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

ORDER MO-2143-F

Appeals MA-040046-2 and MA-040046-4

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This Order disposes of the remaining issues in Appeal Number MA-040046-2 (following my previous Interim Orders MO-2046-I and MO-2054-I in this same appeal), and addresses the issues raised in Appeal Number MA-040046-4.

BACKGROUND AND NATURE OF THE APPEALS:

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

- [An identified school] Local School Team Meeting notes or records from 1997-2003 concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school kept and used by the principal.

- Records kept by teachers at the identified school from 1997 to [the date of the request] concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school.

- Records resulting from their investigation into their son's educational history at the school.

- Records with respect to the Board's internal investigation as to what happened to their son, including recommendations resulting from that investigation.

- Records in response or reaction to an identified letter from the Minister of Health to the Board.

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

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

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

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

The Board's response also stated:

> I am enclosing copies of all records to which you have been granted access. Where only partial access has been granted, we have severed (not released) the exempted portions. …
>
> All persons named in the request who could be contacted were asked to search for the requested records. If no copy of a requested record is enclosed, then no such record exists or can be found.

MA-040046-2

The requesters (now the appellants) appealed the Board's decision, and Appeal MA-040046-2 was opened. The appeal letter identified that the appellants were appealing the denial of access, and also took the position that additional responsive records exist.

During mediation, the appellants confirmed that they were not interested in certain information, including records denied on the basis of sections 10(1) and 11(h), and those records were no longer at issue in this appeal. Also during mediation, the appellants identified that they were concerned that the Board may have narrowed the scope of the request, and stated that there was a public interest in the issues raised in this appeal.

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

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

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

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

I then sent a Notice of Inquiry to the appellants, along with the non-confidential representations of the Board, and invited the appellants to address the issues. I also invited the appellants to address issues that pertained to the scope of the appeal and the possible public interest. The

appellants themselves provided lengthy "preliminary representations" and subsequently, through their lawyer, provided additional representations on the issues.

One of the issues raised in Appeal MA-040046-2 relates to the reasonableness of the searches conducted by the Board for responsive records. As identified above, in the course of providing representations in this appeal, the Board located additional responsive records. The Board subsequently issued a new decision regarding access to those records. As the issues regarding access to those records and the reasonableness of the search for those records were raised after representations were received in this appeal, a subsequent appeal (Appeal MA-040046-4, discussed below) was opened to address the issues raised by the Board's new decision letter. In the circumstances, I decided to address the access issues relating to the records at issue in Appeal MA-040046-2 in an Interim Order (Order MO-2046-I), but to defer my review of issues relating to the reasonableness of the search for responsive records, in order to address that issue at the same time as the reasonable search issue is addressed in Appeal MA-040046-4.

Accordingly, MO-2046-I only dealt with issues relating to access to the responsive records in Appeal MA-040046-2. These records consisted of portions of seven pages of Local School Team Meeting minutes (Records 1 through 7), an email (Record 8) and an attached draft letter (Record 9).

In Interim Order MO-2046-I, I upheld the Board's decision to deny access to two records on the basis of the exemptions claimed for those records. With respect to the undisclosed portions of the seven other records, I found that their disclosure would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellants or their child, and that they qualified for exemption under section 38(b) of the *Act*. However, upon my review of the Board's exercise of discretion, I found that the Board had not exercised its discretion in denying access to those portions of Records 1 through 7 that qualified for exemption under section 38(b). Provision 2 of Interim Order MO-2046-I accordingly read:

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

The Board then provided me with representations regarding the factors it considered in exercising its discretion to deny access to the severed portions of Records 1 through 7, and I reviewed the appropriateness of that exercise in Interim Order MO-2054-I. In that interim order, I upheld the Board's decision to deny access to the severed portions of Records 1 through 7, and I remained seized of the matter in order to deal with the outstanding issues relating to the reasonableness of the Board's search for records, and to address that issue at the same time that it is addressed in Appeal MA-040046-4.

MA-040046-4

As identified above, Appeal MA-040046-4 was opened to address the issues raised by the appellants which arose as a result of the Board's new decision regarding access to responsive records that it located after Appeal MA-040046-2 was in the inquiry stage of the process. That decision letter arose from the same request which gave rise to Appeal MA-040046-2 (set out above).

The Board's new decision identified that 46 additional responsive records had been located. It stated that, pursuant to section 52(3)3, the *Act* did not apply to 8 of the responsive records. With respect to the remaining records to which the *Act* did apply, the Board stated that access was granted in full to 6 of the records, and access to the remaining records was denied under the exemptions found in sections 7 (advice or recommendations), 12 (solicitor-client privilege) and 38(a) (discretion to refuse requester's own information). The Board attached an index of records to the decision letter. In the index, it also identified that some of the records were exempt under section 14 and/or 38(b) (invasion of privacy).

This appeal file was streamed directly to the adjudication stage of the process. I sent a Notice of Inquiry to the Board, initially. The Board provided representations in response to the Notice of Inquiry, and referred to the records as described in the index. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the Board's representations, to the appellants. The appellants were invited to address the issues set out in the Notice of Inquiry, as well as issues regarding the reasonableness of the Board's search for records, in addition to the information previously provided in appeal MA-040046-2. The appellants provided representations in response.

Accordingly, this order addresses the issues raised regarding the application of the identified sections of the *Act* to the records at issue in Appeal MA-040046-4, and addresses the issues regarding the reasonableness of the search in both Appeals (MA-040046-2 and MA-040046-4).

RECORDS:

The records at issue in this appeal consist of documents numbered 7 to 46, as identified in the index prepared by the Board and provided to the appellants along with the decision letter. They include handwritten notes, facsimile transmissions, copies of email messages and other correspondence.

DISCUSSION:

APPLICATION OF THE *ACT*

The Board claims that section 52(3)3 applies to Records numbered 7-14, which consist of handwritten notes of a psychologist employed by the Board [the school psychologist].

General Principles

Section 52(3)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:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

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].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

Section 52(3)3: matters in which the institution has an interest

Introduction

For section 52(3)3 to apply, the institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

In support of its position that the records are excluded from the scope of the *Act*, the Board states:

> Records 7 to 14 are the handwritten notes of [the school psychologist], Psychologist employed by the Board at the time these records were created. The records are of telephone conversations or meetings she attended concerning employees within her department of psychology at the Board. She was the person responsible on behalf of the Board for looking into the allegations of staff misconduct made by the [appellants] as against certain employees in the Psychology Department of the Board.

The Board then identifies the two individuals against whom the allegations were made, and then states:

> Records 7 to 14 were prepared, maintained and used by [the school psychologist] during her review of allegations of misconduct against [the two employees] as made by the [appellants]. The records were used by her in the carrying out of her duties on behalf of the Board in that regard. The purpose of the review was to determine whether or not staff had followed proper policy and procedures … [with respect to matters] that involved the [appellants'] son's dealing with the Board's Psychology Department.
>
> [The school psychologist] then used the information to consult with legal counsel and other senior Board staff in deciding, among other things, what action, if any, the Board should take.
>
> The Board clearly has an interest in ensuring that [the two named employees] were following proper Board policy and procedures …

The Board also provided me with confidential representations addressing in greater detail the information contained in each of Records 7 through 14.

Analysis

Part One of the Test under Section 52(3)3

The Board submits that the records were prepared, maintained and used by the school psychologist, on behalf of the Board.

The records consist of notes taken by the school psychologist in the course of her meetings and conversations with individuals regarding allegations made against certain identified Board employees. I am satisfied that Records 7 through 14 were prepared, maintained and used by the Board, and that the first part of the test under section 52(3)3 has been satisfied.

Part Two of the Test under Section 52(3)3

As noted above, the records consist of notes of telephone conversations and meetings attended by the school psychologist concerning Board employees. I accept that they were prepared and used by the Board in relation to discussions or communications, specifically, meetings and telephone conversations about the allegation made against the two employees. As a result, the second part of the section 52(3)3 test has been met.

Part Three of the Test under Section 52(3)3

The Board submits that the discussions and communications relate to an employment-related matter in which the Board has an interest.

I am satisfied that the two individuals against whom the allegations were made were employees of the Board at the time the records were prepared, maintained and used, and that the allegations and the actions taken in relation to the allegations are about employment-related matters concerning these employees.

I also agree with the Board's position that it had an interest in these employment-related matters involving its employees, and that this interest was more than a mere curiosity or concern. [See *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Therefore, the third part of the section 52(3)3 test has been met.

I have found that all three parts of the section 52(3)3 test have been met. As a result, I conclude that Records 7 through 14 are excluded from the scope of the *Act* by virtue of section 52(3)3. In addition, I find that none of the exceptions in section 52(4) apply in the circumstances.

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

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

The meaning of "about" the individual

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

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

The meaning of "identifiable"

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

Representations and findings

The Board's representations on whether the records contain personal information focus primarily on the personal information contained in Records 7 through 14, which I have found are excluded from the scope of the *Act* by virtue of section 52(3)3. However, by relying on section 38(a) in conjunction with the other discretionary exemptions raised by the Board, the Board acknowledges that all of the records remaining at issue contain the personal information of the appellants and/or their child. On my review of the records, I find that all of them contain the personal information of the appellants and/or their child, as they all contain their names along with other personal information relating to them (paragraph (h)). Some of the records also contain the child's date of birth (paragraph (a)) and information relating to the child's education (paragraph (b)) for the purpose of the definition of "personal information" contained in section 2(1).

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

The Board claims that section 38(a), in conjunction with section 12, applies to all of the information contained in Records 15 through 46, which include handwritten notes, facsimile transmissions, copies of email messages and other correspondence.

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."

Solicitor-client communication privilege

Representations

The Board takes the position that twelve of the records remaining at issue qualify for exemption under the solicitor-client communication privilege component of both Branch 1 and 2 of section 12. The Board states:

> Records … 15, 16, 24, 25, 26, 30, 31, 32, 35, 36, 37 and 38 at issue in this appeal constitute communications of a confidential nature between the Board and its [named] in-house legal counsel, or external legal counsel retained by the Board, [a named lawyer], for the purpose of obtaining or giving legal advice, or represented a continuum of communications between legal counsel and the Board, or was legal counsel's working papers created for formulating legal advice. Therefore, those records are subject to solicitor-client privilege pursuant to Branch 1 and 2 of section 12 of [the *Act*]. In addition, [in-house counsel] selected these records to be included in his brief in anticipation of litigation.

The Board then reviews each of the records and identifies why it takes the position that the records qualify under the solicitor-client communication privilege.

The appellants respond to the Board's position by stating that, based on the descriptions of the records and the representations of the Board, ten of these twelve records appear to qualify for exemption under section 12 (that is, Records 15, 16, 26, 30, 31, 32, 35, 36, 37 and 38). However, they request that I review these records to ensure that they qualify for exemption.

Findings

On my review of the records which the Board claims qualify for exemption under the solicitor-client communication privilege in section 12, I make the following findings:

- Record 15 is a fax cover sheet and letter sent from a school principal to in-house legal counsel, to which are attached a further 6 documents. The Board states that this fax and letter were created and sent to in-house counsel on a confidential basis (as indicated on the fax cover sheet) for in-house counsel's use in giving legal advice. On my review of these records, I accept that this correspondence and the attachments were direct communications of a confidential nature between a client and solicitor, or their agents or employees, made for the purpose of obtaining professional legal advice.

- Record 16 is in-house legal counsel's handwritten notes representing his working papers used to formulate and give his legal advice.

- Record 26 is a fax cover page that refers to correspondence to in-house legal counsel.

- Record 30 is the handwritten note of a Board employee (together with an attached draft letter) in which she records the confidential legal advice she received by telephone on behalf of the Board from the Board's outside legal counsel.

- Record 31 is an email from a Board employee to the Board's outside legal counsel. The Board takes the position that it was created as part of the continuum of communications between the Board employee and outside counsel for the purpose of keeping counsel informed so that legal advice could be sought from him.

- Record 32 is an email (along with an attachment) from a Board employee to the Board's outside legal counsel seeking legal advice. The attachment also refers to the seeking of legal advice on the matters referenced in the emails.

- Record 35 is an email from a Board employee to in-house legal counsel, in which the employee seeks legal advice. Record 36 is an email from in-house counsel to the Board employee, responding to Record 35 above and providing his legal advice. Record 37 is a string of emails between a Board employee and in-house legal counsel in which the employee seeks legal advice and in-house counsel responds. Record 38 is a document which the Board states was sent to in-house counsel from a Board employee.

Based on my review and description of these records as set out above, and based on the representations of the Board, I find that Records 15, 26, 31, 32, 35, 36, 37 and 38 and the attachments thereto were direct communications of a confidential nature between a client and

solicitor, or their agents or employees, made for the purpose of obtaining professional legal advice. I also find that the disclosure of Record 30 would reveal the confidential legal advice received from a lawyer, and that Record 16 constitutes a legal advisor's working papers directly related to seeking, formulating or giving legal advice. Accordingly, I am satisfied that all of these records qualify for exemption under the solicitor-client communication privilege in section 12 of the *Act*.

With respect to Records 24 and 25, I will review these documents under my discussion of litigation privilege, below.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO- 2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Representations

The Board's representations

The Board takes the position that all of the records remaining at issue were created or prepared for the dominant purpose of anticipated litigation against the Board by the appellants. The Board supports its position by referring to the nature of the allegations made against the Board and its staff, as communicated by the appellants to the school psychologist and the Board Superintendent.

The Board refers to various documents which it indicates describe the types of allegations made against the Board, and includes reference to the appellants' Notice of Appeal letter, a letter sent to an MPP dated December, 2003, the school psychologist's notes regarding the allegations against certain Board employees (contained in Records 7 to 14, and which I have found above fall outside the application of the *Act*), and staff emails generally. The Board then provides some specifics of the allegations made by the appellants which it claims led it to the conclusion that litigation from the appellants could reasonably be contemplated.

In addition, the Board states:

> To date, the Board is not aware that any litigation has been commenced. However, the [appellants have] sought to appeal to the Ministry of Education pursuant to the *Education Act* the issue of removing records from the OSR. Further, the Board is of the view that the [appellants are] waiting upon the completion of this appeal before commencing any such litigation.
>
> Records 17 to 23 are handwritten notes prepared by [the school psychologist] of telephone calls and meetings with the [appellants] or other Board staff. The records were prepared during the months of November 2002, December 2002 and January 2003. They were prepared for the dominant purpose to obtain legal advice and in contemplation of litigation. … The notes were also created for legal counsel for use in giving legal advice and in contemplation of litigation.
>
> [The school psychologist] used the notes to refresh her memory when seeking legal advice throughout the relevant time in question. Upon her retirement from full-time employment with the Board, she turned them over to [in-house counsel] with the aim of keeping him informed of the chronology of events so he could use them to continue to provide on-going legal advice in this matter to the staff including [the school psychologist's] successor.
>
> Further, [in-house counsel] selected these notes to include in his brief for the above purpose and in contemplation of litigation….
>
> Records 27, 28, 29, 33, 34 and 39 to 46 ... were also created for legal counsel for use in giving legal advice and in contemplation of litigation. All of the emails

> have been "printed" by [the school psychologist] whether or not she was the author. She did so for legal counsel. [The school psychologist] turned all of these records over to [in-house counsel] with the aim of keeping him informed of the chronology of events so he could use them to continue to provide ongoing legal advice in this matter to the staff including [the school psychologist's] successor.
>
> Further, [in-house counsel] selected these records to include in his brief for the above purpose and in contemplation of litigation.

The Board then refers to the "dominant purpose" test used to determine litigation privilege as described by the courts in *Waugh v. British Railways Board*, and *General Accident Assurance Co*. The Board concludes by adding that:

> The test really consists of three elements, each of which must be met. First, it must have been produced in contemplation of litigation. Second the document must have been produced for the dominant purpose of receiving legal advice or as an aide to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be reasonable - meaning that there is a reasonable contemplation of litigation.
>
> Thus, even though the author of the emails may not have created them with the "dominant purpose" of contemplated litigation, [the school psychologist] printed them out for that reason and for use by legal counsel in giving legal advice….
>
> As a result, privilege attaches to Records 7 to 14, 17 to 23, 27, 28, 29, 33, 34 and 39 to 46.
>
> As explained … above, litigation is still reasonably contemplated. Furthermore, Branch 2 statutory litigation privilege applies to these records and any termination of litigation does not negate the privilege. [*Ontario (Attorney General) v. Big Canoe* (2002), 62 OR. (3d) 167 (C.A.)]

The appellants' representations

The appellants take issue with the position of the Board that the referenced records were created or prepared for the dominant purpose of anticipated litigation by them against the Board. The appellants argue that many of the records referred to by the Board in support of its position that it anticipated litigation from the appellants, were created a considerable time after the records at issue were created. The appellants also provide considerable information concerning the circumstances surrounding the creation of the records at issue. They state that at the time the records at issue were created (from November, 2002 until the end of January, 2003), the Board employees involved in creating the records at issue would not have had a reasonable apprehension of litigation.

The appellants also state that, during that period, their allegations could not have included the ones referred to by the Board, and state: "We could not allege then what we did not know." The appellants state that between November 2002 and January 2003 they were trying to understand what was happening with their son. They state:

> During November, 2002 - February, 2003, as we discovered things, we asked for explanations, and where appropriate … for rectification of our son's record. We were acting in good faith on assurances from the [Board] officers that explanations would be provided, and our son's records and status at school put right. At some point in January 2003 we were informed that some [Board] officers were "talking to lawyers", but even then we believed that working in cooperation with these offices must offer the best solution, given the obvious facts and merits of the case. Only … in a conference call on February 6, 2003 … did we … abandon that good faith. If any of these [Board] officers were contemplating litigation before 2003 - then they knew a great deal more than we did, and than we could allege, at that time….

The appellants also take issue with the Board's position that these records were "prepared in contemplation of litigation", by the actions of the school psychologist of printing off copies and providing them to in-house counsel when she retired in 2003. The appellants state:

> Litigation privilege attaches to documents that are "created" in contemplation of litigation. Many of the claims of privilege in this case relate to documents that were created prior to the contemplation of litigation and were subsequently printed in contemplation of litigation.

The appellants state that the subsequent printing and providing of these documents to the in-house counsel does not mean that they were "created" in contemplation of litigation.

In addition, the appellants take issue with the Board's argument that these records were "selected" by legal counsel to include in his brief in contemplation of litigation. They refer to the nature of these documents (which are not publicly available, but include notes of Board employees) and argue that, due to the nature of these documents, they cannot be included under the *Nickmar* test set out above.

Analysis and Findings

As identified above, litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. In order to meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

In this appeal, the Board asserts that the records at issue, created between November, 2002 and the end of January, 2003, were all created by the authors for the dominant purpose of reasonably contemplated litigation. The appellants take the position that they were merely finding out

information during that time period, and it was only in February of 2003 that litigation could possibly have been contemplated.

I have carefully reviewed the records at issue in this appeal, as well as the representations of the parties and the other documentation in this appeal.

The information provided by the appellants sets out in detail the history of the dealings between the appellants and the Board. Although the appellants acknowledge that they had raised issues with the Board in the past, and had one "brief period of conflict" with the school attended by their son in the past, it was not until November of 2002 that the issues resulting in the creation of the records at issue in this appeal began to escalate. During November of 2002 the appellants "conveyed their concerns" to Board employees and then made their allegations of misconduct against two Board employees. The records relating to these allegations (to which the *Act* does not apply, see above) were created during the latter part of November and the early part of December, 2002 and, as identified by the Board, were created in the course of determining whether or not staff had followed proper policy and procedures with respect to matters that involved the appellants' son.

In my view, based on the material provided to me, I am not satisfied that all of the records at issue were prepared for the dominant purpose of reasonably contemplated litigation. Although I accept that, given the nature of the allegations made against the Board employees, litigation between the appellant and the Board may have been a possibility, in my view the records created in the earlier dealings between the Board employees and the appellants relating to these matters would not have been created for the "dominant purpose" of reasonably contemplated litigation.

However, in my view by the end of December of 2002, litigation against the Board was specifically anticipated by Board employees, and I accept that the records created from that point in time would have been prepared for the dominant purpose of reasonably contemplated litigation. Although the appellants take the position that litigation could only have been reasonably contemplated by the Board in February of 2003, I do not accept that position. The appellants acknowledge they were aware that the Board had consulted with its lawyers, who were then involved in these matters, prior to February of 2003. Given the nature of the allegations made by the appellants and the persistence with which they pursued them, I am satisfied that, during the course of December of 2002, the nature of the relationship between the Board and the appellants changed, and records created by the Board in relation to the appellants' allegations would have been prepared for the dominant purpose of reasonably contemplated litigation. The issue which I must address is at what point in time litigation was reasonably anticipated by the Board.

After carefully reviewing the representations and the records, I am satisfied that, following various meetings the appellants had with different Board employees on December 4, 2002, litigation could be reasonably anticipated by the Board from that point in time. In my view, the records remaining at issue in this appeal relating to the allegations and issues raised by the appellants, and created on or after the day following December 4, 2002, were created for the "dominant purpose" of reasonably contemplated litigation. I conclude that at that time, litigation

was reasonably contemplated by the Board, and had become more than a "vague or general apprehension of litigation".

However, in my view, based on the information provided to me, records created on or before December 4, 2002 would not have been created for the "dominant purpose" of reasonably contemplated litigation. Accordingly, any records created on or before that day would not have been created for the "dominant purpose" of existing or reasonably contemplated litigation.

Accordingly, I conclude that Records 17, 18, 19 and 41, which were created on or prior to December 4, 2002, were not created by the Board employees for the "dominant purpose" of existing or reasonably contemplated litigation. However, the Board argues that these records qualify for exemption under section 12 of the *Act* on a number of other grounds, and I will briefly review those arguments.

As identified above, the Board takes the position that, upon her retirement from full-time employment with the Board late in 2003, the school psychologist turned her notes (including Records 17, 18 and 19) over to in-house counsel with the aim of keeping him informed of the chronology of events so he could use them to continue to provide on-going legal advice in this matter to staff, including the school psychologist's successor. The Board also states that, by printing out Record 41 for in-house legal counsel, the school psychologist (who is not the author of this record) created the record for legal counsel for use in giving legal advice and in contemplation of litigation. The Board also states that in-house counsel selected these records to include in his brief for the above purpose and in contemplation of litigation.

Based on the material provided to me, I am not satisfied that Records 17, 18, 19 or 41 qualify for exemption under section 12 of the *Act* on the basis that they were provided by a Board employee to in-house counsel, or printed out and provided to him. The subsequent printing and providing of these documents to in-house counsel does not mean that they were "created" in contemplation of litigation. These records were already in existence at the time they were provided to the lawyer. In addition, I am not satisfied that these records are the type of documents which could become privileged on the basis of the test in *Nickmar*, nor have I been provided with evidence to demonstrate that in-house counsel exercised skill and knowledge in selecting them for inclusion.

As a result, I find that Records 17, 18, 19 and 41, which had been created on or prior to December 4, 2002, were not created for the "dominant purpose" of existing or reasonably contemplated litigation under Branch 1, nor were they prepared in contemplation of or for use in litigation under Branch 2 of section 12. The other records remaining at issue in this appeal were created after December 4, 2002 and, in my view, qualify for exemption under the litigation privilege component of Branch 1 of section 12 of the *Act*.

Accordingly, I find that Records 15, 16, 20-40, and 42-46 are subject to solicitor-client privilege under section 12 of the *Act*. Because these records also contain the personal information of the appellants and/or their son, they are exempt from disclosure under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

I have found that Records 17, 18, 19 and 41 do not qualify for exemption under section 12. As no other exemptions are claimed for Records 17, 18 and 19, I will order that they be disclosed to the appellants. The Board has claimed that Record 41 qualifies for exemption under section 7 of the *Act*, and I will now review the application of that exemption to Record 41.

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

The Board has claimed the application of the discretionary exemption in section 38(a) in conjunction with section 7(1) to Record 41.

General principles

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

[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]

Representations and findings

Record 41 is a copy of an email sent from a school principal to the school psychologist. The Board takes the position that it contains information which would reveal the advice or recommendations given by the school psychologist to the principal. The Board states that in Record 41 the principal is seeking advice from the school psychologist. The Board also states that the appellants know how the principal proceeded, and that by revealing the request for advice and the specific advice sought contained in Record 41, this would reveal the actual advice that was given.

The appellants question the application of section 7 to the records at issue, including Record 41, and request that this office review the application of that exemption to the records.

Record 41 is a relatively brief email from a school principal to the school psychologist, in which the principal identifies issues and specifically requests advice as to how to proceed. Although the record itself does not contain advice or recommendations for the purpose of section 7 of the *Act*, I am satisfied that, based on the representations of the Board and the nature of the dealings between the parties, the disclosure of Record 41 would permit the appellants to accurately infer the advice or recommendations given. Accordingly, I find that Record 7 is exempt from disclosure under section 7 of the *Act*. Because this Record also contains the personal information of the appellants and their son, 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.

EXERCISE OF DISRETION

As set out above, sections 7, 12 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 has provided detailed representations on the factors it considered in deciding to exercise its discretion to withhold access to the records for which it claimed exemption under sections 7, 12 and 38(a). These factors include the nature of the information contained in the records, the nature and purpose of the exemptions in sections 7 and 12, and the fact that certain information was provided to the appellants. On my review of all of the circumstances surrounding this appeal, including the Board's representations on the manner in which it exercised its discretion, I am satisfied that the Board has not erred in the exercise of its discretion not to disclose the records withheld under sections 7, 12 and 38(a).

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 for the following records:

- [An identified school] Local School Team Meeting notes or records from 1997-2003 concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school kept and used by the principal.

- Records kept by teachers at the identified school from 1997 to [the date o the request] concerning the requesters' son and any references to procedures and treatment of learning disabled students at the school.

- Records resulting from their investigation into their son's educational history at the school.

- Records with respect to the Board's internal investigation as to what happened to their son, including recommendations resulting from that investigation.

- Records in response or reaction to an identified letter from the Minister of Health to the Board.

In addition to these five categories of records, identified in the request as a "summary of information sources", the request letter also identified by name numerous Board employees under each of those five categories. The 9-page request then provided a "Detailed list of Records Requested", and listed 57 incidents or categories of requested records, often including a list of the names of the Board employees for each of these categories of requested records.

In response to the request, the Board identified over 100 responsive records, and granted access to all but the records addressed in appeal MA-040046-2. The Board's response also stated:

> I understand that on or about December 4, 2002 you met with [the school psychologist] and reviewed [your son's] Board psychological file. You requested at that time that a copy of the entire file be mailed to you. The entire file except the Standardized Test Protocol forms was mailed to you on December 6, 2002. We are again providing you with a copy of this file.
>
> I am enclosing copies of all records to which you have been granted access. Where only partial access has been granted, we have severed (not released) the exempted portions. …
>
> All persons named in the request who could be contacted were asked to search for the requested records. If no copy of a requested record is enclosed, then no such record exists or can be found.

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

During mediation, the appellants provided the mediator with a 9-page edited copy of their appeal letter, which describes in detail the questions they raise concerning the adequacy of the search conducted by the Board. On consent, that letter was shared with the Board when I sent the Notice of Inquiry in appeal MA-040046-2, inviting the Board to address the reasonableness of the search.

In its representations in response to the Notice of Inquiry, the Board identifies that it had located additional responsive records, and that a supplementary decision would be made regarding access to those additional records (see above). The Board also provided representations on the nature of the searches conducted for responsive records, and provided five affidavits sworn by Board employees regarding the nature of the searches conducted and the results of those searches.

The Board's representations were shared with the appellants, who provided a 30-page copy of their "provisional representations" in response. Through counsel, the appellants also provided further representations on the issue of the reasonableness of the searches for records. As set out in Interim Order MO-2046-I, I deferred my review of the issue of the reasonableness of the search for responsive records, in order to address that issue at the same time as it is addressed in Appeal MA-040046-4. The appellants provided further representations on the search issue in their representations in appeal MA-040046-4, in response to the Notice of Inquiry I sent to them in that appeal.

Reasonable Search

Appellants' letter of appeal

The appellants' letter of appeal, a modified version of which was shared with the Board, identified a number of the reasons why the appellants took issue with the nature of the searches conducted by the Board.

The letter begins by reviewing the request and the response received from the Board. It also reviews the records provided to the appellants in response to the request. With respect to the nature of the searches conducted, the appellants' concerns can be summarized as follows:

- The appellants believe that the Board is withholding records. The appellants base this belief on the records which they obtained while their son was attending the school, and they state that "many of these documents would certainly have other documents and records related to them, which we have not seen." The appellants then state that, since they already have these documents, and state that they are relevant, the Board did not conduct a reasonable search.

- The appellants state that they were not provided with specific information regarding the source, provenance, location or purpose of the documents which were provided to them.

- Although a particular test was not requested, the reasons why the test was administered were requested. The appellants therefore consider the Board's denial of access to the test "an attempt to divert attention" from other serious issues.

The appellants also identify the following as "inadequacies of what was provided":

- They believe additional school meeting notes ought to exist.

- They refer to the records they received from the social workers file, and they believe records relating to a "socialization study" at the school ought to exist (and make allegations concerning the "true purpose" of this study).

- They refer to an identified Superintendent (Superintendent A) and the material they had received from her in the past as proof that other records ought to exist. They then refer to four instances where they had involvement with this Superintendent, but that the records which they received relating to these incidents were incomplete - that is - that other records relating to these incidents ought to exist (for example, notes of conversations the superintendent referred to having with others, including legal counsel).

- The appellants' son's Grade 5 report card is missing.

- The Psychological file, which the appellants identify as possessing a complete copy of (up until an identified date), contains certain double-sided sheets of paper. One of the pages appears to be missing, and they question the numbering of the pages which were provided to them. They also state that one of the attendees at an identified meeting was taking notes of the meeting, and request copies of those notes, as well as other correspondence and notes maintained by her.

Lastly, the appellant identify the following as records which were not provided but which they argue "must exist":

- Certain teacher records (referred to in point 2 of their request), as well as a reference to a "green book" which the appellants were shown, but not provided with.

- Internal emails or other communications - the appellants maintain that these must exist, and give instances of where records such as these would have been created.

- Records responsive to point 3 of the request, about the "internal investigation" of the appellants' son's case. The appellants refer to Superintendent A and the school psychologist as people who were involved in this and ought to have records. Records referred to include communications with members of the legal department. In addition, the appellants refer to two individuals who were employees but left the employ of the Board. The appellants state that they are now requesting copies of records relating to the departure of these employees, as they believe they would be relevant.

- The appellants then specifically request details about how the Board records, stores and retrieves personal information, and specifically ask about information relating to three identified [employees].

Representations of the Board

In response to the Notice of Inquiry sent to it, the Board provided representations on the nature of the searches it conducted for responsive records.

The Board begins by identifying that, after receiving the request, the Senior Manager of Board Services [the Senior Manager], who is the person responsible for making decisions in response to requests for information pursuant to the *Act*, had a telephone conversation with one of the appellants to further confine the places to search. The Board then provides the following information regarding the specific details of the search (for simplicity, I have retained the paragraph numbers as set out in the Board's representations):

> 56. Upon receipt of the Request, [the Senior Manager], by memorandum dated January 26, 2004, wrote to [the] Superintendent of Education, [of an identified area], stating the nature of the appellants' request and asking that [the] Superintendent initiate a search for the Records or advise him if there was someone he should contact. (See Affidavit of [the Senior Manager])
>
> 57. Subsequently, [the Senior Manager] was advised that [the appellant's son's school (hereafter "the school")] is located within [an identified] family of schools and that he should contact [an identified individual, hereinafter referred to as Superintendent A], Superintendent of Education for that area. (See Affidavit of [the Senior Manager]).
>
> 58. By memorandum dated February 4, 2004, [the Senior Manager] wrote to [an identified individual], General Legal Counsel for the Board and … [the] Executive Superintendent, Special Education and Support Services, stating the nature of the Appellants' Request and asking them to initiate a search for the Records. (See Affidavit of [the Senior Manager])
>
> 59. [The Senior Manager] then sent a copy of the request to Superintendent [A] to coordinate a search for records because she is the Supervisory Officer

responsible for [the school], where the appellants' son attended. (See Affidavit of [the Senior Manager])

60. Superintendent [A] then searched her files and requested the Principal of [the school], [B], to search through the Ontario Student Record (the "OSR") and any school files in order to respond to the request. (See Affidavits of Superintendent [A] and Principal [B])

61. By memorandum dated February 27, 2004, Superintendent [A] advised [the Senior Manager] of the results of her search, the results of Principal [B's] search and enclosed copies of the records which were responsive to the request. (See Affidavits of [the Senior Manager] and Superintendent [A]). Superintendent [A] produced from her files the following documents:

> (a) "MTG.-[specified date]" notes and Area Identification, Placement, Review Committee, Consent dated … both in response to item number 54 of the request,
>
> (b) "… Phone Message" and … letter to [an identified individual] from [the Minister of Education], both in response to item number 56 of the request; and
>
> (c) Email and attachment from [an identified individual], In-House Legal Counsel for the Board which I have been advised has not been disclosed to the appellants pursuant to Section 12 of [the *Act*]. These documents are in response to item number 57 of the request.

62. Superintendent [A] was not involved in any investigation of the [identified test] or anything to do with the Psychology Department because this is not her area of responsibility. She had no records responsive to items 44 and 48 of the request. (See Affidavit of Superintendent [A] and Exhibit "B" thereto).

63. To the best of Superintendent [A's] knowledge, there was no formal "investigation into [the appellants' son's] school career as it had been handled by Toronto District School Board as a whole" as alleged by the appellants in item 55 of the request. In any event, she has no records responsive to this item in the request. (See Affidavit of Superintendent [A] and Exhibit "B" thereto).

64. Superintendent [A] requested [an identified individual (hereafter administrative staff person C)], administrative staff person with the Board, to contact the following persons listed in the request: [21 named individuals]. (See Exhibit "C" to Affidavit of Superintendent [A]).

65. [Administrative staff person C] asked the [21] persons listed above the following two questions: "Do you have any documents pertaining to [the appellants] family, in particular [the appellants' son]?" and "Do you have any awareness that a document exists and where we might find it?" All [21] persons listed above answered "No" to both questions except [Principal [B] and individual [D]]. (See Exhibit "C" of Affidavit of Superintendent [A])

66. By memorandum dated February 13, 2004, Superintendent [A] requested that Principal [B] search through the OSR and any school files for records responsive to items 3, 13, 14, 15, 16, 25, 26, 28, 29, 30, 49, 51 and 52 of the request. (See Affidavit of Principal [B])

67. By memorandum dated February 13, 2004, Principal [B] advised Superintendent [A] of the results of her search and forwarded twenty-five records from the OSR which records included Individual Education Plans; Identification, Placement and Review Committee documents; and Provincial Report Cards. (See Affidavit of Principal [B])

68. In addition, Principal [B] located a binder containing a typed summary of LST Meeting notes left by the previous Principal… . Principal [B] located the following LST Meeting notes which were responsive to the Request: [seven identified dates].

69. Executive Superintendent [E] requested that [F], Central Co-ordinator of Support Services, coordinate the search for records responsive to the Request located in the Social Work and Psychology Departments. (See Affidavit of [the Senior Manager])

70. Central Co-ordinator [F] then requested that [Coordinator [G]], Co-ordinator of Social Work for the … Region, coordinate the search in the Social Work Department and that [the school psychologist], Co-ordinator of Psychology for the … Region, coordinate the search in the Psychology Department. (See Affidavits of [the senior manager], [Coordinator G] and [the school psychologist])

71. [Coordinator G] provided [individual F] with a copy of the Board's Social Work file for the appellants' son. In turn, [individual F] produced a copy of the file to [the senior manager]. (See Affidavits of [the senior manager] and [Coordinator G])

72. In addition, [Coordinator G] contacted the following social workers employed with the Board who were identified in the Request and asked them whether or not they had any notes or other materials responsive to the Request:

[three identified individuals, including individual D]

(See Affidavits of [the senior manager] and [Coordinator G])

73. On or about March 30, 2004, [Coordinator G] produced to [the senior manager] three pages of handwritten notes made by [individual D] described as follows:

(a) [The school] – [identified date] at the top of the note;

(b) Contact Note: … dated [a specified date], 2002; and

(c) Contact Note: … dated [a specified date], 2002.

74. In addition, [Co-ordinator G] advised [the senior manager] that [the two other identified individuals] advised her that they do not have any notes or other material responsive to the Request. (See Affidavit of [Coordinator G])

75. On or about February 16, 2004, [the school psychologist] produced to [the senior manager] a photocopy of the entire Board Psychology file of the Appellants' son. (See Affidavits of [the senior manager] and [the school psychologist]).

76. During the first week of March, 2004, [the school psychologist] telephoned [four named individuals] to inquire whether these persons had any documents relating to the appellants or their son. They responded that they did not have any documents. (See Affidavits of [the senior manager] and [the school psychologist])

77. On April 2, 2004, [the senior manager] issued the decision letter disclosing all of the records which had been produced to him except those records which are now the subject of [Appeal MA-040046-2] and the standardized test protocols. (See Affidavit of [the senior manager])

78. During the summer months, in a bona fide attempt to follow up on the appellants' concerns regarding the existence of additional responsive records as set out in the Notice of Appeal, [the lawyer on behalf of the Board] went back to the Board staff in question and asked them about the issues raised in the Notice of Appeal and, where appropriate, to conduct a further search for records responsive to the Request.

79. In late August, 2004, during [the senior manager's] absence from the Board, the Board's internal legal counsel, [individual I], produced records which will now be reviewed by [the senior manager] and a supplementary decision letter issued to the appellants.

Existence of Records

80. The Notice of Appeal alleges that additional records exist beyond those identified by the Board. Some of those records were not disclosed because they were not responsive to the request. The following representations address the appellants' concerns regarding the existence of additional responsive records.

81. 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 original search and the subsequent search which is also described above and below, when addressing the appellants' specific issues, proves that the Board has made a reasonable effort to identify and locate responsive records.

82. 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 conducted the search: the Superintendent of Education, the Co-ordinator of the Psychology Department, the Co-ordinator of the Social Work Department and the Principal of [the school]. In addition, approximately thirty current and retired teachers, principals, psychologists and social workers were also contacted as requested by the appellants.

83. It is submitted that the search by the Board was both reasonable and thorough.

84. During [the] above-mentioned inquiry in the summer, it was discovered that through inadvertence, a member of [the senior manager's] staff had not photocopied and included in the April 2, 2004 decision package, the records produced by [individual F] which were responsive to items 17, 18 and 19 of the Request. Notwithstanding that the appellants have admitted in their Notice of Appeal that they already have a copy of these documents, [the senior manager] will send a copy of those documents to the Appellants. [reference to certain documents attached to the affidavit]

85. Documents relating to the "socialization study", all records for all students relating to this "socialization study", and any other documents in the Social Work file apart from items 17, 18 and 19 now requested under (II) on page 4 of the Notice of Appeal, did not form part of the original Request.

[An identified doctor – individual J's] November 27, 2002 Notes

86. At page 6 of the Notice of Appeal, the appellants explain why they believe page 2 is missing from those notes. The following is the Board's explanation.

87. Subsequent to the receipt of the Notice of Appeal, [the Board lawyer] asked [individual H] to look at the copy of the notes that exist in the psychology file and to describe them. She described them as follows: The notes are three pages in length. The first page is single-sided with the heading "Misrepresentation of [an identified individual's] Qualifications" and the date, November 27, 2002. The back of the first page is blank. The next page is numbered 3 and it is double-sided and the last page of the notes are also double-sided. This appears to be consistent with the appellants' statement in the Notice of Appeal where they described the first copy of these notes that they received on December 5, 2002. (See Affidavit of [the senior manager])

88. Subsequently, [individual J] confirmed to [the lawyer on behalf of the Board] that to the best of her recollection, page 2 is not missing and that she must have made an error in numbering the pages. (See Affidavit of [the senior manager])

89. [The senior manager's] assistant explained that on April 2, 2004, when she was photocopying [individual J's] notes, she saw that the first page was single-sided and assumed that the remaining two pages were the same and therefore, photocopied them as single-sided. This single-sided version was the copy that I received. In order for [the senior manager] to communicate with me regarding these documents, they had been numbered. This document was numbered "44". (See Affidavit of [the senior manager])

90. When it was subsequently discovered that [the lawyer on behalf of the Board] did not have a complete copy of those notes, [the senior manager's] assistant labeled the missing pages "44p.3" and "44p.5" so that I could identify the document to which the pages belonged. (See Affidavit of [the senior manager])

91. [The senior manager's] assistant was working from a photocopy of these notes and not the original. On the photocopy, the page numbers are obscured. She did not intend to alter the original numbering of those pages. (See Affidavit of [the senior manager]).

Grade 5 Report Card

92. When Principal [B] searched the OSR in February, 2004, she could not locate a copy of the appellants' son's December … grade 5 report card. (See Affidavit of Principal [B]).

93. On August 31, 2004, Principal [B] again searched the OSR for this grade 5 report card and could not locate it. (See Affidavit of Principal [B]).

94. Principal [B] also asked [an identified individual], the grade 5 teacher of the Appellants' son, if she had a copy of the report card and whether she knew what happened to it. She answered she did not have a copy of the report card, which is consistent with the Ministry of Education Guidelines on OSR's which states that the report cards are to be filed in the OSR. (See Affidavit of Principal [B]). In addition, when [the grade 5 teacher] was questioned by [administrative staff person [C]] in March 2004, she gave the same answer. (See Affidavit of Superintendent [A]).

95. Assuming that the grade 5 report card was issued, and [the grade 5 teacher] has no reason to believe that one was not prepared by her, the appellants would have received a copy of that report card in December ... The only explanation staff can think of regarding the missing report card is that it was misfiled.

[The School] Team Meeting Notes

96. Local School Teams, also known as School Support Teams, are created at the local school level. School Boards do not have a legislative responsibility to establish such teams, but most Boards do. The purpose of LSTs is to support teachers, school administrators and parents by facilitating appropriate intervention for students in need of assistance in regular and special education.

97. There are no formal rules about the composition of the LST as the teams are designed to suit the specific needs within each particular school, using the individual resources and skills of the school staff responding to local conditions. The core members of the team would include: the principal or vice-principal; the school's special education resource teacher (if available); the student's current teacher; a special education consultant (if needed); or any other professional as needed.

98. The usual process is as follows. The parent or class teacher recognize that a student is experiencing difficulty in learning for whatever reason. The teacher initiates a problem solving process at the classroom level. If the student continues to have difficulty, a referral is usually made to the LST.

99. The team then meets and discusses each student's problems with learning. During the meeting, the members of the team will change as the discussion moves to each student. Parents are often in attendance at these meetings and therefore would only attend during the discussion of their child.

100. The issues are discussed and solutions proposed. A student continues to be brought forward to the LST until such time as the problems are resolved and/or the appropriate supports are put in place, etc.

101. There is no formal requirement for taking notes and each school develops their own practice. Usually each member of the team takes notes for their purposes ie., usually as a "to do" list and a member of the school administration takes the official notes, if any.

102. During the time in question, former Principal [K] would usually take handwritten notes and then prepare and type a short summary of the meetings and keep the typed notes in a binder in her office.

103. Once the tasks listed on the handwritten notes were completed and/or the handwritten notes were no longer needed, each staff person would destroy their notes. Usually the official notes of the LST would be destroyed once the child leaves the particular school.

104. This is a very fluid process where from team meeting to team meeting the needs and strengths of the child may change and previous notes in certain cases may become outdated. Again, this is not a formal process like an Identification, Placement and Review Committee ("IPRC") meeting. It is a tool to be used at the local school level.

105. In this case, the LST notes are kept in a binder in the Principal's office.

106. [Individual K] was the former principal of [the school] and retired in … 2002. On occasion, she is brought back by the Board on a per diem basis to assist with covering medical leaves, maternity leaves, etc. The appellants confirm at page 7 of their Notice of Appeal that Principal [B] advised them that she had spoken with former Principal [K] and she advised that the notes she used to prepare the IPRC application in December 2000 no longer existed. Former Principal [K] was also contacted again in March 2004 by [administrative staff person C] and she again responded that she has no documents regarding the Appellants' son. (See Affidavit of Superintendent [A]).

107. [The lawyer for the Board] again contacted former Principal [K] this past summer and she again confirmed that she has no notes or documents. In addition, once the IPRC makes its decision and the appeal period has passed, any of her own handwritten notes regarding the IPRC were shredded as is the usual practice at the Board. Once the IPRC makes a decision, the official record for the Board is the IPRC decision and the package used in the meeting.

108. On April 2, 2004 the Appellants received a copy of the IPRC package which contains a summary of former Principal [K's] notes as well as the classroom teacher's notes.

109. The Appellants were provided with seven typed pages of LST notes and 7 pages of handwritten LST notes prepared by [individual L] and filed in the

psychology file. The Appellants state that they do not have the typed written notes for LST meetings held on [three identified dates]. It is true that the typed version of these notes could not be found, however, they do have a copy of [individual L's] handwritten notes for [two of the identified dates].

110. Item 2 in the Request refers to a document for "Local IPRC School Team Meeting". As explained above, an IPRC is not the same thing as an LST. This may explain why no notes for [one of the identified dates] LST meeting could be found.

111. A review of the detailed list of records in the Request indicates that the Appellants wanted LST notes for the following dates: [9 identified dates].

112. Either a typed written LST note or [individual L's] handwritten note was provided for each of these LST meetings except for [two of the identified dates].

113. It may be that there was no LST meeting in September 1998. A review of former Principal [K's] summary of LST meetings in the December, 2000 IPRC package mentions a November, 1998 LST meeting but does not mention a September, 1998 LST meeting.

114. During the search of [the school] offices by Principal [B] in February 2004, she located former Principal [K's] binder of the typed summary of LST notes. These were provided to the Appellants on April 2, 2004. (See Affidavit of Principal [B]).

115. In response to the Notice of Appeal, on August 31, 2004 Principal [B] again searched LST meeting notes for notes referring to the appellants' son. None could be found. (See the Affidavit of Principal [B]).

[Superintendent A]

116. To the best of Superintendent [A's] knowledge, she has produced from her files all records responsive to the Request. (See Affidavit of Superintendent [A]).

117. As a Superintendent of Education, [superintendent A] is responsible for twenty elementary schools, eleven secondary schools and the support programs for expelled students. The [identified] family of schools is a large area and, as a result, she spends a great deal of her time traveling by car within this area. Therefore, she handles many matters by telephone and clearly cannot make notes while driving.

118. In any event, the appellants state in their Notice of Appeal that they have copies of correspondence between themselves and Superintendent [A].

119. The records referred to in paragraph B on page 5 and paragraph D on page 6 of the Notice of Appeal did not form part of the original Request.

Regrading of ... Project

120. The Appellants requested that Principal [B] have the appellants' son's [identified] writing Project remarked. The Principal complied with their request. Principal [B] and Superintendent [A] do not recall creating any records with regard to this matter and no records could be found, other than the appellants' letter dated December … 2002. (See Affidavits of Superintendent [A] and Principal [B]).

Cleaning Out of OSR

121. Superintendent [A] and Principal [B] do not recall creating any records with respect to this matter and no records can be found other than the appellants' letter dated December, 2002. (See Affidavits of Superintendent [A] and Principal [B]).

Notes, Telephone Calls and Emails

122. The usual documents prepared by a teacher are behavioral logs; ISA Funding documentation; Individual Education Plans; and achievement reporting such as report cards. The official record for a student at a school board is the OSR. The *Education Act* and the Ministry of Education's guideline on OSR's govern this file.

123. The expectation of teachers is that any notes concerning the evaluation of a student are eventually destroyed as the substance of those notes are incorporated into the report card or Individual Education Plan. These documents then become the official records. Therefore, teachers do not keep records. Anything conducive to the education of the child is kept in the OSR.

124. Elementary school teachers at the Board do not have personal computers and therefore, generally do not have email which would explain why there were no emails from teachers.

125. Teachers do have access to computers to generate their report cards and Individual Education Plans but once the hard copy of those documents is produced, it would be consistent … that it would be deleted. This is certainly the case in the situation set out on page 7 or the Notice of Appeal, where [an identified individual] is being asked in December, 2002 if she has any records on her computer for the school year 2000-2001.

126. The "Green Book" mentioned on page 7 of the Notice of Appeal was not produced because it did not form part of the original Request.

127. There [are] approximately 13,000 students in Superintendent [A's] region. On a daily basis she takes calls and emails from principals and parents concerning those children. It is not realistic to assume that she would be making notes on every call or meeting or that if she did, she would continue to keep there once the issue is resolved.

128. Since the amalgamation of the seven school boards in the GTA, there are fewer staff covering a larger territory. Supervisory staff receive numerous emails and telephone calls. It is not inconsistent with the facts of this case that if any notes regarding telephone calls or meetings were made, they may have been destroyed once the issue was dealt with. In any event, an exhaustive search for records has been made. No notes, etc. could be located.

The Board attaches to its representations five affidavits from five of the individuals involved in the searches for records and/or in the interactions the appellants and their son had with the Board. These affidavits were sworn by the senior manager, Superintendent [A], Principal [B], Coordinator [G] and the school psychologist. These affidavits are provided in support of the information contained in the representations of the Board.

The appellants' representations in MA-040046-2

In response to the Notice of Inquiry in Appeal MA-040046-2, the appellants provided lengthy and detailed representations in support of their view that the searches conducted for responsive records were not reasonable. Their representations can be summarized as follows:

- that the searches conducted for responsive records were not reasonable, and that the Board's submissions "show in detail that no thorough search was conducted as promised: indeed, that no real search was conducted at all."

- that one-third of those named in the appellant's request were not contacted.

- that the contact with a number of the individuals who were contacted was inadequate (by means of a single short telephone call, made by an administrative assistant).

- that the search was narrowed to include only files which the Board knew the appellants already possessed.

- that the search was narrowed to include only existing written records.

- that certain departments and files (for example, the Special Education Department and the ISA files) were not searched.

In support of these points, the appellants provide very detailed representations, which I have carefully reviewed. In addition to extensive material supporting the main points the appellants make as summarized above, the appellants also focus on the following:

- that the search conducted at the school was inadequate, and the appellants identify the types of searches that they would consider appropriate, based on what they believe occurred at the school.

- that, notwithstanding the fact that the senior employees and individuals conducting the searches were the ones who created the records and were involved with the matters relating to the appellants' son, it was inappropriate for them to be conducting the searches for records, as this placed them in a "conflict of interest". The appellants also make a number of other allegations against these employees.

- that documents were destroyed or "funneled" to the legal department.

Counsel for the appellants also provided lengthy representations relating to the reasonableness of the searches conducted. Many of the points made in these representations parallel those made by the appellants, and they include: allegations that documents were destroyed; accusations that the scope of the request was improperly narrowed or reduced, particularly in light of the reasons why a time extension was requested; that specific employees were not contacted; that certain identified individuals simply "passed the request on" to others; that no explanations were provided with respect to certain portions of the request; and that the records which were subsequently located had been deliberately withheld. The representations also set out in great detail the nature and extent of the searches which the appellants now require the Board (and this office) to conduct.

The appellants' representations in MA-040046-4

In their representations in response to the Notice of Inquiry in MA-040046-4, the appellants were also invited to address the issues regarding the reasonableness of the search for records as a result of the fact that additional records had been located.

The appellants provided additional representations relating to the sufficiency of the search conducted by the Board for responsive records. In particular, they refer to the records which were subsequently found and which are at issue in appeal MA-040046-4. They state that these records ought to have been located in response to the first search conducted, and make allegations against Board employees. In addition, the appellants state that some of the records which were subsequently located had been copied to other Board employees, and that the searches conducted in response to the request ought to have located some of these records.

The appellants also identify a number of other concerns and allegations they have, and request that one of the remedies to address their concerns is that the Board be precluded from claiming the exemptions for the records which were located as a result of further searches. In addition, the

appellants also make a number of allegations regarding the record-keeping practices of the Board.

Analysis and Findings

As a preliminary matter, I wish to point out that 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, over 100 responsive records were identified and almost all of those were provided to the appellants. The remaining documents to which access was denied were addressed in Orders MO-2046-I and MO-2054-I. As a result of the further searches conducted, an additional 46 responsive records were located, and access was granted to some of those records (the records to which access was denied are reviewed above).

It is clear from the representations of both parties that they have spent considerable time and effort addressing the issue of whether the searches conducted by the Board for records responsive to the appellants' request was reasonable. I have set out above 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. Although I have not set out the appellants' representations in the same way, as they are considerably lengthier than the Board's, I have carefully reviewed all of the appellants' 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 appellants' request. It has also specifically responded to the points made in the appellants' appeal letter, and addressed each of those points in some detail. The Board has also provided

affidavit evidence from five individuals who conducted searches for responsive records, including some of the individuals who were directly involved with the creation of records and/or dealing with the appellants in the course of their interactions with the Board, resulting in the creation of records. The Board's representations and affidavits confirm that approximately 32 individuals were involved in searching for responsive records.

Based on the information provided by the Board, I am satisfied that the Board's search for records responsive to the request was reasonable in the circumstances.

Because of the extensive and detailed nature of the appellants' representations, I will specifically address a number of their claims.

The appellants take the position that the searches conducted for responsive records were not reasonable, and that the Board's submissions "show in detail that no thorough search was conducted as promised: indeed, that no real search was conducted at all." I specifically reject this position, and find that the Board conducted a reasonable search for responsive records.

The appellants state that one-third of the individuals named in the request were not contacted. I accept that not every individual listed or mentioned in the appellants' detailed nine-page single-spaced request was contacted in the course of the Board's search for records. However, based on my review of the Board's searches, and particularly given that the affidavits were provided by senior employees (or former employees) at the Board who had direct knowledge of the nature of the records requested, and that numerous other individuals most directly related to the appellants' request were contacted, I find the searches conducted were reasonable.

The appellants take the position that the Board's efforts to search for and locate records held by a number of the individuals who were contacted was inadequate (i.e.: that contact was made by means of a single short telephone call, made by an administrative assistant). As set out above, the issue to be decided is whether the Board has conducted a reasonable search for the records. Whether a search is reasonable depends on a number of factors. In this appeal, I am satisfied that contacting a number of the individuals by telephone and asking relevant questions relating to the search for responsive records was reasonable in the circumstances of this appeal, particularly given the large number of individuals identified by the appellants in their request.

The appellants argue that the search was narrowed to include only existing written records. In support of this position they refer in considerable detail to an attachment to two affidavits, in which the request to the affiants to conduct a search was for the search to be for "existing written records". I have carefully reviewed this attachment to the records, as well as the affidavits to which they are attached. One of these affidavits specifically identifies that the searches conducted by the affiant were of various records, including "notes and emails"; the other affidavit specifically identifies that the affiant "regularly" cleans out her emails as a result of the number of matters she deals with on a daily basis. Based on this information, I am satisfied that the searches conducted were not unilaterally narrowed.

The appellants take the position that certain departments and files (for example, the Special Education Department and the ISA files) were not searched. In support of their position they refer to a number of records which they have received in the course of their request for records which evidence that the Special Education Department was copied with some of the documentation, and they refer to another order of this office involving a different school board and appellant (Order MO-1778) in support of their view that ISA records ought to exist. The appellants also state that, on their review of the Board's representations regarding the nature of the searches conducted, the ISA files and the Special Education Department are not specifically mentioned.

However, in the appellant's representations they refer to conversations they have had in the course of their dealings with the then Supervising Principal of Special Education, that they were informed that "no files on children generally, or on [their son], were kept in her department". In addition, affidavit evidence from the Board confirms that the Executive Superintendent of Special Education was asked to initiate a search for responsive records, and he identified the areas where those searches for responsive records ought to be conducted. I do not accept the appellants' lawyer's characterization of the Executive Superintendent's actions as "simply passing the request on" to others. The Executive Superintendent of Special Education was involved in the searches and chose how to conduct those searches. I am satisfied that the searches conducted to identify and locate any responsive records was reasonable.

Finally, based on my review of the representations provided in this appeal, and particularly on the evidence provided by the Board regarding their search for records, and the sworn evidence provided by key personnel involved in these matters and involved in the search for responsive records, I do not accept the allegations made by the appellants regarding deliberate destruction or withholding of responsive records.

Accordingly, based on all of the evidence provided to me, and as particularized above, I am satisfied that the Board's searches conducted for responsive records was reasonable.

ORDER:

1. I uphold the decision of the Board that the *Act* does not apply to Records 7-14.

2. I order the Board to disclose Records 17, 18 and 19 to the appellants by sending the appellants a copy of these records by **February 19, 2007**.

3. I uphold the Board's decision that the other responsive records qualify for exemption under the *Act*.

4. I uphold the Board's search for responsive records.

5. In order to verify compliance with the terms of Order provision 2, I reserve the right to require the Board to provide me with a copy of the material which it discloses to the appellants.

Original signed by: January 19, 2007
Frank DeVries
Adjudicator