



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-436

Appeal M-9400357

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Board of Education for the City of Hamilton (the Board). The request indicated that it only pertains to "... information related to [the appellant's] August 31, 1992 letter of complaint charging systemic discrimination ..." against her son by five Board employees. For ease of reference, I will refer to the appellant's letter of August 31, 1992 as "the complaint". In particular, the appellant wanted access to:

- (1) all records in the possession of the Board and the school relating to the inquiry and investigation by the Superintendent of Schools (Area 1) into the conduct of the five Board employees (this part of the request also refers to a meeting which occurred on September 3, 1992);
- (2) all records in the possession of the Board and the school relating to the inquiry and investigation by the former Director of Education into the conduct of the five Board employees (this part of the request also refers to a meeting which occurred on September 25, 1992);
- (3) all records in the possession of the Board relating to the inquiry and investigation by the Chair of the Board into the conduct of the five Board employees (this part of the request also refers to a letter to the Chair dated December 18, 1992);
- (4) all records in the possession of the Board and the school relating to the inquiry and investigation by the Board's former Superintendent of Human Resources into the conduct of the five Board employees (this part of the request also refers to a meeting which occurred on April 8, 1993--also mentioned in the request which led to appeal M-9400425 and the resulting Order M-435);
- (5) all records in the possession of the Board and the school relating to the inquiry and investigation by the Board's Superintendent of Human Resources into the conduct of the five Board employees (this part of the request also refers to a meeting which occurred on October 14, 1993--also mentioned in the request which led to Appeal M-9400364 and the resulting Order M-434);
- (6) all records in the possession of the Board and the school from any other person or department who may have an interest in or need to know about the complaint and the allegations contained in it;
- (7) a computer message created by a named Board employee, or, if there is no record of the message, a copy of the computer log which authorized its removal;
- (8) a copy of any affidavit sworn by the Board employee regarding the contents of the message referred to in item (7);
- (9) all records in the possession of the Board and the school relating to the inquiry and investigation by the Director of Education into the conduct of the five Board employees; and
- (10) all other records related in any way to the complaint.

In addition, the appellant requested answers to the following questions:

- (11) whether the Superintendent of Schools (Area 1) interviewed the five Board employees referred to in the complaint, and if so, when the interview took place;
- (12) whether the former Director of Education interviewed the five Board employees referred to in the complaint, and if so, when the interview took place;
- (13) whether the Board's former Superintendent of Human Resources interviewed the five Board employees referred to in the complaint, and if so, when the interview took place;
- (14) whether the Board's Superintendent of Human Resources interviewed the five Board employees referred to in the complaint, and if so, when the interview took place;
- (15) whether the Board's Superintendent of Human Resources is related to another named individual; and
- (16) whether anyone requested an affidavit from the Board employee referred to in item (7) above, regarding the contents of the computer message.

The Board's response to the request was sent to the appellant's authorized representative. The Board provided access in full to a number of responsive records. No exemptions were claimed. In addition, the Board advised the appellant that no affidavit of the type described in item (8), above, had ever been requested or produced.

The appellant commenced an appeal of the Board's decision on the basis that additional records should exist.

The sole issue in this appeal is whether the Board's search for records was reasonable in the circumstances. A Notice of Inquiry was provided to the appellant and the Board. Representations were received from the Board only.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must

be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

The appellant has not submitted representations. However, her letter of appeal provides information about her reasons for believing that additional records should exist. She states that, given the extensive records kept by the Board with respect to other activities, it is not credible that more detailed records were not kept regarding her complaint. She also refers to the Board's response to her request, in which the Freedom of Information and Privacy Co-ordinator (the Co-ordinator) states that she consulted the Superintendent of Schools for Area 1 during her attempts to locate records. The appellant queries why the other Board employees and officers mentioned in her request, or others who might have been able to assist the Co-ordinator, were not contacted for their assistance.

The Board's representations refer to previous and concurrent requests made by the appellant and her representative. The Board's representations go on to state that the Commissioner's office "... has determined through three prior orders that the Board has taken all reasonable steps to conduct searches to locate records which would respond to the appellant's requests". On this basis, the Board takes the view that the request which is the subject of this appeal is "frivolous and vexatious".

As part of its representations, the Board has provided an affidavit sworn by the Co-ordinator. The affidavit contains general assertions relating to the efforts which were made to locate responsive records. However, the majority of its contents relate to previous and concurrent requests and appeals initiated by the appellant and her representative. This leads the Board to take the position that, as the affidavit states, "... the appellant's requests are frivolous and vexatious and amount to an abuse of process as they have been dealt with previously".

I infer that the Board's representations, and the Co-ordinator's affidavit supplied with them, are intended to advance and/or support the following arguments:

- (1) there is a category of requests which may be considered "frivolous", "vexatious", or "an abuse of process", and if a request falls into such a category, that is a relevant factor for me to consider in this inquiry;
- (2) the Board's search for responsive records was reasonable in the circumstances of this appeal.

I will deal with these arguments in turn. With respect to the first one, the Act does not contain any provisions to define or forbid requests which are "frivolous", "vexatious" or an "abuse of process", nor has the Board referred me to any authority to support its position that these are factors which ought to be considered in this appeal. Accordingly, in my view, this argument has not been substantiated.

Turning to the second argument, it is my view that the "circumstances" of this appeal could include previous or concurrent requests and appeals initiated by the appellant or her representative, if any of these related to essentially the same types of records to which access is sought in this appeal.

In Order M-254, I dealt with a situation where a requester had previously made similar requests to the one which was under consideration there. I stated as follows regarding this issue:

[IPC Order M-436/December 16,1994]

The fact situation in this appeal is unusual in that the City chose to rely, in part, on searches conducted with regard to a previous request in reaching the conclusion that it did not have a copy of the requested record. In some circumstances that would not, in my view, constitute a reasonable search. However, in this appeal, the previous request was submitted only a few months prior to the present request, and it is clear that the requested record falls within the ambit of the previous request as clarified. Furthermore, the amount of search time expended on these searches was considerable. Under the circumstances, I find that the City's action in relying, in part, on these previous searches was reasonable.

In my view, however, the situation in this appeal is different. In reaching my decision in Order M-254, I had been provided with detailed evidence as to the nature of the previous searches, and it was clear that the requested record would have fallen within the ambit of the previous request and the searches conducted with respect to that previous request. In that appeal, it was also clear that the record had been created prior to the date of the previous request. In addition, the time period between the requests in Order M-254 was only a few months.

In this case, I have been provided with very little information about the previous searches which were conducted, nor am I satisfied that the scope of the previous requests to which the Board has referred would necessarily capture all records which might be responsive to this request. I also note that all of the previous requests which the Board has specifically mentioned in its representations (all of which resulted in appeals, leading to Orders M-134, M-191 and M-192) were submitted more than a year before the request under consideration here. Given the appellant's continued activities with respect to the complaint, it is quite possible that additional records have been created during this period. For all these reasons, the evidence presented to me has not established that the "circumstances" of this appeal are similar to those in Order M-254, and I am unable to conclude that the Board's responses to previous requests have any bearing on whether the search was reasonable in this case.

As previously noted, the Board's representations also refer to concurrent requests submitted by the appellant, which led to Appeals M-9400364 and M-9400425. In Order M-434 (dated December 16, 1994), which disposed of Appeal M-9400364, I found that the Board had conducted reasonable searches for records relating to the meeting of October 24, 1993. This meeting is referred to in item (5), above. Since I have already ruled on the adequacy of the search for that category of records (which may be only part of the records responsive to item (5) above), I will not address this again, and the order provisions below do not refer to the category of records dealt with in Order M-434.

Similarly, in Order M-435 (dated December 16, 1994), which disposed of Appeal M-9400425, I found that the Board had conducted reasonable searches for records relating to the meeting of April 8, 1993. This meeting is referred to in item (4), above. Since I have already ruled on the adequacy of the search for that category of records (which may be only part of the records responsive to item (4) above), I will not address this again, and the order provisions below do not refer to the category of records dealt with in Order M-435.

For any other records which may respond to items (4) and (5), above, and the other items requested, I must now assess whether the search conducted by the Board in connection with this request represented a

reasonable attempt to locate responsive records. The Notice of Inquiry asked the Board to provide particulars of its search, in affidavit form. Neither the Board's representations nor the Co-ordinator's affidavit contain this information. All of the references to a search or searches in these materials are very general and do not answer the questions posed in the Notice of Inquiry. No particulars of locations searched, or individuals contacted, are provided. Moreover, the information contained in the decision letter, which refers to only one individual being contacted by the Board in its attempt to locate responsive records, supports the appellant's contention that other individuals who might have provided assistance were not contacted.

Accordingly, I am unable to conclude that the Board's search for records was reasonable in the circumstances of this appeal.

There is one other matter which must be considered. The Board's representations assert that the Board is not obligated to create a record in order to respond to the request. This submission is most relevant with respect to the parts of the request which are in the form of questions (see items 11-16, above). I agree with the Board on this point, and my order should not be interpreted as requiring the Board to create responsive records. The Board's only obligation is to locate records which already exist and which contain the requested information.

ORDER:

1. I order the Board to conduct a further search for records which are responsive to the request as summarized in this order (with the exception of those categories of records responsive to items (4) and (5) as identified in this order, which have been dealt with in Orders M-434 and M-435, and with the further exception of records previously disclosed to the appellant or her representative under the Act), and to advise the appellant's representative in writing of the results of this search, within 30 days after the date of this order.
2. In the event that additional responsive records are located in the search referred to in Provision 1, I order the Board to render a final decision on access to the records in accordance with the provisions of sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20.
3. I order the Board to provide me with a copy of the correspondence referred to in Provisions 1 and 2 (if applicable), within 35 days after the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
John Higgins
Inquiry Officer

_____ December 16, 1994