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

ORDER MO-2651

Appeal MA10-63-2

Thames Valley District School Board

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BACKGROUND:

This order relates to a request submitted to the Thames Valley District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "a detailed budget and financial statement for TVRAA [Thames Valley Region Athletic Association] for the … 2009/2010 school year and the 2 (two) previous years."[1]

The responsive records identified at that time consisted of general ledgers for the years 2007 to 2009. The board explained that the TVRAA did not prepare annual budgets or financial statements of its own for those years because it operates from a specific budget line included in the board's budget. The requester was not satisfied with the information produced in response to the request and appealed the adequacy of the board's search to this office. Appeal MA10-63 was opened to address the issues.

A mediator was appointed to explore resolution of the appeal. During mediation, the board undertook a further search for financial records and identified a three-page record titled "Multi-Year Preliminary Budget Review," but denied access to it under section 8(1)(b) of the *Act* (law enforcement investigation). The appellant then appealed the denial of access to the record.

As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought representations on the search issue and denial of access from the board. However, the representations received did not directly address those issues. The board indicated that it was prepared to disclose the record to the appellant "but only upon the conclusion of the ongoing Crown prosecution" of an individual formerly associated with TVRAA administration. In view of the board's position, I decided to issue an interim order to determine certain issues.

In Order MO-2549-I, issued on September 9, 2010, I reviewed the board's exemption claim under section 8(1)(b) and found that the exemption did not apply. I also found the board's search for responsive records to be inadequate because the board provided insufficient evidence of its efforts to satisfy me that it had conducted a reasonable search. The provisions of Order MO-2549-I required the board to disclose the record to the appellant, to conduct additional searches and to issue a decision letter respecting any records identified as responsive through those searches.

Provision 3 of Order MO-2549-I also required the board to provide me with "affidavits sworn by the individuals who conducted the searches," both initially in response to the request and also in response to the order itself, and to do so by October 6, 2010. On that date, I received the requested correspondence from the board containing the affidavits of eight individuals.[2]

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[1] In previous documentation relating to the inquiry for Appeals MA10-63 and MA10-63-2, I had referred to the TVRAA as the Thames Valley Recreation Athletic Association. My error in this regard is corrected for the first time in this order.

[2] The eight affidavits were sworn by the following staff members of the board: Executive Superintendent for Human Resource Services, Executive Superintendent for Program Services, Learning Supervisor for Program Services, former Interim Chair of the TVRAA, Athletic Director at one of the board's secondary schools, current Coordinator of Secondary Athletics, Manager of Financial Services, and Manager of Information Technology Services.

On October 8, 2010, the board sent a decision letter to the appellant that stated:

> Further to Order MO-2549-I dated September 9, 2010, issued by Adjudicator Loukidelis … this is to advise you that the following documents were located in the search conducted to determine what records exist that may be "reasonably related to TVRAA financial or budget information for the 2007-2008, 2008-2009, and 2009-2010 school years," as referenced in paragraphs 2 and 3 of said Order:
>
> 1. spreadsheets for the years 1999 up to an including 2008-2009;
> 2. copies of letters and invoices to the participants of TVRAA;
> 3. copies of cancelled cheques from the participants of TVRAA;
> 4. printouts obtained from TD Canada Trust for [the TVRAA's] bank account … as well as copies of cheques cashed and forms completed to open the account;
> 5. the records from TD Canada Trust for the [London and District Referees' Association] account;
> 6. the board's general ledger account and copies of all invoices paid through the board's general ledger account, including all amounts paid for TVRAA for the current year and the previous six years of activity;
> 7. invoices from 2007-2008, 2008-2009 and 2009-2010;
> 8. copies of the minutes from the TVRAA executive council meetings for the school years 2007 to 2010; and
> 9. draft budget for TVRAA dated May 2010.

The board denied access to the records in their entirety, pursuant to the law enforcement exemptions in sections 8(1)(a) and (f) of the *Act*. The appellant appealed the board's decision, and Appeal MA10-63-2 was opened to address the issues.[3]

At the intake stage, this office sent the board a Request for Documentation to obtain copies of the records identified in the October 8, 2010 decision letter. As the records were not sent to this office within the specified time period, Registrar Robert Binstock issued an Order for Production to the board respecting the records. The records were received on November 26, 2010 and the appeal was streamed directly to adjudication, where it was assigned to me to conduct an inquiry.

In the correspondence accompanying the records, legal counsel for the board took the position that the records identified in the board's October 8, 2010 decision letter did not fall within the scope of the appellant's request. Further, counsel took the position that there had been a misunderstanding with respect to what information ought to be available – i.e. considered "responsive" – to the appellant's initial request, particularly as that request had been construed by the terms of Order MO-2549-I. The board stated:

> At all times it was the board's intention to comply with Adjudicator Loukidelis' Order, and it did so; however, at no time has the board conceded that the records identified in the further ordered search have any relevance to the appellant's original request, nor does it believe that to be the case. These records were not

[3] The original appeal, MA10-63 was closed at that time.

> identified with the initial request because they are unrelated to it. They were only identified because of the Order requiring the further and broader search. If the term "reasonably related" had certain meaning, the board was not aware of this and it certainly did not intend to concede that by identifying the records they would be deemed to support the original request.

As the appeal had been transferred to adjudication by that point, I replied to the board on December 21, 2010 to address several matters. With respect to the term "reasonably related," I referred to the discussion of the term that had been included in the board's initial Notice of Inquiry. Respecting the scope of the request and the identification of responsive records, I advised the board that:

> It is generally understood that prior to an institution issuing a decision letter identifying and listing records and claiming exemptions to deny access that a decision as to their responsiveness has already been considered and made [by the Head]. …

However, at that particular point in time, the second matter I wrote about took some precedence over the first. I advised the board that on my review of the records provided to this office and in view of the circumstances, it appeared as though the records could be excluded from the operation of the *Act* on the basis of section 52(2.1), which states:

> This *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed (emphasis added).

I advised the board that I was seeking the appellant's representations on the possible application of section 52(2.1) of the *Act*. In correspondence sent to the appellant on the same date, I stated:

> It is my preliminary opinion that I have no jurisdiction to review the exemption [claims] to the records in the present circumstances because the records fall outside the jurisdiction of [the *Act*] by virtue of the operation of section 52(2.1) of the *Act*.
>
> Section 52(2.1) is one of the specific "jurisdictional" provisions contained in section 52 of the *Act* that, if found to apply to a record, completely removes that record from the scope of the *Act*. …
>
> The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.[4]
>
> In *Toronto Star*, the Divisional Court found that the words "relating to a prosecution" in section 52(2.1) are of a broad scope, requiring only "some

[4] *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).

> connection" between the records and an ongoing prosecution. Further, the court found that section 52(2.1) may apply to a broad spectrum of records, whether or not they are even part of the prosecutor's brief.
>
> Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. …

After receiving the appellant's submissions, I wrote to the board, stating:

> By this correspondence, I am seeking the board's representations on the possible application of section 52(2.1) of the *Act* to the records identified by the board in its October 8, 2010 decision letter to the appellant. The board's representations should address **all** of the records, notwithstanding the position taken by the board respecting responsiveness in its November 25, 2010 correspondence. … If necessary, the issue of responsiveness can be addressed at a later point in the inquiry into Appeal MA10-63-2.
>
> … the board's representations should include the most recent information regarding the status of the relevant prosecution, such as whether the individual has been sentenced and the corresponding appeal periods, including their expiration, as this information is available to the board.

I received representations from the board respecting the application of section 52(2.1) to the records at issue. A short time later, the board advised that this individual was sentenced in mid-March, with the appeal period set to expire 30 days later, or April 17, 2011.

Section 52(2.1) is a time-limited exclusion, and the expiry of the sentencing appeal period effectively rendered the issue of the application of the jurisdictional exclusion in section 52(2.1) moot. Accordingly, on April 19, 2011, I sent a Supplementary Notice of Inquiry to the board. Noting that the time limit for the exclusion of prosecution-related records from the *Act* in this particular appeal had passed, I stated:

> I have therefore reconsidered the approach I will take in this inquiry. Specifically, given that the possible application of the exclusion in section 52(2.1) had been raised on my initiative following the issuing of a decision letter by the board, I have opted to exercise my discretion to re-open my inquiry into the board's initial denial of access under section 8, rather than ruling on section 52(2.1).

The Supplementary Notice of Inquiry outlined the issues of responsiveness and the law enforcement exemption in sections 8(1)(a) and (f), as originally claimed in the October 8, 2010 decision letter. I received representations from the board that addressed the issues of scope and responsiveness, section 8 (law enforcement), and the board's exercise of discretion. The board asked that its representations be reviewed in the context of the November 2010 correspondence and the affidavits respecting search provided in October 2010.

The board also raised a new issue with the possible application of section 52(3)1 of the *Act*. Section 52(3)1 is another jurisdiction-limiting provision in the *Act* that relates to the exclusion of labour relations or employment-related records.

Next, I sent a modified Notice of Inquiry to the appellant, along with the relevant portions of the board's representations, to seek the appellant's representations on the responsiveness of the records identified by the board in response to the provisions of Order MO-2549-I. I also enclosed a copy of the board's index of records, dated November 24, 2010. I concluded that I did not require the appellant's submissions on section 52(3)1, section 8 or the board's exercise of discretion. The appellant subsequently provided submissions by email.

RECORDS:

The records identified in the October 8, 2010 decision letter include: spreadsheets (1999-2009)[5]; letters and invoices to TVRAA participants; cancelled cheques from TVRAA participants; TD Canada Trust account documents; ledgers; invoices and cheque requisitions, TVRAA Executive Council meeting minutes (2007-2010); and a TVDSB/TVRAA budget dated May 2010.

ISSUES:

1. Are the records identified in the board's October 8, 2010 access decision responsive?
2. Was the board's search for responsive records adequate?
3. Are the remaining records excluded from the *Act* under section 52(3)1?
4. Do the law enforcement exemptions in sections 8(1)(a) and (f) apply?

DISCUSSION:

ARE THE RECORDS IDENTIFIED IN THE OCTOBER 8, 2010 DECISION LETTER RESPONSIVE?

As noted above, the board takes issue with the responsiveness of the majority of the records that were identified as a result of the searches ordered in Order MO-2549-I. The board claims that certain records are not responsive for two reasons: either because some of the records were created outside the time period specified in the initial request and Order MO-2549-I or because the searches required by Order MO-2549-I improperly broadened the scope of the appellant's initial request. In my view, to determine this issue, I must review the context, including the circumstances leading up to issuing Order MO-2549-I.

[5] With its November 25, 2010 letter and records, the board provided copies of the spreadsheets identified in the first category only for the years 2007-2009, "in accordance with the timeframe for records sought by the appellant in his initial request." I accept that this change reflects the years specified by the appellant in his request and the years specified in the searches ordered by me in Order MO-2549-I.

Order MO-2549-I and the initial request

As identified on the first page of this order, the appellant's request was for "a detailed budget and financial statement for T.V.R.A.A. for the current 2009/2010 school year and the 2 (two) previous years."

In conducting my inquiry into the board's access decision and the adequacy of its search to that point, I sought representations from the board on these issues. As stated, I proceeded directly to an interim order without seeking submissions from the appellant. The following is an excerpt from my reasons regarding the challenge of determining the adequacy of the board's search in the circumstances:

> In the Notice of Inquiry, I provided the outline of the search issue as it is usually set out when seeking representations from an institution. I required the board to provide a written summary in affidavit form of all steps taken in response to the request. Indeed, in its own request for an extension, the board stated that it required the extension, in part, because it was trying to contact an individual to swear the affidavit. However, in the representations ultimately provided to this office, the board provided no submissions outlining the nature and extent of its search(es) for responsive records, and no affidavit evidence as required. In doing so, the board appears to have interpreted the identification of a specific record (the Multi-Year Preliminary Budget Review) as the "sole record at issue" as being conclusive of the search issue. The board states:
>
> > It was initially our understanding that the requester was challenging the Board's statements regarding its searches and the availability of records that related to his initial request for detailed budget and financial statement for TVRAA for the 2009/2010 school year and the two prior years. *We now understand that the sole record at issue is the Multi-Year Preliminary Budget Review which was first raised in discussion with the mediator in May [2010]* [emphasis added].
> >
> > As the sole record at issue is the Multi-Year Preliminary Budget Review, which the Board has in its possession and which the requester seeks, it is our expectation that the Commissioner does not require a search history at this time.
>
> The board's conclusions respecting the search issue are both puzzling and, unfortunately, incorrect. As stated, part of the reason given by the board in its request for an extension for the submission of its representations was that it was seeking out the assistance of an individual to execute the search affidavit required by me in the Notice of Inquiry. It appears that the board reconsidered this issue in the interim period, but reached the wrong conclusion about what was required of it.

> It perhaps bears emphasis at this point that it is the Notice of Inquiry that presents the issues to be decided in an appeal, as determined by the adjudicator, not any documents which may have preceded it during the appeals process, including those created during mediation. The adequacy of the board's search for responsive records would not have been included in the Notice of Inquiry if not for the appellant's insistence that additional records responsive to his request ought to exist and my conclusion that the issue must be reviewed at adjudication through the submission of written representations (and a sworn affidavit) by the board to determine the issue with finality.
>
> Had the board provided written representations, including the affidavit, on the search issue as required, these may have offered sufficient evidence for me to reach conclusions as to the adequacy of the search, or searches, conducted by the board in response to this request. In the face of the misunderstanding on the board's part apparent from the submissions outlined above, I am unable to conclude that the searches conducted were reasonable in the circumstances.
>
> Accordingly, I will order the board to conduct further searches for records reasonably related to the request and to provide the previously requested affidavit evidence and written submissions respecting the searches ordered by me in this interim order, as well as past searches conducted by board staff in response to the initial request. To be clear, the board should search for records reasonably related to TVRAA financial or budget information for the 2007-2008, 2008-2009, and 2009-2010 school years. In addition to the order provision outlined below, the board may refer back to the outline of the search issue provided in the July 20, 2010 Notice of Inquiry for assistance in preparing its affidavit and written submissions.

General principles in determining responsiveness

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This provision requires a requester to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour (Orders P-134 and P-880). To be considered responsive to the request, records must "reasonably relate" to the request (Orders P-880 and PO-2554).

In seeking representations from the parties on the issue of responsiveness, I directed their attention to the terms of the search ordered in Order MO-2549-I, as well as the wording of the request. Both of these have already been set out in this order. The board's index of records, dated November 24, 2010, was also provided to the appellant as a reference.

In its November 2010 letters, and with regard to requiring additional time to produce certain records identified in the October 8, 2010 decision letter, the board stated:

> … items 6 and 7 … are invoices for amounts paid through the board's general ledger account. This documentation … was initially located during the police investigation and third party [forensic] audit of the board's files…[6]
>
> At the time of the audit, no request for these records had been submitted, nor, as I have indicated above, are they responsive to the appellant's initial request received last May. In fact, the appellant has never requested these records from the board. Instead, they were ordered identified by the adjudicator who deemed them to have been requested.[7]

In its May 2011 representations, the board reiterated its view that the "records were at no time responsive to the appellant's request which forms the basis of Appeal MA10-63." The board submits that the appellant made ongoing inquiries for these records after the initial explanation about the lack of responsive records (other than the general ledger records for 2007, 2008 and 2009) was provided to him.

The board refers to the appellant's requests for documents detailing the TVRAA's: "budget and financial statements"; "budget, balance sheet and income statements;" "funding breakdown;" and "financial statements, including a budget." According to the board, "this exchange continued several times," and each time, the appellant was advised that the TVRAA does not have an annual budget or prepare financial statements because its expenses are detailed as a line item in the board's budget. The board explains further that the TVRAA is not a separate legal entity or organization that functions apart from the board and "its funding is through the board's budget and identified in its general ledger." As the board states,

> These records [as outlined on page 2, above] were not identified with the appellant's initial request because they are not responsive to it. … These records were identified solely because of the Order requiring a further and broader search. The appellant sought financial statements and budget information for TVRAA and was provided with the responsive record, that being, the board's general ledger records identifying the TVRAA budget as a line item. No other financial statements or budget existed for TVRAA at the time of the initial request.
>
> The spreadsheets, invoices, cancelled cheques and bank records located in the search that was ordered to be done detail specific TVRAA transactions, meeting minutes and a draft budget … never approved [and] do not disclose the budget information sought. …
>
> The board attempted to assist the appellant with understanding that no responsive records existed to his request other than the board's general ledger account which was produced.

[6] Correspondence from board legal counsel, dated November 16, 2010.
[7] Correspondence from board legal counsel, dated November 25, 2010

The board's position with respect to the searches conducted at the time of the initial request and in response to Order MO-2549-I is set out in the affidavits submitted by the individuals who conducted the required searches that were submitted to this office in October 2010. I have reviewed the affidavits and have considered the evidence provided in them with respect to searches for, and the identification of, responsive records. Generally, the evidence indicates that the appellant was advised by the board "that although TVRAA is included in the operating and printing budgets in the board's general ledger accounts, no budgets, balance sheets or projected statements existed for TVRAA."[8]

Respecting the responsiveness of the records described in the October 8, 2010 decision, the appellant states:

> After mediation and appeal the TVDSB did search again and found related records. Without seeing records 1-7 I cannot comment on their relevance to my request.
>
> The records found in section 8 and 9 I consider to be very relevant. Within the minutes of TVRAA executive meetings is a superintendants section that often discusses budget, finances and money. The reason I know this is that I have a copy of a few TVRAA executive meetings and it was also one of my submissions in mediation to prove that the records should reasonably exist.
>
> I would also suggest that the draft budget for TVRAA dated May, 2010 is related. This budget has to have some financial connection to previous TVRAA spending and funding.
>
> …
>
> I realize that an organization has no obligation under the *Act* to create a document that does not exist, even though it ought to exist. I would submit that during this request process the TVDSB created or had created documents that are reasonably related to my original MFOI request. … [T]here must exist more financial documents than the ones disclosed by the board. I have never been provided any funding information. In order to determine how much money was stolen there must be records indicating funding, legitimate expenses and questionable expenses.

The appellant's representations refer to his continued belief "that a proper search has not yet been done." The appellant notes that his

> original request went to … a man who was trying to conceal a massive ongoing fraud. The records I requested were required to exist. To me it would not be unreasonable to suggest [that this individual] made these records unavailable. Given this the 2 partners in TVRAA; the TVDSB and the LDCSB should have

[8] Paragraph 8 of the affidavit of the Executive Superintendent of Human Resource Services, sworn October 4, 2010.

> searched their own records since both organizations involved should have kept their own records. …

Analysis and findings

To begin, I confirm that this order addresses only the appellant's request to the Thames Valley District School Board, not the London District Catholic School Board or any other institution.[9]

The determination of what records are responsive to a request is the crucial initial step to be taken by the head of an institution. The importance of this determination was explained in Order P-880 by former Adjudicator Anita Fineberg in the following manner:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request [see also Orders P-1051 and PO-2554].

In this context, I reject the board's submission that the records before me in Appeal MA10-63-2 "were ordered identified by the adjudicator who deemed them to have been requested." First, I note that I required further searches and evidence to substantiate those searches as a natural consequence of not having been provided with sufficient evidence of the searches initially done by the board in response to the appellant's request, notwithstanding that such evidence was sought.

Moreover, I reject the characterization that I "deemed" records to have been requested by virtue of framing the search terms as I did in Order MO-2549-I. As suggested in Order P-880, the act of "deeming" records to have been requested is effectively the function of the Head in the first instance. Further, and as I pointed out to the board in my December 21, 2010 correspondence sent, in part, to clarify the matter,

> It is generally understood that prior to an institution issuing a decision letter identifying and listing records and claiming exemptions to deny access that a decision as to their responsiveness has already been considered and made [by the Head]. Given the board's October 8, 2010 decision, it would be reasonable for the appellant and this office to conclude … that the records listed were identified by

[9] The request was initially submitted to the London District Catholic School Board, but was transferred to the Thames Valley District School Board (the board) under section 18 of the *Act* because the latter school board acts as the "banker board" for the TVRAA.

> the board as responsive to the parameters of the search ordered in Order MO-2549-I…

In other words, the Head (or his or her delegate) forming an opinion as to the responsiveness of records is a precondition of making a decision on access to any records thought to be responsive. Moreover, this sequence of events or determinations is to be followed regardless of whether the Head is responding to a request or to the terms of a search ordered by an adjudicator.

It is worth noting that there was a considerable amount of communication back and forth between the appellant and the board's FOI coordinator regarding this matter, due in part to the appellant's belief that the records he was seeking ought to exist. The board's evidence is that in the earlier stage of communicating with the appellant (prior to the appeal to this office), the appellant's requests for documents referred to the TVRAA's: "budget and financial statements; "budget, balance sheet and income statements;" "funding breakdown;" and "financial statements, including a budget." Moreover, an October 7, 2009 email from the board's FOI coordinator to the appellant states: "… We have given you what we have regarding the **financial records** for TVRAA [emphasis added]." The appellant observes in his representations that "[i]t has become apparent to me that this request was and is subject to change."

In my view, this highlights the difficulties encountered by both the board and the appellant in establishing *precisely* what records were sought, and might exist, in what was a very fluid situation in the circumstances, given the investigation and prosecution of the individual formerly associated with the TVRAA.

During my inquiry into Appeal MA10-63-2, the board has argued quite forcefully that the searches ordered by me in Order MO-2549-I resulted in a broadening of the scope of the appellant's request. In the board's view, the searches ordered by me essentially caught entire categories of records in the request's net that would never otherwise have been identified and had only been located by the external forensic audit related to the investigation of irregularities in the TVRAA's finances.

In part, I agree with this submission. In the context of the rather fluid circumstances described above, I accept that the particular turn of phrase I adopted in seeking to clarify the additional searches – when taken in isolation from the remainder of the reasons and the wording of the order provision itself – may have led to the overbroad identification of records by the board.

At page 5 of Order MO-2549-I, I stated:

> Accordingly, **I will order the board to conduct further searches for records reasonably related to the request** and to provide the previously requested affidavit evidence and written submissions respecting the searches ordered by me in this interim order, as well as past searches conducted by board staff in response to the initial request. To be clear, the board should **search for records reasonably related to TVRAA financial or budget information for the 2007-2008, 2008-2009, and 2009-2010 school years** [emphasis added].

Further, order provision number 2 of Order MO-2549-I states:

> I order the board to conduct further searches for **responsive records within its record holdings**, and to provide evidence with respect to searches conducted previously in responding to the appellant's request initially [emphasis added].

Specifically, I accept that the use of the word "information" in the latter part of the paragraph in my reasons regarding the focus of my order may have had the unintended effect described above. On a plain reading of the wording of the request compared to the particular sentence of the order under review here, the insertion of "information" clearly led to the board contemplating a broader range of record types, not just "records reasonably related to the request" and "responsive records within its record holdings," as written elsewhere in the order.

As suggested previously, the appellant's interest in learning more about the financial irregularities at the TVRAA appears to have motivated his request. In his representations, he submits that "In order to determine how much money was stolen there must be records indicating funding, legitimate expenses and questionable expenses." However, my decision as to the responsiveness of the records before me is not determined by the appellant's motivation.

I find that the scope of the appellant's request in this appeal is defined by the document types and school years that it specifically identifies, namely budgets and/or financial statements for the 2007-2008, 2008-2009, and 2009-2010 school years. Therefore, responsive records are those that are reasonably related to those document types and the stated time period.

Accordingly, based on my own review of the records identified by the board, I find that the majority of them are indeed not responsive.

More specifically, I find that the spreadsheets (record 1), the cancelled cheques (record 3) and the invoices and cheque requests (records 2 and 7) are not responsive.

Regarding the categories of documents identified as records 4 and 5 in the index, I would emphasize the reference to the board conducting "further searches for responsive records within its record holdings" in provision 2 of Order MO-2549-I. Records 4 and 5 are banking records that were obtained from TD Canada Trust. It cannot be said that these records form part of the board's own record holdings. Regardless, the information contained in these banking inquiry statements is not responsive to the appellant's request. I find, therefore, that records 4 and 5 also fall outside the scope of the appellant's request.

The appellant argues that the TVRAA executive council minutes for the relevant school years (record 8) may be responsive to his request because the superintendent's section often contains discussion of budget and financial matters. However, I have reviewed all of the TVRAA executive council minutes provided, in their entirety, and I find that none of them contain information that is reasonably related to the request. Accordingly, I find that the documents listed as record 8 are not responsive to the request.

The exceptions to my finding respecting the non-responsiveness of a large number of the records identified in the October 8, 2010 decision letter are the records listed as record 6 and record 9 on the board's November 24, 2010 index.

Record 6 consists of extracts (15 pages) from the TVDSB general ledger account for the three relevant school years listing expenses for secondary athletics and the board's "Championship Fund." In the introductory section of Order MO-2549-I (dealing with Appeal MA10-63), I stated that the board "provided copies of general ledgers showing revenue and expenses for the years 2007 to 2009 [to the appellant]…" After the order was issued, the appellant sought to correct this reference, stating "the board did provide a ledger showing expenses but never provided a ledger showing revenue." In any event, it appears that the board provided the ledgers in lieu of the requested budget or financial statements which the board maintains were not at that time kept for the TVRAA. In my view, the account ledgers are responsive to the request, as they are reasonably related to the appellant's request and I base this finding, in part, on the board's prior treatment (i.e. disclosure) of similar documents.

Record 9 is the one-page record identified in the index as a "draft budget for TVRAA". The board acknowledges that this record could be construed as responsive to the request, but argues that it is not because the record was created in May 2010, after the appellant submitted his request. However, on my review of this record, I note that it contains itemized revenues (funding) and expenses not only for the 2009-2010 year end, but for all of the budget years in question, i.e. 2007-2008, 2008-2009, and 2009-2010. Notwithstanding the date of its creation, I find that this record contains information that fits within the scope of the appellant's request. Accordingly, I find that record 9 is responsive to the request.

WAS THE BOARD'S SEARCH FOR RESPONSIVE RECORDS ADEQUATE?

I am also prepared to make a finding respecting the adequacy of the searches conducted for records responsive to the appellant's request.

In his representations, the appellant refers to his continued belief "that a proper search has not yet been done," in part because he believes that certain individuals who should have been contacted were not. Both individuals mentioned by the appellant are board superintendents. One of these individuals works for another school board in the area and is not employed by the institution that is subject to the request here. However, the other identified individual is the superintendent for the TVDSB and, in fact, I did receive affidavit evidence respecting her involvement in this matter. Further, and as indicated earlier in this order, I received affidavit evidence from seven other board staff members attesting to their varied involvement in the searches and in the surrounding circumstances of the matter, generally. I have considered this evidence in making my finding on this issue.

As discussed in greater detail in Order MO-2549-I, where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search. Therefore, the board was required to provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records (Orders P-624 and PO-2559).

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. The appellant suggests that one possible explanation for the absence of records he contends ought to exist is that the individual formerly associated with the TVRAA may have destroyed such records. However, even if there were evidence before me to indicate that responsive records may have been destroyed by that individual in seeking to conceal his actions, no remedy is available under the *Act*. As the appellant acknowledges, the board is under no obligation to create records, even ones that perhaps ought to have existed. In the circumstances, I accept that additional responsive records simply may not exist, for the reasons given by the board. Accordingly, I uphold the board's search for responsive records.

I will now review whether the records I have found to be responsive are excluded from the *Act* through the operation of section 52(3)1.

ARE RECORDS 6 AND 9 EXCLUDED FROM THE *ACT* UNDER SECTION 52(3)1?

The board takes the position that section 52(3)1 applies to all of the records at issue in this appeal and, therefore, that the *Act* does not apply.

Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction in this appeal, I must review its possible application. If I find that the exclusion applies to records 6 and 9, and that none of the exceptions in section 52(4) apply, it follows that I lack jurisdiction to review the issue of access, or denial thereof, to those records. The relevant part of section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution. …

In *Ontario (Attorney General) v. Toronto Star*[10], the Ontario Divisional Court defined "relating to" in section 65(5.2)[11] of the *Act* as requiring "some connection" between the records and the subject matter of that section. This definition has been adopted for the words, "in relation to" in section 52(3).[12] For section 52(3)1 to apply, therefore, it must be reasonable to conclude that there is some connection between the record and "proceedings or anticipated proceedings… relating to labour relations or to the employment of a person" by the board.

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct

[10] *Supra*, footnote 4.
[11] Section 65 of the provincial *Freedom of Information and Protection of Privacy Act* is the equivalent of section 52 in the municipal *Act*. Both sections deal with exclusions, i.e. the non-application of the statute to certain types of records.
[12] See Order MO-2537.

from matters related to employees' actions (*Ontario (Ministry of Correctional Services) v. Goodis*).[13]

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157).

For section 52(3)1 to apply, it must be established that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The board's representations on the application of the exclusion in section 52(3)1 are relatively brief and can be set out in their entirety, as follows:

> Now that the Crown proceedings have concluded, the board has advised the appellant that it relies upon section 52(3)1 for the exemption [sic] provided therein, as the board anticipates court proceedings involving [the former TVRAA staff] which relates specifically to the period of his employment with the board … The records in issue have been maintained by the board and will be used by the board for the purposes of this litigation and are therefore exempt [sic] from the *Act*.

On July 4, 2011, I received a letter from the board attaching a copy of a local newspaper article that relates to the board's pursuit of restitution (in civil proceedings) from the individual formerly associated with the TVRAA. The article was provided in support of the board's claim under section 52(3)1 "on all pending FOI requests by the requester"[14]

As indicated above, I did not seek representations from the appellant on the application of section 52(3)1.

I have concluded that it is necessary to address the board's position on section 52(3)1 in the present appeal clearly and strongly in view of the history of this matter generally. In the initial stages of the predecessor appeal (MA10-63), I sought representations from the board on the issues of the adequacy of its search for responsive records and the possible application of the law

[13] (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)

[14] The appellant has submitted other requests to the board related to these same circumstances generally, none of which are before me.

enforcement exemption in section 8(1)(b) (ongoing law enforcement investigation). In the Notice of Inquiry seeking those representations, I also stated:

> In addition, and based on the information in the appeal file, it appears that the board may have suggested to the appellant that it would not deal (further) with his access to information request under the *Act* while the police investigation related to the TVRAA was ongoing. The board should be aware that the police investigation does not have the effect of suspending the board's obligations and responsibilities under the *Municipal Freedom of Information and Protection of Privacy Act*.

As I construe it, the board's claim that section 52(3)1 excludes the records at issue here from the scope of the *Act* (and effectively from review by this office) pending conclusion of the restitution proceedings is quite similar to the position taken earlier in the appeal process that the board would not proceed with the appellant's request until the police investigation was complete. In my view, this position is untenable. Any ongoing pursuit of restitution from the individual who has now been convicted of defrauding the board (TVRAA) does not have the effect of suspending the board's obligations under the *Act*.

With specific reference to the board's claim and submissions that section 52(3)1 excludes the records from the *Act*, I find that section 52(3)1 does not apply to either of the records.

I must first consider the nature of the records which are the subject of the exclusion claim under section 52(3)1. Record 6 consists of four different general ledger excerpts for secondary athletics and the board's "Championship Fund." Record 9 is a reconciliation document itemizing revenues and expenses for secondary athletics for the three school years in question.

In *Ontario (Ministry of Correctional Services) v. Goodis*, the Ontario Divisional Court confirmed that the purpose of section 65(6) of the provincial *Act* (the equivalent of section 52(3) in the *Act*) is to maintain stability in labour relations and employment matters. The Court held that the types of records excluded from the *Act* under section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[15] Even on this basis, I could find that records 6 and 9 are not the types of documents contemplated for exclusion by section 52(3). The Court in *Goodis* stated that employment-related matters are separate and distinct from matters related to employees' actions. In my view, therefore, section 52(3) does not, as a matter of course, exclude records that may be used in actions arising from the tortious acts of an institution's employee.

Regarding the first requirement of the test for section 52(3)1 set out above, I am prepared to accept that records 6 and 9 were prepared, maintained or used by the board and, therefore, that the first part of the test under section 52(3)1 has been met.

[15] *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289. The examples given by the Court of the type of action (proceeding) that might qualify for exclusion as litigation relating to terms and conditions of employment would be "disciplinary action against an employee or grievance proceedings."

However, the next part of the test for exclusion under section 52(3)1 requires me to decide whether the connection between the records and the civil litigation related to restitution ("proceedings") is clear enough to be able to state that the preparation, maintenance or use of the records was "in relation to" those proceeding. This office has interpreted the word "proceedings" to mean a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue. Further, for proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used (Orders P-1223 and PO-2105-F).

In Order MO-2352, I addressed the City of Elliot Lake's claim that sections 52(3)1 or 52(3)3 applied to certain records identified as responsive to a request under the *Act* for records dating from the time of the requester's employment with the city. I stated:

> The record at issue … reflects an arrangement between the Elliot Lake Residential Development Commission, a branch of City government, and a third party, for the provision of consulting and planning services in exchange for payment based on certain terms.
>
> With respect to section 52(3)1, I note that in Order MO-2024-I, the Senior Adjudicator acknowledged that the record at issue in that case would not have been created but for the proceedings, but found that there was no obvious relationship between it and the proceedings in question. In the present appeal, the City apparently seeks to rely on the ongoing civil action between the City and the appellant, a former employee, to form the requisite "proceedings" for the second requirement. However, based on the information before me, the proceedings upon which the City relies, did not exist, nor could it be said that they were reasonably contemplated at the time of the record's creation. In my view, not only is the record not "an incidental result" of the civil proceedings, there is no connection between the creation of the record and those proceedings at all … For all these reasons, I find that the second requirement under section 52(3)1 is not met, and the record cannot be excluded on that basis.
>
> For similar reasons, this record does not meet the second requirement of the test for exclusion under section 52(3)3 of the *Act*. In the circumstances, I am not satisfied that the preparation, maintenance or use of the record was "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. Although the City alluded to the appellant's civil action as an "employment-related matter" that could be construed as "an interest," there is no evidence before me to support such a connection. Specifically, I reject the suggestion that there existed such "an interest" at the time the record was created. Since there is no recognizable connection between the creation of the record and any labour relations or employment-related matter in which the City might be said to have an interest, I find that part two of the test under section 52(3)3 is not met, and the record is not excluded from the *Act* under that provision.

In my view, the reasoning of Order MO-2352 is applicable, and I adopt it in the present appeal.

In the circumstances of this appeal, I accept that the litigation in which the board is engaged to seek restitution from its former employee constitutes "proceedings," as that term is used in the second part of section 52(3)1. However, the records at issue here were created initially for a purpose wholly unrelated to the restitution proceedings relied on by the board in claiming that section 52(3)1 excludes the records from the *Act* now. Clearly, the records were created to document expense transactions for 2007-2010 (record 6) and to summarize and reconcile revenues and expenses for 2007-2010 (record 9) for the board's secondary athletics program. The board has provided no evidence that any civil action against the TVRAA's former employee for restitution was either reasonably contemplated or already initiated at the time the records were created. Therefore, I find that it is not reasonable to conclude that the collection, preparation, maintenance or usage of records 6 and 9 was in relation to the restitution proceedings.

In the circumstances, I find that the board has failed to establish the requirements for the application of section 52(3)1, and I find that the *Act* applies to records 6 and 9.

I will now review whether sections 8(1)(a) or (f) apply to records 6 and 9.

DO THE LAW ENFORECMENT EXEMPTION IN SECTION 8(1)(a) OR (f) APPLY TO RECORDS 6 AND 9?

In the October 8, 2010 decision letter issued consequent to Order MO-2549-I, the board denied access to the records identified through its additional searches pursuant to sections 8(1)(a) and (f), which state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter; …
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

As already described in this order, the board's exemption claim under section 8 was not initially pursued due to the intervening consideration of the possible exclusion of the records from the *Act* under section 52(2.1) (ongoing prosecution). However, upon completion of the proceedings related to that prosecution, I exercised my discretion to revive the inquiry into the board's denial of access, and sought representations on the law enforcement exemption from the board accordingly.

In the Supplementary Notice of Inquiry sent to the board on April 19, 2011, I set out an excerpt from Order MO-2549-I to provide context for the representations I was seeking. The excerpt from pages 3 and 4 of the interim order was intended to remind the board of the evidentiary burden it was required to satisfy to establish the application of the exemption. Of the initial

inquiry conducted into the board's previous claim of section 8(1)(b) to the record at issue in MA10-63, I wrote:

> … I advised the board that [section 8] … required [it] to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" resulting from disclosure of the record, and that evidence amounting to speculation of possible harm would not be sufficient.[16] …
>
> The board provided submissions on the ongoing prosecution of the criminal matter in which it claims to be an "interested party," requesting that I keep the content of those submissions confidential. I am prepared to maintain that confidentiality largely because the board's representations do not directly address the application of section 8(1)(b) of the *Act* as outlined in the Notice of Inquiry, or as past orders of this office have interpreted the provision. …
>
> On my review of the record, it is clear that it was created by the board for the purpose of making decisions related to funding secondary school athletics. In my view, the possibility that the record may have been used by the police in its (law enforcement) investigation of issues arising from the management of TVRAA funds does not establish the application of section 8(1)(b). …

As the evidence provided by the board was insufficient to establish the application of section 8(1)(b), I found that the exemption did not apply and ordered the board to disclose the record to the appellant.

In the present appeal, the board has again provided submissions on the law enforcement exemption, requesting that I maintain their confidentiality. As I had concluded that I did not require representations from the appellant on the application of section 8 in this appeal, I did not share the board's representations with him. However, for the purpose of explaining my decision not to uphold the exemption in this order, I will set out portions of the board's representations that do not meet the confidentiality criteria established by this office.[17]

The board's October 8, 2010 decision letter explained the denial of access in the following manner:

> The information forms the basis of the police investigation and the subsequent charges laid against [an individual] for fraud which remain the subject of an ongoing Crown prosecution. Its disclosure could reasonably be expected to interfere with a law enforcement matter and could reasonably be expected to deprive [that individual] of the right to a fair trial or impartial adjudication.

[16] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[17] IPC Practice Direction Number 7 (August 2000) titled *Sharing of representations*.

In the representations submitted to this office, the board claims that the records at issue were turned over to the police by the board during the investigation into the financial irregularities. These same records were produced to the Crown and used in the prosecution of the individual "as they provided detail[s] of specific TVRAA transactions and bank account records in support of the alleged theft and fraud…" The board states that the records were used in the Crown's case and their confidentiality was maintained for that reason. According to the board, "they do not form part of the public record today."

In relation to the records that post-date the removal of the individual formerly associated with the TVRAA from his employment with the board (October 2009), the board submits that:

> These records were relevant to the prosecution insofar as they related to the procedural changes carried out by TVRAA subsequent to the alleged period of the theft/fraud thereby assisting the Crown in its case…

With respect to section 8(1)(f), the board submits that disclosure of the records "as of the date of its decision letter would have represented a real and substantial risk of interference with [the individual's] right to a fair trial and impartial adjudication… [because] [t]he use of this documentation … was equally important in the defence…" This submission is based on the assertion that the Crown and defence used the records in negotiating the contents of an Agreed Statement of Facts.

Analysis and findings

As the board acknowledges, the circumstances under which it claimed that sections 8(1)(a) and (f) applied to the records identified in the October 8, 2010 letter no longer exist. Notably, the board did not abandon the exemption claims under section 8 notwithstanding the change in circumstances. However, as I advised the board, where section 8 uses the words "could reasonably be expected to" – as in sections 8(1)(a) and (f) – it is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[18]

Respecting the term "law enforcement matter" in section 8(1)(a), the Divisional Court has held that "matter" may extend beyond a specific investigation or proceeding to include, for example, a database maintained by the police to track crime guns.[19] On the facts of this appeal, however, I am satisfied that no such "matter" exists now, even if such a law enforcement matter may have been found to exist during the time leading up to the prosecution of the individual formerly associated with the TRVAA. Moreover, as set out in the Notice of Inquiry, to establish the application of section 8(1)(a), the law enforcement matter in question must be ongoing or in existence (Order PO-2657). The exemption does not apply where the matter is completed (Orders PO-2085 and MO-1578).

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[18] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[19] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

There is no dispute that the prosecution of the individual that resulted from the law enforcement investigation is now complete. Accordingly, there is no basis upon which records 6 and 9 could be exempt under section 8(1)(a), and I find that the exemption does not apply.

To establish the application of section 8(1)(f), the board was required to provide evidence of a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. To begin, I am not persuaded by the board's submission that defence counsel's use of these particular records (the ledger excerpts and budget reconciliation) provides any evidence, let alone "detailed and convincing" evidence, that disclosure of them could reasonably be expected to result in a "real and substantial risk" of interference with the identified individual's right to a fair trial even were the trial ongoing. Regardless, the trial and prosecution of the individual in question has been completed. In the circumstances, there is no longer any credible argument available that disclosure of records 6 and 9 could reasonably be expected to lead to the harm contemplated by section 8(1)(f). Consequently, I find that section 8(1)(f) does not apply.

Given my finding that sections 8(1)(a) and (f) do not apply to the responsive records, I will order them disclosed to the appellant. In view of this finding, it is not necessary for me to review the board's exercise of discretion in denying access.

ORDER:

1. I order the board to disclose records 6 and 9, as identified on the board's November 2010 record index, to the appellant **by September 30, 2011**.

2. In order to verify compliance with this order, I reserve the right to require the board to provide me with a copy of the records disclosed to the appellant pursuant to provision 1.

Original Signed By: August 31, 2011
Daphne Loukidelis
Adjudicator