ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-015

May 10, 2005

BOARD OF TRUSTEES OF MEDICINE HAT SCHOOL DISTRICT # 76

Review Number 2631

Office URL: www.oipc.ab.ca

Summary: The Applicants made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Board of Trustees of Medicine Hat School District # 76 (the "Public Body") for documents relating to an incident in which their daughter had been falsely accused of having written threatening e-mails to other students, and questioned at length about this matter by school officials. The request covered documents relating to the way this incident was investigated and dealt with by the Public Body and the teachers' professional disciplinary body. Relying on various sections of the Act, the Public Body withheld some documents, provided some in severed form, and refused to confirm or deny the existence of some documents.

The Commissioner held that the Public Body had met its duty to assist the Applicants under section 10(1) of the Act and had conducted an adequate search for records. He held that the Public Body should not have refused to confirm or deny the existence of a certain category of records in reliance on section 12(2)(b). He held that some of the records, relating to tests, were excluded from the scope of the Act under section 4(1)(g), and that some were properly withheld by the Public Body on the basis they could prejudice the use of particular tests or audits under section 26. He upheld the Public Body's decision to withhold or sever some of the records to protect the personal privacy of third parties under section 17. He also upheld the Public Body's decision to withhold some of the records on the basis of legal privilege under section 27(1)(a). However, not all of the Public Body's decisions

under sections 17, 26 and 27(1)(a) were upheld. The Commissioner required the Public Body to disclose some of the records it had severed or withheld in reliance on these sections. He also held that the Public Body did not properly apply section 23(1)(b) of the Act (local public body confidences) to records of meetings of a committee of the Public Body. Finally he required some severing of records that he ordered to be disclosed, in order to preserve the future utility of tests, protect the privacy of third parties, or because the records were unresponsive.

Statutes Cited: Canada: *Copyright Act*, R.S.C. 1985, c. C-42, s. 32.1; **AB:** *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 1(n), 4(1)(b), 4(1)(g), 10(1), 12(2)(b), 17, 17(1), 17(2)(b), 17(4), 17(4)(d), 17(4)(f), 17(4)(g), 17(5), 17(5)(a), 17(5)(c), 17(5)(f), 17(5)(h), 23(1)(b), 26, 27(1)(a), 40(1)(v), 40(4), 59(3)(b), 72; *Freedom of Information an Protection of Privacy Regulation*, AR 200/95, s. 18 ; *School Act*, R.S.A. 2000, c. S-3, ss. 70, 70(3), 123; *Teaching Profession Act*, R.S.A. 2000, c. T-2, ss. 33, 47(4).

Authorities Cited: AB: Orders 96-015, 96-019, 97-002, 98-009, 99-028, 2000-003, 2000-005, 2000-029, F2003-005**; B.C.:** No. 62-1995; **Ont:** P-673.

Cases Cited: *Solosky v. The Queen,* [1980] 1 S.C.R. 821; *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

Authors Cited: Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, Toronto: Butterworths, 1993.

I. BACKGROUND

[para 1] On April 12, 2001, the daughter of the Applicants (then a grade six student) was questioned in the office of her school by the vice-principal and the school counselor about allegations that she had written threatening e-mails to other students. She was required to stay in the office for a period of about four hours. She was given false information for the purpose of obtaining an admission. The Applicants (parents) were not informed about the questioning at the time it was taking place. The allegations were later found to be untrue.

[para 2] These events ["the incident"] were investigated by the Superintendent of the Board of Trustees of the Medicine Hat School District # 76 (the "Public Body"). The Applicants did not agree with the Superintendent's decisions about how the matter should be resolved, and appealed these decisions to the Board of Trustees. (The Board of Trustees is empowered to hear such appeals under section 123 of the *School Act*. As the Board of Trustees and the Public Body are the same, I will, for the sake of clarity in this decision, refer to this Board, when it was acting as a decision-maker with respect to the appeal, as "the Board".)

[para 3] The Board held a hearing. By resolution it adopted a decision granting the Applicants' requested remedies. This decision was issued on October 25, 2001.

[para 4] On December 4, 2001, at 7:30 p.m., a committee of the Board held a meeting in which it agreed to recommend to the Board that it take certain actions relating to issues arising from the appeal. Immediately thereafter (at 9:12 p.m.) the Board held a meeting at which it passed resolutions.

[para 5] On October 9, 2002 the Applicants made a formal request to the Public Body for documents related to the events of April 12, 2001. This request included intelligence and psychological tests administered to the Applicants' daughter in 1998.

[para 6] The Public Body provided 345 pages of documents. It withheld some documents, provided some in severed form, and refused to confirm or deny the existence of some documents. With respect to the meetings of the Board of December 4, it provided the Applicants with the minutes of the later meeting, but not with the minutes of the earlier one. The Applicants requested a review of the Public Body's decision by my office, and I authorized mediation.

[para 7] The Public Body released further documents and information during mediation. However, the Applicants were not satisfied with the mediation process, and on January 7, 2003 they requested that I conduct an inquiry to determine if the Public Body had conducted an adequate search, and to review the decision of the Public Body to withhold records.

[para 8] Some of the affected parties who had been identified for the inquiry provided written responses, requesting their personal information not be disclosed. I accepted these responses *in camera.*

[para 9] One of the Applicants as Next Friend has brought a civil action against the Public Body for damages suffered by her daughter arising from the incident.

II. RECORDS AT ISSUE

[para 10] The records are:

- the questions, answers and scores for intelligence and psychological tests administered to the Applicants' daughter (Record A)
- draft decision of the Board, and minutes recording deliberations of a committee of the Board (Record B)
- notes and correspondence by and among officials of the Public Body, and between these officials and legal counsel, and the Public Body's insurer (Record C)

- files containing personal information of the Vice-Principal, School Counselor, and Principal (Record E, pp. 1-2)[1]
- severed parts of documents relating to the Board hearing, and to the investigation of the incident or the outcomes of this investigation (the severed parts contain personal information of school staff, students, parents of students and others) (the remainder of Record E).

III. ISSUES

[para 11] The original issues in the inquiry were:

A. Did the Public Body meet its duty to the Applicants, as provided in section 10(1) of the Act? In this case, did the Public Body conduct an adequate search for responsive records?
B. Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2)(b) of the Act?
C. Are the records excluded from the application of the Act by section 4(1)(g)?
D. Does section 17 of the Act (personal information) apply to the records/information?
E. Did the Public Body properly apply section 23(1)(b) of the Act (local public body confidences) to the records/information?
F. Did the Public Body properly apply section 26 of the Act (testing and auditing procedures and techniques) to the records/information?
G. Did the Public Body properly apply section 27(1)(a) of the Act (privileged information) to the records/information?

[para 12] The Applicants have raised two additional issues which I will also address:

H. Did the FOIP Coordinator of the Public Body exercise his discretion on an improper basis?
I. Did the Public Body disclose personal information of the Applicants' daughter in violation of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicants, as provided in section 10(1) of the Act? In this case, did the Public Body conduct an adequate search for responsive records?

[para 13] The Applicants suggest that certain documents are likely to exist, but were not provided. These are as follows:

---

[1] In this Order I refer to these records in the same manner as the Public Body referred to them in its open submission. I do this because section 59(3)(b) requires me to take every reasonable precaution to avoid disclosing whether information exists, if the head of the Public Body in refusing to provide access did not indicate whether information exists. Some of these records were withheld in their entirety, and some were disclosed but severed.

- rough notes of a meeting taken by the Superintendent's secretary
- letters from the Board of Trustees to the Superintendent ensuring that the orders of the Board were fulfilled.
- letters pertaining to fulfillment or otherwise of certain aspects of the Board order (relating to in-service training)
- records of the Superintendent's questioning of particular staff members
- records of discussions between the Public Body and the Applicants' original legal counsel.

[para 14] The Public Body has provided a detailed list of the steps it took to locate responsive documents. Most of the documents listed above, if they existed, would be in the possession of the then-Superintendent. With respect to documents in the possession of the then-Superintendent, in addition to obtaining his original files, the Public Body official (Associate Superintendent and Secretary-Treasurer) who responded to the request provided evidence that he specifically asked the Superintendent whether he had any additional responsive records in his personal possession, and satisfied himself that he did not. The existence of the documents listed by the Applicants, beyond those already provided in severed form, is speculative. The steps the Public Body showed that it took satisfy me that it took all reasonable steps to identify and locate responsive documents in its possession. I find the Public Body met its duty to the Applicants under section 10(1) and conducted an adequate search for responsive records.

Issues B and F: Are the records excluded from the application of the Act by section 4(1)(g)? Did the Public Body properly apply section 26 of the Act (testing and auditing procedures and techniques) to the records/information?

[para 15] These issues relate to Record A, the intelligence and psychological tests (Wechsler Intelligence Scale for Children, Canada QUick Individual Educational Test, and Comprehensive Behavior Rating Scale for Children) that were administered to the Applicants' child, or filled out relative to her by a teacher.

[para 16] Pages 3 to 12 and 14 to 23 of Record A – the largest portions of the first two tests - contain the questions to be asked of the test subject. These pages also contain answers handwritten by the test subject (the Applicants' daughter). As well, they appear to contain handwriting of the psychologist, recording the subject's answers, or results or scores. In some cases the answers as written by either the test subject or the psychologist reveal the questions. In some cases, in particular the 'spelling' parts of the test, the answers and the questions can be equated in the sense that the word that is spelled is the one that was asked to be spelled. However, in some cases the psychologist's handwritten notes or graphs record results or scores in a way that would be meaningless to the untrained reader.

[para 17] The person who administered the test deposed that he discussed the test results with the Applicant parents and provided them with a summary of the findings based on the tests, but that he did not provide the questions, nor the subject's answers or the answers, results, or scores, he recorded. The summary forms part of the Public Body's open submission, as an attachment to the affidavit of the person who administered the test. In

their submission the Applicants dispute they were given the summary at the time the test was administered (though they agree it was given to them later). They also say they were not given sufficient information about what the test results revealed about their daughter.

[para 18] The Public Body argued that section 4(1)(g) and section 26 apply to all of these records.

[para 19] Section 4(1)(g) provides:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
> *…*
>
> *(g) a question that is to be used on an examination or test … .*

[para 20] In my view this provision covers the questions in the intelligence tests. I do not have jurisdiction over these records. However, section 4(1)(g) does not apply to the Comprehensive Behavior Rating Scale for Children (pages 25 to 27), which contains questions for rating the subject to be answered by a third person (teacher), rather than to be administered to the subject.

[para 21] In my view section 4(1)(g) does not apply to the answers to the tests written by the Applicants' child, except those (the spelling words) that can be equated with the questions in the sense described in para.16 above. Neither does section 4(1)(g) apply to the parts of the psychologist's notes that record the answers or results or that tabulate and graph the scores. However, I note that some of the answers reveal the questions, or something about them. Though answers that reveal the questions do not fall outside the Act by virtue of section 4(1)(g) (except for the spelling words), they do fall under section 26, and I will deal with them in the following section.

[para 22] Section 26 provides:

> *26 The head of a public body may refuse to disclose to an applicant information relating to*
>
> *(a) testing or auditing procedures or techniques,*
>
> *(b) details of specific tests to be given or audits to be conducted, or*
>
> *(c) standardized tests used by a public body, including intelligence tests,*
>
> *if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*

[para 23] I have already held that the test questions on pages 3 to 12 and 14 to 23 of Record A are outside my jurisdiction. I have no jurisdiction to decide whether section 26

applies to these records. The Public Body has no obligation to disclose them by virtue of the Act.

[para 24] In my view section 26 applies to part of page 1 (which I will accordingly order to be severed) because it contains information in relation to a standardized test which could reasonably be expected to prejudice the use of the test. Section 26 also applies to the answers to the first two tests, either because they reveal the questions or something about them, or because the answers in themselves can prejudice the future usefulness of the tests. (I will order severing of these parts of the records as well.)

[para 25] Section 26 also applies to pages 2, 26 and 27 of Record A. I accept the Public Body's argument that such psychological assessment tools are meant to be used by trained professionals, and that their disclosure to the general public could erode their future utility.

[para 26] The Applicants suggest the tests are no longer useful because they were administered several years ago. The Public Body asserts with respect to the Wechsler Intelligence Scale for Children that the same test will be used again in the future. There is nothing in the content of any of the tests which suggests they would become outdated, nor is there any evidence before me that they are outdated.

[para 27] I accept that the Public Body withheld the records described in paragraphs 24 and 25 so as to preserve their utility. This was a proper exercise of the Public Body's discretion.

[para 28] With respect to pages 13, 24 and 25, (what appear to be scoring sheets), and the scoring portions of page 1, these are neither questions, nor can I see how they could prejudice the use or results of the tests. I note that in any case the Applicants have copies of three of four of these records, as they were contained in the attachments to the Applicants' submissions. In my view these documents do not meet the criteria for withholding under section 26.

[para 29] The remaining parts of Record A consist of the psychologist's recording of the results or scores in a manner which is meaningless in isolation from the test, at least to a person unfamiliar with the test. In my view their disclosure could not reasonably be expected to prejudice the use or results of the tests. I recognize that previous orders of this office have held that the Commissioner will not order the disclosure of meaningless material. It seems unlikely the Applicants themselves could interpret these results. However, a trained professional could possibly help them do so. As they do not meet the criteria in either sections 4(1)(g) or 26, in my view, these parts of the records were not properly withheld from the Applicants.

[para 30] With regard to the Public Body's representations that disclosure of these records would involve breach of federal legislation that protects the copyright in the materials, and breach of the non-disclosure provisions of the contract under which the psychologist purchased the test materials, I note the following. First, with respect to the

concern about violating copyright, the *Copyright Act*, R.S.C. 1985, c. C-42, contains a provision (section 32.1) that it is not an infringement of copyright for any person to disclose information pursuant to provincial 'access to information' legislation. Second, the Act supersedes an agreement as to how or when information will be disclosed (see Orders 2000-003, 97-002). In my view, this principle applies to the contract terms regarding non-disclosure between the psychologist and the vendor of the tests. Finally, as to the concern that the psychologist may be breaching his professional obligations as a registered psychologist in 'handing over' copies of the test, I note that the order to disclose in this case would be directed at the Public Body (which now has custody of the records) and not at the psychologist.

Issue C: Did the Public Body properly apply section 23(1)(b) of the Act (local public body confidences) to the records/information?

[para 31] This issue relates to Record B.

[para 32] The first record in Record B is a draft decision and in my opinion it falls under section 4(1)(b) of the Act. This section excludes from the operation of the Act "a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity". The board of trustees of a school district engaged in deliberations relative to an appeal from the decision of a Superintendent under section 123 of the *School Act* is, in my opinion, acting in such a capacity. The draft decision does not fall within the scope of the Act, and I have no jurisdiction to make an order respecting it.

[para 33] The second document in Record B is minutes that reveal some aspects of deliberations of a meeting of the Conference Committee of the Board that was held subsequent to the issuance to the Applicants of the Public Body's decision in the Applicants' appeal. (I note that there was an error in the Public Body's submission, and the minutes of the 9:12 meeting of the Board of Trustees (which had already been provided to the Applicants) were mistakenly included and discussed in the submission instead of the minutes of the 7:30 meeting of the Conference Committee, which were withheld. The comments below apply to the minutes of the meeting of the Conference Committee held at 7:30.) The Public Body relies on section 23(1)(b) to withhold this document.

[para 34] Section 23(1)(b) provides:

> *23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal …*
>
> > *(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*

[para 35] For this section to apply, it must be shown that an Act authorizes the holding of the meeting in the absence of the public. The Public Body points to the *School Act* section 70(3) for this authority. This section provides

> *70(1) The meetings of a board shall be held in public and no person shall be excluded from them except for improper conduct … .*
>
> *(3) Notwithstanding subsection (1), when a majority of the trustees present at a meeting of the board are of the opinion that it is in the public interest to hold the meeting or a part of the meeting in private for the purpose of considering any matter, the board may by resolution exclude any person from the meeting.*

[para 36] I cannot conclude that this section gives the required authority in this case. First, though the trustees who comprised the 'Conference Committee' of the Board were the same people who comprised the Board (in the meeting that immediately followed), I do not know if the 'Conference Committee' can be equated with the Board for the purposes of section 70. Therefore I cannot say that section 70 applies. Second, the Public Body says that it is common practice for boards of trustees to hold meetings *in camera* when they discuss individual students or personnel issues. However, there is nothing in the minutes themselves nor in any other material presented to me that allows me to know whether in the case of the meeting in question, the trustees asked themselves if the public interest would be served by holding the meeting in private, and passed a resolution to that effect, as the *School Ac*t requires. Because of this lack of clarity about whether section 70 of the *School Act* applies, and whether the Board or its committee complied with it, I am unwilling to permit reliance on section 23(1)(b) for refusal to disclose the records of its deliberations by reference to *School Act* section 70.

[para 37] I have also considered whether the Board was authorized to hold the meeting *in camera* by virtue of section 18 of the regulation to the Act.

[para 38] The parts of section 18 that are potentially relevant provide:

> *18(1) A meeting of a local public body's elected officials, governing body or committee of its governing body may be held in the absence of the public only if the subject-matter being considered in the absence of the public concerns …*
>
> > *(b) personal information of an individual, including an employee of a public body, …*
> >
> > *(d) labour relations or employee negotiations, …*
>
> *and no other subject-matter is considered in the absence of the public.*

[para 39] I will assume for the present purpose that the Conference Committee is a committee of the governing body of the Public Body. If *personal* personnel issues were discussed at the meeting in question, the substance of any such discussions is not revealed

by the minutes. The meeting did concern an aspect of labour relations, as it dealt with which Public Body officials had jurisdiction to deal with certain personnel matters. (The way the trustees decided to resolve this jurisdictional issue is revealed in the minutes.) The minutes also reflect a decision to recommend amendment of an earlier resolution to correct an error. This latter step was apparently necessitated by an oversight.

[para 40] The latter decision – the correction of an error - does not fall under any of the subsections of section 18. Thus I cannot conclude that the final clause of section 18 – that "no other subject matter was considered" - was met even for the limited part of the meeting that gave rise to responsive records. I cannot say, therefore, that the Board was entitled to meet in the absence of the public to deal with the issues related to the Applicants' appeal. Thus I cannot conclude that the Public Body was entitled to rely on section 23(1)(b), to withhold minutes that reveal aspects of the deliberations, by reference to section 18 of the regulation to the Act.

[para 41] Some parts of the minutes cover topics addressed in the meeting which were unrelated to the Applicants' case (the parts under numbers 1 to 3 and 5 to 11.) These parts are unresponsive and must be severed before the document is released.

Issue D: Did the Public Body properly apply section 27(1)(a) of the Act (privileged information) to the records/information?

[para 42] The Pubic Body relies on section 27(1)(a) (solicitor and client privilege and litigation privilege) relative to Record C.

[para 43] As set out in *Solosky v. The Queen,* [1980] 1 S.C.R. 821 (discussed in Order 96-015) a document must meet the following criteria for solicitor-client privilege to apply:
(i) it is a communication between solicitor and client,
(ii) which entails the seeking or giving of legal advice, and
(iii) which is intended to be confidential by the parties.

[para 44] To correctly apply litigation privilege, the Public Body must show that:

- there is a third party communication.
- the maker of the document or the person under whose authority the document was made intended the document to be confidential.
- the "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

[para 45] Record C includes the following:

a) pages 1 to 6: notes made by the Superintendent relative to the incident

[para 46] The Public Body's argument respecting these records is combined with its argument about documents prepared by the Public Body's legal counsel. This argument states with respect to all these documents that they "… were part of the file of the Superintendent of the Public Body, and the documents themselves demonstrate that they are working papers and draft submissions prepared by or provided to counsel for the Superintendent in the course of dealing with the potential litigation by the Applicant and with respect to the hearing of the appeal by the Applicant." The argument also says that "These documents are clearly communications between the Superintendent and his counsel, clearly involve legal advice … ."

[para 47] I cannot accept this part of the Public Body's submission. The Public Body does not assert that the Superintendent supplied his notes to the legal counsel. Rather, if it meant to suggest this (which is itself not clear given the multiplicity of subjects and predicates in the assertion), it does so by asserting that the documents on their face demonstrate that he did so. In my view, the contrary is true. With the minor exception of the material under the heading "Discussions with Legal Counsel" on the final page, the notes are not on their face written for such a purpose; indeed, the final heading suggests the rest were not. Neither is the second statement - "These documents are clearly communications between the Superintendent and his counsel, clearly involve legal advice … ." – applicable to these pages. These pages are not "clearly" such communications, and they involve no legal advice. I have no basis on which to conclude, therefore, that these notes were part of a communication to legal counsel for the purpose of receiving legal advice. Neither can I conclude that they were created for the dominant purpose of providing them to legal counsel for advice and use in litigation. I note finally that this discussion is made largely irrelevant by the fact that all but the first page of this set of notes (or an exact copy thereof) was disclosed to the Applicants in a severed form under Record E, pages 15 to 19. Any privilege that might have existed for pages 2 to 6 (which is that of the Public Body rather than that of the persons whose names were severed) has thus been waived.

[para 48] However, because the material under the final heading (on page 6 (severed in the duplicate document in Record E)), appears to have been related to obtaining legal advice, it may be withheld on the basis of solicitor-client privilege. I agree with the Public Body that it was appropriate to withhold this information in these particular documents from disclosure by reference to their nature. They related to the seeking of legal advice about the investigation into the incident, and in the circumstances they needed to be confidential for this purpose.

[para 49] In addition, with respect to page 1, the material under #6, and the second bullet under the heading "July 27, 2001" on page 3 (severed in the duplicate document in Record E), in my view these records may be withheld on the basis of legal privilege. These parts of the document record the Public Body's intentions relative to settlement. Though neither record was a communication to the other party, the former was a precursor to such a communication, and the latter recorded such a communication. The policy to include settlement communications under the head of privilege in order to encourage parties to potential litigation to compromise without resort to trial (as stated in Manes & Silver,

Solicitor-Client Privilege in Canadian Law at page 116) applies to both these portions of Record C. I agree with the Public Body it was appropriate to withhold these particular documents from disclosure by reference to their nature. In the circumstances they needed to be confidential for the purpose of trying to effect a settlement.

b) pages 7 to 32:

[para 50] These documents are a solicitor-client communication, giving legal advice, and were properly excluded under section 27(1)(a). I agree with the Public Body that it was appropriate to withhold these particular documents from disclosure by reference to their nature. They related to the seeking and giving of legal advice and in the circumstances they needed to be confidential for this purpose.

c) pages 33 to 37:

[para 51] Pages 33 to 35 are communications between officials of the Public Body and the Public Body's insurer. They notify the insurer of the Applicants' claim to be compensated for specified expenses, and discuss the facts of the incident and details of the claim. Pages 36 and 37 are communications amongst Public Body officials regarding information to be provided to the insurer. In my view litigation privilege does not apply to any of these documents. They were not created for the dominant purpose of a lawyer's advice or use in existing or contemplated litigation. There is little or nothing in the documents that is apparently useful for such a purpose. Further, it does not seem that litigation against the Public Body was in contemplation at the time the records were created (June and July of 2001). At this point it was not clear whether the claims for compensation that had been made by the Applicants to that date would be met (as eventually they were, in October of 2001).

d) pages 38 to 40

[para 52] These documents are also communications between the Public Body and its insurer. The documents were created after notice was given to the Public Body of contemplated civil litigation against it. They include communications between the insurer and a Public Body official which refer to enclosures and (for one of them) ask that information be preserved. They also include a communication between a Public Body official and an implicated staff member about providing information to the insurer. While litigation may have been in contemplation at this stage, there is, again, nothing in the documents to suggest the dominant purpose of their creation was for a lawyer's advice or use in the contemplated litigation.

d) pages 41 to 43

[para 53] This document was not a solicitor-client communication. Neither was its dominant purpose for the lawyer's advice and use in existing or contemplated litigation. It recorded the provision of an information update to the Board of Trustees. However, page

42 (except for the first 3 lines), and all the information above the final heading on page 43, are unresponsive.

Summary for Record C

[para 54] In view of the foregoing discussion I find that only a small number of the documents or parts of documents were properly withheld on the basis of privilege. With respect to the rest, no other discretionary exception was claimed. However, these remaining records will be examined below to determine if the mandatory exception under section 17 applies to prohibit disclosure that would be an unreasonable invasion of the privacy of third parties.

Issue E: Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2)(b) of the Act?

[para 55] The Public Body relies on section 12(2)(b) to refuse to confirm or deny the existence of records requested by the Applicants

- regarding disciplinary action taken against named employees of the Public Body
- a copy of the letter of complaint respecting the incident by the then-Superintendent to the teachers' professional association, and
- the results of the process of the professional association.

[para 56] Section 12(2)(b) provides:

> *12(2) … the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 57] The Public Body says that confirming or denying the existence of records responsive to the request for disciplinary records would imply that disciplinary action was or was not taken by the Public Body or by the teachers' professional association. It says that disclosure of this fact (existence of the record) is an unreasonable invasion of the personal privacy of the third parties. (Alternatively, it submits that disclosure of any such records would be an unreasonable invasion of the privacy of the third parties under section 17 of the Act.)

[para 58] Order 98-009 held that the considerations as to whether disclosure of the existence of records is an unreasonable invasion of the personal privacy of third parties are similar to those under section 17 of the Act.

[para 59] In my view one of the factors in section 17 (section 17(5)(a)) comes into play in deciding the present question. There is a need in this case for public scrutiny of the incident. This scrutiny must be sufficient to allow the Applicants to know whether the

matter was treated properly and with sufficient seriousness. (This is discussed at greater length below in the part of the decision that deals with section 17 of the Act.) However, the need to subject the activities of the Public Body to scrutiny must be balanced against the privacy interests of these employees who were implicated in the incident. In my view the proper balance under circumstances such as the present is as follows: if discipline is clearly warranted, though disclosure of the exact discipline might be an unreasonable invasion of privacy, the fact there was discipline would not be an unreasonable invasion of privacy. It follows that I do not accept that the Public Body need not confirm or deny the existence of records, if any, revealing that discipline was imposed in circumstances in which discipline was clearly warranted.

[para 60] Further, in this case, the exact discipline imposed by the teachers' professional association is publicly available. The *Teaching Profession Act,* section 47(4), provides that a decision by the teachers' professional disciplinary body is to be provided to members of the public on request without charge. The name of a disciplined teacher as well as the discipline imposed is provided. In view of this, there is little point in refusing to confirm or deny the existence of disciplinary action, if any, taken by this body.

[para 61] Thus I do not accept that the Public Body properly refused to confirm or deny the existence of disciplinary records, if any.

Issue G: Does section 17 of the Act (personal information) apply to the records/information?

[para 62] Section 17(1) provides:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[para 63] Section 17 is a mandatory ("must") section of the Act. According to this section, personal information must be withheld if its disclosure would be an unreasonable invasion of a third party's personal privacy. The Public Body has no discretion to release such information.

[para 64] In order for section 17 to apply two criteria must be fulfilled:

(a) the withheld or severed information must be "personal information" of a third party; and

(b) the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

[para 65] The first question is whether the withheld or severed records contain "personal information" of third parties.

[para 66] Personal information is defined in section 1(n). The relevant portions provide:

> *1 In this Act, …*
>
> > *n) "personal information " means recorded information about an identifiable individual, including*
> >
> > > *(i) the individual's name, home or business address or home or business telephone number, …*
> > >
> > > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given, …*
> > >
> > > *(viii) anyone else's opinions about the individual, and*
> > >
> > > *(ix) the individual's personal views or opinions, except if they are about someone else;… .*

[para 67] The Applicants contend that the information of employees of the Public Body and of other persons in this case is not the personal information of those people, but rather is the personal information of their daughter, because it arises out of the incident that involved their daughter. I do not accept this argument. I must apply the definition of "personal information" in the Act. Section 1(n) provides that "personal information" means "information about an identifiable individual". Many of the records in this case contain personal information about various individuals.

[para 68] The Applicants also argue that the staff of the school constitute part of the Public Body and should not be treated as third parties for the purposes of dealing with their personal information, and that records these persons created as part of their employment are information of the Public Body and not information of third parties. I do not accept this contention. Order 96-019 held that employees of a Public Body are considered third parties for the purpose of dealing with their personal information. The records at issue contain personal information of these third parties.

[para 69] Under the present heading I need to deal only with personal information of third parties that I have not already held

- was properly withheld under other exceptions to the Act,
- is not covered by the Act, or
- is unresponsive.

[para 70] Dealing first with Record A, much of this was properly withheld. The records that remain mainly contain the information of the Applicants' daughter. However, they also contain some information of the psychologist who administered the tests (they

show how he recorded some of the answers and scores), as well as of another school staff member involved in the testing. This is personal information of these people.

[para 71] With respect to Record B, pages 1 to 5 are outside the scope of the Act. Pages 6 and 7 contain names of Board members and other persons present at a meeting of a committee of the Board of Trustees, and their actions in their capacity as Public Body officials. This is the personal information of these people.

[para 72] With respect to Record C, pages 2 to 6 were disclosed in severed form as part of Record E, and the severed information is dealt with under Record E below. Part of page 1 (#6) and of page 3 (second bullet under the last heading), and pages 7 to 32, were properly withheld under section 27(1)(a) of the Act. Page 42 (except the first three lines) and page 43 (above the heading) are unresponsive. The following of the remaining documents in Record C contain personal information of third parties: pages 1, 33 to 43.

[para 73] With regard to the records referred to by the Public Body in its open submission as Record E pp. 1- 2, the parts that were withheld in their entirety all contain the personal information of the third parties to whom they pertain.

[para 74] The severed parts of the remainder of Record E all contain personal information of third parties.

[para 75] I will now consider whether the disclosure of any of the personal information of third parties in Records A, B, C, and the withheld or severed parts of Record E, would be an unreasonable invasion of a third party's personal privacy under section 17. In doing this I will consider whether any of the information is covered by section 17(2)(b), and whether any of the presumptions in section 17(4), and any of the factors in section 17(5), apply.

Section 17(2)(b)

[para 76] The Applicants argue that section 17(2)(b) - compelling circumstances affecting health or safety – apply to the information at issue, and that, therefore, disclosure would not be an unreasonable invasion of the personal privacy of third parties. They say their daughter's emotional and mental health continues to be adversely affected by the non-disclosure of the information. However, while the Applicants have put forward some evidence of the negative psychological consequences their daughter has experienced as a consequence of the incident, they have not provided information that would allow me to determine the effect of disclosure or non-disclosure of the information at issue on their daughter's mental state. I cannot conclude, therefore, that section 17(2)(b) applies in this case.

Section 17(4)

[para 77] The relevant parts of section 17(4) provide:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …

> *(d) the personal information relates to employment or educational history,…*
>
> *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations, …*
>
> *(g) the personal information consists of the third party's name when*
>
> > *(i) it appears with other personal information about the third party, or*
> >
> > *(ii) the disclosure of the name itself would reveal personal information about the third party…*

Section 17(4)(g) - name plus personal information

[para 78] For all the personal information of third parties in Records A to C, and the withheld or severed parts of Record E (except pages containing unidentified people or illegible words), either

- the names of third parties appear together with other personal information about them, or
- disclosure of the name itself (of the witnesses) would reveal other information about them (that they gave the statements, and were in some way involved in the events).

[para 79] I find that section 17(4)(g) creates a presumption that disclosure would be an unreasonable invasion of the personal information of third parties found in Records A to C and (except pages containing unidentified people or illegible words) the withheld or severed parts of Record E.

Section 17(4)(d) – employment history

[para 80] The Public Body claims that the parts of the results of the Superintendent's investigation that are severed from the documents in Record E relate to employment history within the terms of section 17(4)(d), and therefore the presumption under that section applies to these records.

[para 81] According to Order 2000-029: "employment history" in section 17(4)(d) is a broad, general phrase that covers information pertaining to an individual's work record. Order F2003-005 held that the term "employment history" describes a complete or partial chronology of a person's working life such as might appear in a resumé or personnel file.

[para 82] In my view all of the withheld documents in Record E, as well as the severed part of page 2 of this record, are such as appear or might appear on a personnel file, and are subject to the presumption in section 17(4)(d).

[para 83] With respect to the severed parts of the remainder of Record E, I do not accept that the notes of the Superintendent or others made during the investigation into the activities of particular staff members involved in the incident constitute part of the "employment history" of the latter persons. Only as much of the results of the investigation as is likely to or actually does make its way into an employee's personnel file falls within section 17(4)(d). The results or conclusions of an investigation may be part of a personnel file and of a person's "employment history". In this case, the notes made by the Superintendent and by another investigator about the involvement of staff members in the incident, as described to him by various people, are not themselves such as would appear in the personnel files of these people. Therefore I do not accept that the presumption in section 17(4)(d) applies to these records.

Section 17(4)(f) – personal or personnel evaluations

[para 84] The Public Body argues that section 17(4)(f) applies where an assessment is made based on professional judgment, by a person with authority to do the evaluation. It says the Superintendent was a person who had such authority as well as the ability to exercise professional judgment. It claims the provision applies to all of Record E.

[para 85] In my view, pages 2 to 12 and pages 16 to 18 of the parts of Record E that were withheld by the Public Body in their entirety, as well as the names on pages 1 and 44 of the severed parts of Record E, are subject to the presumption in section 17(4)(f).

[para 86] With respect to the remainder of the severed parts of Record E, most of these records do not consist of personal recommendations or evaluations, or personnel evaluations.

Section 17(5)

[para 87] Both the Applicants and the Public Body have made submissions about the application of the factors relative to disclosure of third party personal information under section 17(5). The relevant parts of this section provide:

> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety…,*

(c) the personal information is relevant to a fair determination of the applicant's rights,…

(f) the personal information has been supplied in confidence, …

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant … .

Section 17(5)(a) – public scrutiny

[para 88] Order 97-002 said that in order to fulfill what is now section 17(5)(a), there must be evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny. Order 97-002 also considered whether public scrutiny had been called for by more than one person. Finally, citing Ontario Order P-673, the Order noted that where a public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of a public body to public scrutiny, and this was particularly so if the public body had also investigated the matter in issue.

[para 89] I agree with the Applicants that there is a need for public scrutiny of the incident and of the response to the incident by Public Body's officials. In this case there is no indication that anyone other than the Applicants has called for the information. However, this factor is less significant where, as here, the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter.

[para 90] The Public Body concedes in its submission that public scrutiny of the event is called for. It has already disclosed many of the responsive records, resulting from the subsequent investigation, that provide information as to what happened during the incident. However, it has severed personal information from these records, including the names of witnesses. It has also withheld certain records which reveal consequences to the implicated staff. It says that the information and records already disclosed to the Applicants are sufficient to allow the necessary scrutiny, and that unfair damage to the reputation of the employees may result from the disclosure of their names in the context of unsevered records.

[para 91] The actions taken by some members of the school staff during the incident undoubtedly called the activities of the Public Body into question. It is important for the Applicants and the public to know what happened. Thus section 17(5)(a) weighs in favour of disclosing personal information in the records that reveals what happened in the incident.

[para 92] Given the serious nature of the matter, the response to the incident by the Public Body's officials should also be sufficiently transparent to enable those affected, and the public generally, to know whether it was an appropriate response – that justice was done and can be seen to have been done. This weighs in favour of disclosure of information that would reveal how the matter was dealt with.

Public availability of the information as a relevant circumstance under section 17(5)

[para 93] The process of the teachers' professional association is a public one under the related legislation. The *Teaching Profession Act* provides that the meeting of a hearing committee [the body hearing the complaint in this case] must be open, Section 33 provides as follows:

> *33 A hearing before a hearing committee must be open to the public unless*
>
> > *(a) the complainant requests that the hearing be held in private because of the confidential nature of the matters to be heard, or*
> > *(b) in the opinion of the hearing committee, the interest of any person other than the investigated person may be detrimentally affected if the hearing is not held in private.*

[para 94] More significantly, the same Act provides that the decision of a hearing committee [the body hearing the complaint in this case] is publicly available. Section 47(4) provides:

> *47(4) The decision of a hearing committee must be available to the public on request and free of charge.*

[para 95] The professional association provides both the name of a disciplined teacher, and any disciplinary action taken, on request. The openness of the related hearing process and the availability of the association's decision to the public is in my view a "relevant circumstance", within the terms of the introductory words of section 17(5). This factor weighs against the idea that disclosure of the information is an unreasonable invasion of the privacy of persons who are subjected to the process. At the same time, however, the availability of the information through other avenues makes it less important to disclose information about this matter in the related records.

Work-related nature of activities as a relevant circumstance under section 17(5)

[para 96] Much of the personal information of third parties in this case was created as a consequence of the activities of staff of the Public Body performing their duties, or providing evidence of matters they witnessed as a function of their employment. Some of the information is also business contact information of Public Body staff and of others. Order F2003-005 held that the fact records contain only business contact information, or record or otherwise reveal activities of staff of the Public Body in the course of performing

their duties, is a relevant circumstance under section 17(5). Order 2000-005 held that disclosure of the names and titles of employees of a third party was not an unreasonable invasion of the employees' personal privacy as they were acting in formal, representative capacities. Some of the personal information in this case has such aspects. This is a "relevant circumstance" under section 17(5) that weighs in favour of disclosure of such information.

Section 17(5)(c) – fair determination of rights

[para 97] Order 99-028 adopted the following criteria for helping determine if section 17(5)(c) is a relevant circumstance:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 98] The Applicants have instituted a legal action. Thus section 17(5)(c) weighs in favour of disclosing information relevant to a fair determination of the Applicants' rights in this action. Information as to what happened, who witnessed what happened, what they said, and any related information, might be useful to the Applicants in preparing their case. However, the availability of much of this information through the discovery process portion of a civil action is a countervailing factor.

Section 17(5)(f) – information supplied in confidence

[para 99] There is no indication in the materials before me that witnesses to the incident and related matters supplied their information in confidence, nor does the Public Body make any argument to this effect.

Section 17(5)(h) – unfair damage to reputation

[para 100] The Public Body argues that disclosure of records that would reveal the consequences to the implicated teachers could unfairly damage their reputations. I do not accept this argument. The consequences that flowed did so from a proper process. Although the effect on a teacher's reputation might be negative, there is nothing to suggest it would be unfair.

Conclusions under section 17

[para 101] Weighing all the factors discussed above, I conclude as follows:

Record A

[para 102] Section 17(4)(g) triggers a presumption relative to the personal information of the school staff involved in administering these tests. However, because the information was created by these persons in the course of fulfilling their employment responsibilities, disclosure would not be an unreasonable invasion of privacy.

Record B

[para 103] The fact the Public Body's officials named on pages 6 and 7 were present at a meeting, and the decisions they made, is their personal information to which the section 17(4)(g) presumption applies. However, their presence and decisions were in the discharge of their employment or official responsibilities as members or employees of the Public Body. Disclosure of these records would not be an unreasonable invasion of the personal privacy of the named officials.

Record C

[para 104] This record deals with various steps taken by Public Body officials following from the incident. Some of it reveals how the officials responded in terms of planning improvements to avoid future incidents. Some of it shows that Public Body employees corresponded with one another about the incident, or that Public Body employees corresponded with others (the insurers); it also shows what the correspondence contained, and describes some aspects of the incident and some actions taken by Public Body officials, and some requests made by the insurers. The names of the Public Body's officials, what they wrote, and what they did, is their personal information, and the section 17(4)(g) presumption applies. However, the steps or actions taken by these employees were done in the discharge of their employment responsibilities. The same is true of the contents of the correspondence from the insurers. With regard to one record (page 1), disclosure exposes to necessary scrutiny the manner in which the incident was dealt with, and with respect to pages 34 to 36, disclosure exposes details of the incident to scrutiny. Disclosure of all the personal information just described would not be an unreasonable invasion of the personal privacy of the officials and other employees involved.

[para 105] Some of the records reveal business contact information about personnel of the Public Body's insurers, and about the Associate Superintendent and what appears to be a member of his staff. Some of them reveal the names and positions of school staff members. Some contain the names of Board members and other persons present at Committee of the Whole Meeting of the School Board of Trustees, in their capacity as Public Body officials, as well as the names of school personnel relative to instructions they received. Though section 17(4)(g) applies to all this information (on pages 33 to 43), this factor is outweighed by the fact that it is workplace or business information.

[para 106] In some cases, the records reveal the personal information of the school staff implicated in the incident. Again, although section 17(4)(g) applies, the need to disclose what happened in the incident and how the matter was dealt with outweighs this consideration.

[para 107] Some of the records name the lawyers of the Applicants, and describe some correspondence they sent to the Public Body. This is personal information of the lawyers and the presumption in section 17(4)(g) applies. However, the Applicants are already fully aware of who their lawyers were and what actions these lawyers took on their behalf. This is a relevant circumstance under section 17(5) that weighs against the idea that disclosure of the information would be an unreasonable invasion of the privacy of the lawyers.

[para 108] However, for some of the information in Record C the presumption under section 17(4)(g) applies, but there are no factors which outweigh it. This includes the name of a child in one of the 'threatening' e-mails, facts related to another Grade 6 student, the personal e-mail address of a teacher. In addition, most of pages 42 and 43 are completely unrelated to the incident and thus are unresponsive.

[para 109] To summarize, disclosure of the personal information on the following pages in Record C would not be an unreasonable invasion of the personal privacy of any third party: page 1 (except the part (#6) to be severed under section 27), pages 33, 34 (except the name in number 2, and the information in number 4, severed by me), 35, 36 (except the name in number 2, and the information in number 4, severed by me), 37, 38, 39 (except the personal and personal contact information severed by me), 40, 41, and the parts of 42 and 43 not severed by me as unresponsive.

[para 110] With regard to pages 2 to 6, these records were released to the Applicants in severed form. The severed portions are dealt with below in the discussion relative to Record E.

Record E – withheld portion

[para 111] The parts of Record E pp 1-2 that were withheld in their entirety reveal some of the consequences for the school staff implicated in the incident. They include consequences originally imposed by the Superintendent, some consequences arising from the decision of the Board of Trustees, the results of the process of the teachers' professional disciplinary body (as well as some details of the process itself), and other records arising from the incident. The presumption under section 17(4)(g) applies to all these records, and the presumptions under section 17(4)(d) and (f) apply to most of them. These presumptions weigh against disclosure.

[para 112] The need for public scrutiny, under section 17(5)(a), of the manner in which the incident was dealt with by the responsible Public Body officials, is a factor that weighs in favor of disclosure of some of this personal information.

[para 113] The Public Body's response to the incident has two aspects – how the investigations and related decision-making were conducted, and what the outcomes were for the implicated school staff. The withheld parts of Record E primarily reveal the consequences for the staff, but also have some details about the process relative to the proceedings of the professional association's disciplinary body. I will review what the Applicants already know about these things before determining whether disclosure is called for to achieve public scrutiny.

[para 114] The Public Body's original response to the incident was an investigation by the Superintendent. The Applicants expressed some concerns about how the Superintendent conducted his investigation, but the documents in the withheld part of Record E shed no light on this; the only related records are the severed parts of Record E, and these were released to the Applicants (with personal information severed, some of which I will now order to be disclosed). With respect to the outcome of the investigation, the Applicants appear to have disagreed with what the Superintendent decided, and they appear to be largely unaware what, if any, disciplinary action was taken by him against the implicated staff. The disagreement gave rise to the Applicants' appeal to the Board.

[para 115] The Board held a hearing in which the Applicants participated. It provided a decision to the Applicants that set out the remedies granted, and the reasons. The Applicants know that among the remedies was the transfer of one of the teachers out of a school, and the filing of a complaint by the Superintendent with the teachers' association with respect to another one of the teachers (outcomes they had requested). While the Applicants point to a statement one of them made at the conclusion of the hearing to the effect that not everything had been dealt with to his satisfaction, they do not dispute that the Board granted all the remedies they had requested. Thus the Applicants had sufficient information to judge whether to that point, the matter had been treated seriously, and dealt with appropriately. (Again, though the Applicants expressed some dissatisfaction about the manner in which their own lawyer presented their claims to the Board, and about the way their tape-recording of the hearing was dealt with, there is nothing in the materials to suggest the Board acted improperly.) In my view, what the Applicants already know about the response of the Superintendent and of the Board satisfies the need for scrutiny of these matters.

[para 116] In a decision from the office of the British Columbia Information and Privacy Commissioner which dealt with a physical altercation between a teacher and a student (British Columbia Order No. 62-1995), the former Commissioner held that it was enough to meet the demands of public scrutiny for a parent to know that the teacher's behaviour was treated seriously and thoroughly by school officials, and that the teacher had been disciplined in accordance with the appropriate progressive discipline provisions. He held that the parent did not need to know the specifics of the disciplinary decision, and that as to the latter, the teacher's privacy rights prevailed.

[para 117] I agree with this reasoning. As the presumptions under section 17 apply, and in view of the information the Applicants already have about the outcome of the

Board's process, I find the parts of Record E withheld in their entirety that relate to the response to the incident by the Superintendent and the Board were properly withheld under section 17. Disclosure would be an unreasonable invasion of the privacy of the persons whose information is contained in these records.

[para 118] However, the Applicants were at the time of making their submissions – and may still be - completely unaware of how the matter was dealt with by the professional disciplinary body following its receipt of the Superintendent's complaint. Details of this process and its outcome are in the custody and control of the Public Body, but it has chosen to withhold them. In my view the Applicants ought to have access to enough information to know that this matter was dealt with appropriately by the professional disciplinary body.

[para 119] As with the earlier phases of the matter, it might be enough to satisfy the need for scrutiny for the Applicants to know that this body conducted an investigation and held a hearing, and the teacher was disciplined. However, they appear not to know anything about this. Further, there is another aspect to the withheld part of Record E. As noted earlier, under the *Teaching Profession Act*, hearings of the professional disciplinary body are to be held in public unless certain specific exceptions are met, and the resulting decision is available to the public on request. To some degree this conflicts with the idea that disclosure of this aspect of the discipline would be an unreasonable invasion of the personal privacy of the staff members. On the other hand, disclosure of a personal disciplinary record may not be warranted where the information necessary for public scrutiny is readily available through alternate means.

[para 120] Taking into account the presumptions under section 17(4), as well as the public availability of the professional disciplinary body's decision, I find that the withheld part of Record E, which reveals the process and consequences of the professional disciplinary process, need not be disclosed. As much of the information as is necessary to achieve the required scrutiny is publicly available.

Record E – severed parts

[para 121] The remainder of Record E consists primarily of records relating to the investigation of the incident. All of these records were provided to the Applicants, with personal information of third parties (primarily their names) severed. Many of the documents contain descriptions of the events during, or following from, the incident, and the names of the participants or other people present. They also contain the names of people who supplied the descriptions.

[para 122] The severed names, and the descriptions of the activities, during the incident, of the staff members who were implicated in the incident (the principal, vice-principal and school counselor), all trigger the presumption under section 17(4)(g), and in some cases the presumptions under section 17(4)(d) and (f). However, this personal information of the implicated staff is necessary to provide adequate scrutiny of the incident, and to some extent of the way in which the incident was subsequently dealt with by Public Body officials. It may also be relevant to a fair determination of the Applicants' rights in

their legal action. Disclosure of this information (on pages 1, 3, 7, 8, 9 10, 11, 12, 13, 15 to 17, 20 to 22, 26, 27, 30 to 33, 34, 35, 36 to 40, 43, 44, 45, 46, 47, 48, 49) would not be an unreasonable invasion of the personal privacy of these individuals.

[para 123] The presumption under section 17(4)(g) applies to personal information about an implicated staff member which is not directly related to that person's role in the incident. There is no factor favouring disclosure of this information (on page 2) and it was properly severed.

[para 124] With respect to personal information about other staff of the Public Body or of the teachers' professional association who were in some way involved in, or provided information related to, the incident, section 17(4)(g) gives rise to the presumption for all such information. However, much of this information arises as a function of their role in their workplace. This is a factor favouring disclosure. Some of this information about or provided by these staff members would be of value to provide scrutiny of the activities of Public Body officials subsequent to the incident, or could possibly assist the Applicants in achieving a fair determination of their legal rights. Balancing all these factors relative to the severed information of non-implicated Public Body staff members, I find disclosure of the personal information of staff members on the following pages would not be an unreasonable invasion of the privacy of the respective staff members: 4, 5, 10, 11, 13, 14, 17, 18, 22, 23, 28, 29, 30 to 33, 35, 36, 37, 39, 43, 44, 46.

[para 125] The same factors operate in favour of disclosure of some of the personal information of the implicated staff that is not apparently, or not directly, related to their role during the incident. The disclosure of the personal information of these staff members on pages 6 and 46 would not be an unreasonable invasion of their privacy.

[para 126] With respect to personal information of third parties who are not staff of the Public Body or the teachers' professional body - other students, and other parents who were involved or gave information - the presumption in section 17(4)(g) arises in relation to all such information. Disclosure of some of the severed information might be of use to paint a complete picture of the events, which could enhance scrutiny of the Public Body's activities related to the incident. Some of the information could also help the Applicants achieve a fair resolution of their rights by allowing them to know who could be a witness and what evidence they could give. In some cases the context identifies the persons whose names have been severed anyway, and in some cases, the Applicants are already aware of the severed information. Balancing all these factors, I find disclosure of personal information of other third parties on the following pages would be an unreasonable invasion of privacy: pages 4, 5, 10, 11, 17, 22, 25, 27, 30 to 32, 34, 41, 43, 47, 48, 49. I have included in this category a person relative to whom it is unclear if that person was a member of the staff of the Public Body.

[para 127] Two third parties, whose names were provided to the investigators by the Applicants, provided information relating to the incident in a professional capacity. The presumption under section 17(4)(g) applies. Since the Applicants themselves provided these sources, disclosure of the names would not help them to subject the matter to scrutiny

or to vindicate their legal rights. The names of these people (on pages 10, 17, 22, 35, 36) need not be disclosed.

[para 128] Page 21 (second bullet under the last heading) records information about something said by the Superintendent. I have already held that a copy of this information in Record C was properly excluded under 27(1)(a) on the basis of legal privilege. This finding also applies to the information on page 21. Similarly, with respect to the material under the final heading on page 24, my finding that this clause as it is found in Record C was properly withheld under section 27(1)(a) also applies to the material under the last heading on page 24. I do not have to deal with the personal information in these parts of Record E.

[para 129] The descriptive terms on pages 39 and 40 have some relationship to the incident and thus contribute to public scrutiny. Their disclosure would not be an unreasonable invasion of the privacy of those they describe.

[para 130] The records contain names or initials of people (some illegible) whose identity and role has not been revealed in the submission (pages 35, 36, 37, 41, 44). The only personal information about these people is that they were in some unknown way thought to be connected with the events in question. In light of the absence of strong factors favouring disclosure, I find this information should be severed.

[para 131] Finally, with respect to an illegible word that was severed by the Public Body (on page 40), in the absence of any explanation for the severing, I find this word should be disclosed.

Issue H: Did the FOIP Coordinator of the Public Body exercise his discretion on an improper basis?

[para 132] The Applicants raised an additional issue in their submission. They say the Public Body's FOIP Coordinator had a conflict of interest because he was involved in the incident (in that information was provided to him at the time), and he took no action, as a senior Public Body official, to ensure that the investigation of the incident was conducted properly. The Applicants seem to be suggesting that this biased the Coordinator in terms of what information he chose to disclose in responding to the access request – in other words, that for any of the decisions that he made relative to discretionary exceptions, he exercised his discretion based on improper considerations. This argument would apply relative to the exercise of discretion under each of the sections of the Act at issue in the inquiry that are discretionary – that is, sections 12, 23, 26 and 27.

[para 133] The Public Body responded in its rebuttal that the Coordinator's knowledge of the investigation did not result in bias or conflict of interest.

[para 134] I see no basis for finding that the FOIP Coordinator's exercise of discretion about what information to disclose in responding to the access request was influenced by the fact that he received some information about the incident at or about the time it was happening. There is nothing to support the idea that he had any duty to

intervene, nor that his decisions about disclosure involved any sort of cover-up of his own involvement.

Issue I: Did the Public Body disclose personal information of the Applicants' daughter in violation of the Act?

[para 135] The Applicants have asked me to treat a part of their submission as a 'formal complaint' that the Public Body improperly disclosed personal information, in that those of the Public Body's submissions that were exchanged among the parties included personal information of their daughter.

[para 136] Section 40(1)(v) of the Act permits a Public Body to disclose personal information "for use in a proceeding before a court or quasi-judicial body to which … the public body is a party". The present inquiry is such a proceeding, and the Public Body submitted the information to this office for use in the proceeding. Thus if the information fell within the terms of the Act, its disclosure would be permitted by the Act, as long as it was done in a reasonable manner in accordance with section 40(4). In this case the Public Body attached the information in question as evidence in support of one of its submissions, which was a reasonable action, for a proper purpose.

V. ORDER

[para 137] I make this Order under section 72 of the Act.

[para 138] I find the Public Body complied with its duty under section 10(1) of the Act.

[para 139] I find the Public Body did not properly refuse to confirm or deny the existence of records as authorized by section 12(2)(b) of the Act relative to disciplinary actions it took, if any.

[para 140] I make no order respecting the following because they are excluded by sections 4(1)(g), and 4(b), respectively, of the Act:

- Record A: the questions on pages 3 to 12 and 14 to 23.
- Record B: pages 1 to 5.

[However, I have marked the questions in Record A because I will order disclosure of the scoring portions of the records. The marked questions need not be disclosed under the Act because I have no jurisdiction to make any order about them.]

[para 141] I find the Public Body did not properly apply section 23(1)(b) of the Act to the minutes of the committee of the Board held in December 4, 2001, at 7:30 p.m. (the replacement for the second document in Record B), and I order that this be disclosed (except for the part to be severed as unresponsive (see below)).

[para 142] I find the Public Body properly applied section 26 of the Act to the following parts of Record A: part of page 1 severed by me; the answers to the questions on

pages 3 to 12 and 14 to 23 (as severed by me) [note that other than the questions, which are outside my jurisdiction and which I have marked, and the answers, which I have also marked, the remainder of these pages, including the scoring portions, are to be disclosed]; pages 2, 26 and 27.

[para 143] I find the following records are to be severed as unresponsive:

- Record B - the portions under numbers 1 to 3 and 5 to 11 of the minutes of the committee of the Board held in December 4, 2001, at 7:30 p.m.
- Record C - all but the first three lines of page 42 and the part above the heading "ADJOURNMENT" on page 43.

[For clarity I have provided the Public Body with a copy of these records, which I have marked in accordance with the instructions in this paragraph.]

[para 144] I find that the Public Body properly applied 27(1)(a) of the Act to:

- Record C: page 1 - information in #6; page 3 – information in the second bullet under the heading "July 27, 2001"; page 6 – information under the final heading; pages 7 to 32
- Record E: pages 16 and 21- information in the second bullet under the heading "July 27, 2001"; pages 19 and 24 – information under the final heading.

[For clarity I have provided the Public Body with copies of Record C and Record E, severed part, which I have marked in accordance with the instructions in this paragraph.]

[para 145] I order the remaining records in Record C to be disclosed, except that :

- page 4 is to be severed in the same manner as Record E, severed part, page 17 (see below)
- pages 34, 36 and 39 are to be severed as indicated in the discussion under section 17 (see below), and
- page 42 (except the first three lines) and the part above the heading on page 43 are to be severed as unresponsive.

[For clarity I have provided the Public Body with a copy of Record C, which I have marked in accordance with the instructions in this paragraph.]

[para 146] I find that the following records must be withheld from disclosure under section 17 of the Act:

- Record C: page 34 - the name severed by me in paragraph 2 and the information severed by me in paragraph 4; page 36 - the name severed by me in paragraph 2 and the information severed by me in paragraph 4); page 39 – the personal contact information severed by me
- Record E pp. 1-2, parts withheld in their entirety (all)
- Record E, severed parts: the severed part of page 2; the first two of the severed names on page 4; the first four and last two of the severed names on page 5; the last two severed names on page 10; the fifth of the severed names on page 11; the fifth and sixth and the last two severed names on pages 17 and 22; the severed name on page 25; the first of the severed names on page 27; the people referred to by, or including, their first names on pages 30 to 32; the first name in the last bullet on page 31, and other references to the same person on pages 31 and 32; the first and

third of the severed names on page 34; the name on the seventh line and initials on the ninth line under the heading "Issues and Actions (Briefly)" on page 35; the second of the severed names, the initials immediately thereunder, the name immediately under the word "Conduct", and the severed words on the line fifth from the bottom, on page 36; the third and fourth of the severed names on page 37; the severed names on page 41; the last of the severed names on page 43; the names in the left column of page 44; the names and other information of persons other than an implicated staff member on pages 47 and 48; the name and contact information in the third heading on page 49. [For clarity I have provided the Public Body with a copy of Record E, severed part, which I have severed in accordance with the instructions in this bullet. I have also marked the parts of Record E that were properly withheld under section 27(1)(a).]

[para 147] I order the following information that was severed from Record E by the Public Body to be disclosed:

- the severed names of implicated staff (principal, vice-principal and school counselor) on pages 1, 3, 6, 7, 8, 9 10, 11, 12, 13, 15 to 17, 20 to 22, 26, 27, 30 to 33, 34, 35, 36 to 40, 43, 44, 45, 46, 47, 48, 49
- the severed names of other Public Body staff or teacher's professional association staff on pages, 5, 10, 11, 17, 18, 22, 23, 28, 29, 30 to 33, 35, 36, 37, 39, 43, 44, 46
- the descriptive terms on line 5 of page 39, line 2 on page 40, and the word following "Bullying" in the left column on page 44
- the illegible word in the middle of page 40.

[para 148] No justification was given for severing the words at the top of page 19 and the bottom of page 23 of Record E, and I order these words to be disclosed.

[para 149] I find the Public Body's FOIP Coordinator did not exercise his discretion on an improper basis.

[para 150] I find the Public Body did not disclose personal information of the Applicant's daughter in violation of the Act.

[para 151] Along with this Order I am providing the Public Body with a copy of records which I have severed by highlighting the severed information. These records, severed as marked, are to be disclosed to the Applicant.

[para 152] I further order the Public Body to notify me in writing, within 50 days of being given a copy of the Order, that the Public Body has complied with this Order.

Frank Work, Q.C.
Information and Privacy Commissioner