regarding the application of section 38(a), the Board has considered all of those factors, and chose to apply the exemption.

With respect to the application of section 7(1) and 38(a) to Record B4, the Board confirms that it considered the purpose of the section 7 exemption (as identified by previous Orders and upheld by the Courts on judicial review), which purpose 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". It confirms that, in exercising its discretion regarding the application of section 38(a), the Board considered all the relevant factors, and chose to apply the exemption.

In support of its decision to apply section 6(1)(b) in conjunction with section 38(a) to deny access to Record B7, the Board states that it took into account the fact that the meeting of the Committee of the Whole was properly held in-camera pursuant to section 207(2)(b) of the *Education Act* because the subject-matter under consideration involved the personal information of the requester's child and another child, and that, on balance between the right of access and the protection of the deliberative process, it chose to claim the section 6(1)(b) exemption. It states that "[t]he Committee of the Whole Board must be able to deliberate in private particularly in the circumstances of this case where there were legal implications to the Board's final decision".

In support of its decision to exercise discretion in favour of applying section 15(a), the Board's representations focus on its decision to deny access to one piece of legislation and the Ontario Code of Conduct. The Board states:

> … the Board has taken into account the competing interests of access and the purpose of the exemption in section 15.
>
> Specifically, in exercising its discretion regarding the application of section 15(a), the Board has considered the following factors:
>
> (a) both documents are easily accessible to the public for free through the internet;

(b) in the alternative, both records can easily be obtained through government publication centres for a small fee and the legislation can also be obtained through public libraries;

(c) both documents are created by the government of Ontario and not the Board;

(d) the requester could get the most up to date version of both records from the Ministry of Education's website.

Findings

As set out above, the Board has 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, particularly the Board's representations on the manner in which it exercised its discretion to apply the exemptions in sections 6(1)(b), 7(1), 12, 15(a) and 38(a), I am satisfied that the Board has not erred in the exercise of its discretion to apply those exemptions to the identified records. Accordingly, I uphold the Board's exercise of discretion.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Board has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Board will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

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

Background

As identified above, the request resulting in this appeal was a seven-page request for information relating to the requester's child and family, which was subsequently narrowed to include records relating only to the appellant and her child. The request referred to numerous specific types of records, as well as many other documents, including various Board policies and procedures.

In its initial decision letter, the Board stated that over one hundred responsive records had been located, and that access was granted to most of them. During mediation, the Board issued a second decision, in which it identified that additional responsive records were located, and that access was granted to a number of those additional records. It was also during mediation that the appellant confirmed that she was appealing the Board's decision that no additional responsive records exist, thereby raising the issue of whether the Board's search for responsive records was reasonable.

Representations

The Board's representations

In its representations, the Board confirms that it did not seek clarification of the appellant's request, as the request set out sixteen subjects, each of which sets out details of the records sought and from whom. The Board then reviews the details of the searches it conducted for the records, and also provides six affidavits in support of its position that the searches conducted for responsive records were reasonable. The Board's representations on the search issue begin by identifying the details of the search conducted for responsive records, and state:

> The nature of the records requested required that a search of the following locations be conducted:
>
> 1. The [named] local school ["the Public School"];
> 2. The Special Education Department;
> 3. The Social Work Department;

4. The Psychology Department; and
5. The Speech and Language Pathology Department.

The Board then reviews the searches which were conducted in those five locations as follows:

Local School

The Board identifies that the Public School had two files regarding the appellant's child: i) The Ontario Student Record ("OSR") and ii) the office file. It states that all records responsive to the request located in these files have been disclosed to the appellant except for the three records which are the subject of this appeal. The Board then identifies the types of documents which are kept in the OSR and the office file.

The Board then indicates that a named Superintendent of Education coordinated the search for records at the Public School because he was the Supervisory Officer responsible for the school. It also states that the Principal of the school was involved in the searches, and that the searches included contacting current and former teachers of the school, as well as a former principal, to determine whether any additional records existed. The Superintendent and the Principal identify that no additional records were located, and both of these individuals provide detailed affidavits concerning the nature of the searches conducted, and the results of those searches.

The Board's representations also identify why certain specific records relating to the appellant's child would not exist, and supports its position with affidavit evidence.

Social Work Department

The Board's representations identify that each of the Chiefs of Social Work/Attendance for the relevant areas were asked to search their department's files for records responsive to the request. It states that searches were conducted in the Social Work Department's files, and that an identified social worker assigned to the school during the material times confirmed that she had no records responsive to the request. This social worker also stated that it was her belief that no Social Work Department file was ever created for the appellant's child, and identifies the reasons why she takes that position. The Board provides an affidavit sworn by the Chief of Social Work in support of its position that no responsive records exist, detailing the nature of the searches conducted, and the results of those searches.

Psychological Services Department

The Board identifies that a named Chief of Psychology for the Board coordinated a search for Psychological Services Records for the appellant's child. Any records that were located were produced to the appellant (except for the three records at issue in this appeal). The Board also identifies by name the other individuals who were asked to conduct searches for responsive records, and the results of those searches. Furthermore, the Board's representations address specific details set out in the request, and identify why certain specific records were not located

or would not exist. The Board provides an affidavit sworn by the Chief of Psychology in support of its position.

Speech-Language Pathology Department

The Board states that the Chief of the Speech-Language Pathology Department for the relevant region caused a search to be made for the Speech-Language Pathology Department file for the appellant's child. An identified speech-language pathologist, who was assigned to the school during the material times, was asked to locate the Speech-Language Pathology Department file for the appellant's child. The responsive file was located and produced to the appellant (except for the three records at issue in this appeal). The named Speech-Language Pathologist provides an affidavit in support of the position that no other responsive records were located, identifying the nature of the searches conducted and the results of those searches.

Special Education Department

The Board states that a named System Superintendent - Special Education for the Board was asked to conduct a search in her department for responsive records. The System Superintendent's assistant located a Special Education Department file for the appellant's child and a copy of the file was produced to the appellant (except for the three records at issue in this appeal). The Board then identifies the Special Education Department staff who were contacted in the course of conducting the search, and that they confirmed that they have no additional records responsive to the request. The Board provides an affidavit sworn by the System Superintendent in support of its position that a reasonable search was conducted for responsive records.

Existence of Records

The Board then provides general representations on the issue of whether additional responsive records exist. It states:

> As the Notice of Inquiry indicates, the *Act* does not require the Board to prove with absolute certainty that further records do not exist. The above description of the search for records including the six affidavits filed in this matter proves that the Board has made a reasonable effort to identify and locate responsive records.
>
> Based on the nature of the Request, the most experienced and knowledgeable staff were involved in the search. The following persons in positions of responsibility for the … Region where [the Public School] is located and where [the appellant's child] attended were involved in the search: [the named] Senior Manager, Professional Support Services; [the named] Chief of the Psychology Department; [the named] Chief of Social Work/Attendance in the [identified Region]; [the named] Chief of the Speech-Language Pathology Department; [the named] Speech Language Pathologist for [the named] Public School; [the named] System-

> Superintendent of Special Education; [the named] Superintendent of Education for [the named Public School] and [the named] Principal of [the named Public School].
>
> The Appellant has not provided the Board with any indication of what records she is alleging exist but have not been produced to her.
>
> It is submitted that the search by the Board was both reasonable and thorough.

The appellant's representations

The appellant provided brief, confidential representations, and also subsequently provided additional material. On my review of the material provided by the appellant, the focus of those representations relate to concerns about how the Board processed the request, and questions regarding the correctness of information contained in one particular record, and/or the placing of a particular record in an identified file.

Findings

In this appeal, the issue of the reasonableness of the searches for responsive records relates to whether additional responsive records exist. In response to the request for records, responsive records were identified and almost all of those were provided to the appellant. The remaining documents to which access was denied are addressed above.

It is clear from the Board's representations that considerable time and effort was spent addressing the issue of whether the searches conducted by the Board for records responsive to the appellant's request were reasonable. I have set out in some detail the nature of the searches conducted by the Board, and the nature of the evidence provided to me in support of the Board's position that it conducted a reasonable search for responsive records. I have also carefully reviewed the appellant's confidential representations on the issue of the reasonableness of the Board's search.

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Board has conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the Board's search for responsive records was reasonable in the circumstances, the Board's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

In this appeal, the Board has conducted an extensive search for records responsive to the appellant's request. The Board has also provided affidavit evidence from six individuals who conducted searches for responsive records, including some of the individuals who were directly involved with the creation of the records and/or dealing with the appellant and her child in the course of their interactions with the Board, resulting in the creation of records. The Board's representations and affidavits confirm that approximately 30 individuals were involved in searching for responsive records.

The appellant's representations raise questions regarding certain records and/or processes used by the Board. Although it is clear from the appellant's representations that she feels strongly about her interactions with the Board, her representations do not directly address the issue of whether the Board's searches for responsive records were reasonable.

Based on the significant information provided by the Board evidencing the nature of the searches conducted by it for responsive records, including the extensive searches conducted by it and the detailed affidavit evidence provided, I am satisfied that the Board's search for records responsive to the request was reasonable in the circumstances.

ORDER:

1. I uphold the Board's decision that the records remaining at issue qualify for exemption under the *Act*.

2. I uphold the Board's search for responsive records, and dismiss the appeal.

Original signed by: October 24, 2007
Frank DeVries
Adjudicator