

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2692

Appeal MA11-5

Thames Valley District School Board

February 15, 2012

Summary: The Thames Valley District School Board received a request for the requester's file with the board. The board denied access to the records in part citing section 38(a) in conjunction with section 7(1) (advice or recommendations) and section 12 (solicitor-client privilege); and section 38(b) (personal privacy) of the *Act*. This order upholds the board's decision in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 38(a), 7(1), 12.

Orders and Investigation Reports Considered: Orders P-1038 and MO-2525.

OVERVIEW:

[1] The Thames Valley District School Board (TVDSB or the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*). The request stated as follows:

I would like a copy of my personal file held by either the TVDSB or the TVRAA [Thames Valley Region Athletic Association] if it exists.

If a file does not exist or is incomplete I would request a copy of all correspondences either mentioning myself or in response to any of my correspondences. This would include, but not be limited to matters mentioning me, matters dealing with the transfer of [named individual],

matters dealing with [named individual], matters involving TVRAA playing regulations and matters dealing with both WOSSAA [Western Ontario Secondary Schools Athletic Association] and OFSAA [Ontario Federation of School Athletic Associations].

If during your proper search you find items that might be a privacy concern please identify them.

[2] In its decision letter, the board advised that although it identified responsive records, the *Act* does not apply to them in accordance with section 52(2.1) of the *Act*. The board advised that the records relate to a prosecution and all proceedings in respect to the prosecution have not been completed.

[3] In the alternative, the board advised that if the *Act* did apply to the records, access to portions of the records would be denied in accordance with the discretionary exemptions in section 38(a) in conjunction with sections 7(1) (advice or recommendations) and section 12 (solicitor-client privilege), and section 38(b) (personal privacy) of the *Act*.

[4] The requester, now the appellant, appealed that decision.

[5] During mediation, the board advised that all the proceedings in respect of the prosecution have not been completed and it would be premature to proceed with the appeal. The board suggested that the appeal be placed on hold until all proceedings related to the prosecution have been completed and the appeal period had expired. The board advised that when the appeal period was completed the board would revisit its decision. The appellant agreed that the appeal should be placed on hold until that time.

[6] After the prosecution had completed and the appeal period expired, the file was reopened and the appellant asked the board to review its decision.

[7] The board advised that it was no longer relying on section 52(2.1) to exclude the records from the *Act*, but it continued to deny access to portions of the records in accordance with section 38(a) in conjunction with section 7(1) and section 12, and section 38(b).

[8] The appellant disagreed with this position and asked that the file proceed to the inquiry stage of appeal. Accordingly, the file was referred to adjudication. The board then sent a letter to the appellant dated August 18, 2011, disclosing further records. As a result, section 38(b) is no longer at issue.

[9] I sought and received representations from the board and the appellant, which were shared in accordance with *Practice Direction 7* of the *IPC Code of Procedure*. In

its representations, the board withdrew its reliance on section 38(a) in conjunction with section 7(1) for Record 3 (2010-04 August 20, 2010).

[10] In this order, I uphold the board's decision in part.

RECORDS:

[11] The records remaining at issue are all emails, except for one facsimile found at Record 3 (2009-04 May 20, 2010). The records are set out in the following Index of Records:

Record No.	Board Record No.	Description of Record	Date of Record	Exemptions Claimed
1	f.3	Executive Superintendent records - Request 2009-06 - General	July 23, 2009 November 11, 2009 September 1, 2010	7(1), 38(a) 7(1), 38(a) 12, 38(a)
2	f.4	TVRAA Coordinator records - Request 2009-02 - Request 2009-04	May 28, 2009 September 23, 2009	7(1), 38(a) 7(1), 38(a)
3	f.5	FOI Coordinator records - Request 2009-02 - Request 2009-04 - Request 2009-12 - Request 2009-13	May 14, 2009 October 5, 2009 October 9, 2009 May 20, 2010 October 14, 2009 October 14, 2009	12, 38(a) 12, 38(a) 12, 38(a) 12, 38(a) 12, 38(a) 12, 38(a)

		- Request 2010-04	August 20, 2010	12, 38(a)
		- General	September 8, 2009 October 5, 2009	7(1), 38(a) 12, 7(1), 38(a)
			September 1, 2010	12, 7(1), 38(a)

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 7(1) exemption apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[12] 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 if 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;

[13] 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].

[14] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] 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 and PO-2225].

[16] 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 and MO-2344].

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹

[18] The board provided both confidential and non-confidential representations. In its non-confidential representations, the board states that the records contain personal information about the appellant, as well as the personal information of other individuals. In particular, the board states that the records contain the views of the Executive Superintendent and another employee of the board, as well as employment history information of a former board employee in his personal capacity regarding employment issues. The board also states that the records contain the personal information of the former Coordinator of the TVRAA, legal counsel and a third party service provider. The board states that the information relates to these individuals in their personal capacity as opposed to their employment or professional responsibilities with the board.²

[19] The appellant did not provide representations on this issue.

Analysis/Findings

[20] Based upon my review of the records, and taking into account the board’s confidential representations, I agree that they contain the personal information of the appellant and other identifiable individuals in their personal capacity. This personal information includes the personal opinions or views of or about individuals in accordance with paragraphs (e) and (g) of the definition of personal information in section 2(1) of the *Act*.

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

² The board cites Order MO-1550-F.

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

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

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[22] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[23] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. In this case, the institution relies on section 38(a) in conjunction with section 12, which 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.

[24] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[25] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

[26] 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.)].

[27] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[28] 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.)].

[29] 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].

[30] 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

[31] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

[32] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways board*, [1979] 2 All E.R. 1169] 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.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

[33] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[34] 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

[35] 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.”

[36] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2 [Order PO-2733]. However, “branch 2 of section [12] does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.” [Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952]

[37] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel’s skill and knowledge, are exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

[38] Termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above]

[39] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681]

Representations

[40] The board provided both confidential and non-confidential representations on each record, claiming that the records are subject to either solicitor-client communication privilege or litigation privilege. The board states that all of the emails sent by legal counsel have an automatic by-line indicating that the email is being sent in confidence and may be privileged. The board also states that at no time has privilege been waived nor have these emails been disclosed to an outside party.

Solicitor-client communication privilege

[41] The board states that the emails in Record 1 (general, September 1, 2010) and Record 3 (2009-04, 2009-12, 2009-13, and general) are emails made for the purposes of seeking legal advice. As such, the board states that these emails are subject to solicitor-client communication privilege. Concerning individual records, the board provided the following information:

- Record 1 (general, September 1, 2010) and Record 3 (general, September 1, 2010)

The board states that these email chains between legal counsel to the board, the board's Executive Superintendent and the Freedom of Information Coordinator (the FOIC) form a continuum of communications to aid in the legal advice being sought and given.

- Record 3 (2009-04, October 5 and 9, 2009, 2009-12, 2009-13, general October 5, 2009)

The board states that these email chains between legal counsel, the Director of Education and the FOIC form a continuum of communications to aid in the legal advice being sought and given.

- Record 3 (2009-04, May 20, 2010)

The board states that this correspondence from the FOIC to legal counsel was sent to legal counsel's private fax number for the purposes of obtaining legal advice.

Litigation privilege

[42] The board states that the emails in Record 3 (2009-02 May 14, 2009 and 2010-04 August 20, 2010), were created for the dominant purpose of using the content therein in the conduct of contemplated litigation which was a reasonable prospect at that time. As such, the board states that these emails are subject to litigation privilege. Concerning individual records, the board provided the following information:

- Record 3 (2009-02 May 14, 2009)

The board states that this is a continuum of email communications between the FOIC and the Executive Superintendent and reveals the legal advice of legal counsel. The board also states that this record is subject to solicitor-client communication privilege.

- Record 3 (2010-04 August 20, 2010)

The board states that these emails form a continuum of communication between the FOIC and the Executive Superintendent and reveal the legal advice of legal counsel and forms part of a brief of documents that has been maintained by legal counsel for the purpose of advising on contemplated litigation. According to the board, this litigation is an ongoing matter.

[43] The appellant did not provide representations on whether the records at issue are privileged.

Analysis/Findings

[44] Based upon my review of the records for which the discretionary exemption in section 38(a) in conjunction with section 12 has been claimed, I find that all of these records, except for most of Record 3 (2010-04 August 20, 2010), are subject to this exemption.

[45] The records for which the board claim contain information as to the seeking or giving of legal advice from the board's solicitor do contain such information. These records, namely, Record 1 (general September 1, 2010) and Record 3 (2009-02 May 14, 2009, 2009-04 October 5 and 9, 2009, 2009-12 October 14, 2009, 2009-13 October 14, 2009, and general October 5, 2009 and September 1, 2010) are subject to solicitor-

client communication privilege. Accordingly, subject to my consideration of the board's exercise of discretion, I find that these records are exempt from disclosure.

[46] Record 3 (2010-04 August 20, 2010) is not subject to the discretionary exemption in section 38(a) in conjunction with section 12. Other than one sentence, I find that this record does not contain information concerning the seeking or giving of legal advice. It is an email chain between the FOIC and Executive Superintendent and is described by the board as part of the continuum of communication between these two board employees. I find that only one sentence in this record is subject to solicitor-client communication privilege.

[47] As stated above, the section 12 exemption includes records prepared for use in contemplated litigation.³ Based upon my review of this record and the confidential representations of the board, I do not agree that Record 3 (2010-04 August 20, 2010) was prepared for use in contemplated litigation. In order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.⁴ In this case, I find that the litigation described by the board in its confidential representations concerns "merely vague or general apprehension of litigation".

[48] Although the board's legal counsel may have been provided with a copy of this record, which is not apparent from its contents, that alone is not sufficient to bring the contents within section 12. The mere fact a record is reviewed by a solicitor, without evidence of the seeking or provision of confidential legal advice, does not transform these emails in Record 3 (2010-04 August 20, 2010) into a record that is subject to solicitor-client communication privilege.⁵ Accordingly, I find that, other than one sentence, this record is not subject to the communication or litigation privilege. As no other exemptions have been claimed for Record 3 (2010-04 August 20, 2010), I will order it disclosed, except for the one sentence that I have found is subject to solicitor-client communication privilege.

C. Does the discretionary exemption at section 38(a) in conjunction with the section 7(1) exemption apply to the information at issue?

[49] The board relies on section 38(a) in conjunction with section 7(1) for Record 1 (2009-06 and general November 11, 2009), Record 2 and Record 3 (general). For Record 3 (general), I have found that section 38(a) in conjunction with section 12 applies to the October 5, 2009 and September 1, 2010 emails. Therefore, concerning Record 3, I will only be considering the application of section 38(a) in conjunction with section 7(1) to Record 3 (general September 8, 2009).

³ *Magnotta*, cited above.

⁴ Order PO-2323.

⁵ Orders P-1038 and MO-2525.

[50] Section 7(1) states:

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

[51] 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.⁶

[52] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

[53] To qualify as "advice or recommendations", the information in the record must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making.⁷ Advice or recommendations may be revealed in two ways:⁸

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

[54] "Advice" and "recommendations" have a similar, though distinct, meaning. A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.⁹

⁶ 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.).

⁷ Order PO-1993, upheld on judicial review in *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]; see also Orders PO-2028 and 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.

⁸ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

⁹ *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[55] The exemption does not extend to information generated in the process leading up to the giving of advice or recommendations. Consideration must be given to the context in which the record at issue was created and communicated to the person being advised in the decision-making process.¹⁰ Examples of the types of information that have been found *not* to qualify as advice or recommendations include:¹¹

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

Representations

[56] The board provided both confidential and non-confidential representations on each record. The board submits that Record 1 (2009-06) contains the advice of a board employee, the then TVRAA Coordinator, including recommendations as to how to address an issue involving the appellant. The board states that this employee provides a recommendation and then comments on its viability. The board states that:

This information reveals a suggested course of action that was to be considered and was considered in the board's decision making process with regards to these issues. It is not merely factual, but involves recommendations to those in the decision making process, namely the Director of Education and Executive Superintendents charged with this responsibility.

[57] The board submits that:

- Record 1 (general November 11, 2009) contains a request by an Executive Superintendent for advice regarding issues involving the appellant, and it also contains the advice of this individual to the board's Director of Education.

¹⁰ *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

¹¹ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

- Record 2 (2009-02 May 28, 2009) contains an email from the former TVRAA Coordinator with advice to a third party service provider.
- Record 2 (2009-04 September 23, 2009) is an email communication between the former TVRAA Coordinator, the Executive Superintendent and FOIC containing the TVRAA Coordinator's advice.
- Record 3 (general September 8, 2009) is an email communication involving several board employees, including the former TVRAA Coordinator, the Executive Superintendents, the Director of Education and the FOIC. At issue are the advice and recommendations of the former TVRAA Coordinator. The board submits that it can be inferred from this record that the TVRAA Coordinator is recommending a course of action.

[58] The appellant did not provide representations as to whether the records at issue contain advice or recommendations.

Analysis/Findings

[59] The board has claimed that section 38(a) in conjunction with section 7(1) exempts the following records: Record 1 (2009-06 and general November 11, 2009), Record 2, and Record 3 (general September 8, 2009). Based upon my review of the records at issue, and taking into account the board's confidential and non-confidential representations, I find that these records do not contain information that comes within section 7(1).

[60] I find that these records contain factual information only. Further, I find that some of these records contain information as to the seeking of advice. As stated above, the section 7(1) exemption does not extend to protect information generated in the process leading up to the giving of advice or recommendations.

[61] Further, I find that the records do not contain material that permits the drawing of accurate inferences with respect to a suggested course of action or an actual suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making. Nor can a suggested course of action be inferred from a review of these records.

[62] Accordingly, I find that section 38(a) in conjunction with section 7(1) does not apply to Record 1 (2009-06 and general November 11, 2009), Record 2, and Record 3 (general September 8, 2009). As no other exemptions have been claimed for these records, I will order them disclosed.

D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[63] I will now determine whether the board exercised its discretion in a proper manner with respect to the information I have found subject to section 38(a). This information concerns the records or portions of records subject to section 38(a) in conjunction with section 12. The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[64] In addition, 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.

[65] In either 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)].

[66] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[67] The board submits that in exercising its discretion concerning records subject to section 38(a) in conjunction with section 12, it considered such relevant factors as:

(a) The purpose of the *Act*, including the public's right to access their personal information and the protection of the privacy of individuals, as well as the fact that exemptions should be limited and specific. By virtue of the fact that the board reconsidered its position with regards to the exercise of its initial discretion in this matter and subsequently disclosed additional records to the appellant, the board has exhibited its recognition of these principles.

(b) The language of the exemptions afforded by section ...12 of the *Act* and the interests they seek to protect. This must also be considered in conjunction with ...the historic practice of the board with respect to similar information. The board has at all times maintained a consistent position with regards to these exemptions with the overriding concern being the maintenance of the principles of legal privilege.

(c) The appellant's request, as an individual, for his own personal information and his need for the information as weighed against the exemptions being claimed.

(d) The desire to maintain and promote public confidence in the board as weighed against its need to maintain its privileged relationship with its legal counsel...

(e) [The] personal information [of other individuals] that was the subject of possible disclosure.

(f) [The information] continues to form the basis of legal advice being sought from the board's legal counsel regarding possible and contemplated litigation by the board...

[68] The appellant referred to Order MO-2651 in his representations; however, this order does not contain a discussion of the board's exercise of discretion concerning the application of a discretionary exemption.

Analysis/Findings

[69] Based upon my review of the board's confidential and non-confidential representations, I agree that it exercised its discretion in a proper manner taking into account relevant factors and not taking into account irrelevant factors with respect to the records that I have found subject to section 38(a).

[70] Accordingly, I uphold the board's exercise of discretion and find that Record 1 (general, September 1, 2010) and Record 3 (2009-02 May 14, 2009, 2009-04 October 5 and 9, 2009, 2009-12 October 14, 2009, 2009-13 October 14, 2009 and general October 5, 2009 and September 1, 2010) and one sentence in Record 3 (2010-04 August 20, 2010) are exempt by reason of section 38(a).

ORDER:

1. I order the board to disclose Record 1 (2009-06 and general November 11, 2009), Record 2 and Record 3 (general September 8, 2009) to the appellant **by March 8, 2012.**
2. I order the board to disclose Record 3 (2010-04 August 20, 2010) except for one sentence that I have found exempt by reason of section 38(a), read in conjunction with section 12, to the appellant **by March 8, 2012.** For ease of reference, I will provide the board with a copy of this record with the exempt sentence highlighted.

3. I uphold the board's decision to withhold the remaining records.
4. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the board to provide me with a copy of the information disclosed to the appellant.

Original Signed by: _____
Diane Smith
Adjudicator

_____ February 15, 2012