



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

# **ORDER MO-1797**

**Appeal MA-030362-1**

**Halton Catholic District School Board**



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## **NATURE OF THE APPEAL:**

This is an appeal from a decision of the Halton Catholic District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). As background, the requester (now the appellant) sought access to a copy of the record on which a lawyer for the Board (Ms. B.) based the following statement, made in a letter dated January 14, 2000 from the lawyer to another solicitor: "It is our understanding that [the appellant] has not yet completed appropriate anger management training."

The Board issued a decision in which it stated:

1. "The information is not within the possession or control of the Board.
2. The information that you seek in any event would be covered by the solicitor/client privilege and;
3. Such information is in the possession of a third party and supplied in confidence."

The appellant appealed this decision. During mediation the Board issued a new decision letter in which it stated:

"We have a complete file search and the record that you refer to does not exist."

The appellant believes that a record or records must exist. As mediation through this office did not result in a resolution of the issues, this appeal was referred to me for adjudication. I sent a Notice of Inquiry to the Board, initially, inviting it to submit representations on the facts and issues in the appeal. In this Notice, I requested information about the Board's search for records, and directed the Board to provide this information in affidavit form, signed by the person(s) conducting the search. Upon receiving the Board's representations, which included an affidavit about the search, I requested certain additional information from the Board. The Board subsequently provided me with an additional affidavit.

The Notice of Inquiry and the Board's materials were sent to the appellant for his response, and the appellant has also provided me with representations in this appeal.

The issue for me to determine is whether the Board has conducted a reasonable search for records responsive to the request.

## **DISCUSSION:**

### **REASONABLE SEARCH**

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

## **Representations**

In this appeal, the Board provided me with two affidavits, one signed by an Administrator and the other by a lawyer (Ms. T.) with a law firm providing legal advice to the Board. The Administrator's affidavit states that the Board understood the request to be for access to any notes or documents that caused the lawyer for the Board to draft the letter about the appellant. As the individual responsible for responding to access to information requests received by the Board, he assisted the Board with the search for such records. The Administrator describes the type of files that he searched, as well as the searches conducted by other employees at his request. He states that to the best of his knowledge, the documentation that the appellant seeks was never in the possession of the Board.

The affidavit by the Board's lawyer (Ms. T.) states that she searched the files in the possession of Ms. B. as well as all other documentation in the possession of the law firm related to this matter. Ms. T. states that her search involved an examination of all documents and correspondence contained in the files and all sub-files that are in the possession of Ms. B. and the law office and which may have been, either directly or indirectly, related to this matter. She states that she was unable to locate any documentation upon which the statement made in the January 14, 2000 letter may have been based.

In response, the appellant submits that the Board did not conduct a reasonable search. As evidence of this, he produced a number of documents which he states the Board or its law firm should have in their possession. The appellant further states:

In essence, I am looking for the record or records, written or otherwise recorded, that lead to the creation of the January 14, 2000 letter. After all, statements made in the January 14, 2000 letter, that was provided for use in family court, should be based in fact.

The appellant also takes issue with the Board's characterization of his request. He states that the Administrator's affidavit suggests the appellant is seeking a copy of the letter dated January 14, 2000, a document that the appellant already has.

The appellant also points to a number of individuals that he believes should have been asked for assistance in the search, and the law firm's file number, which he believes should have been searched. The appellant notes that the Board's Administrator does not mention a search of the Board's finance files in response to this request, and questions whether there may be correspondence there indicating the work that the lawyer and her firm completed on behalf of the Board with regards to this matter.

The appellant states that some of the information provided by the Board in support of its position relates to a prior freedom of information request, and is not relevant to the current one.

With respect to the affidavit signed by a member of the Board's law firm, the appellant questions its relevance, as the lawyer signing it has never been on any documentation sent by the firm's attorneys. He identifies another individual at the law firm as being a more appropriate person to conduct the search. He also points to a discrepancy in the letter, relating to an attachment.

### **Analysis**

On the basis of the material before me, I accept that the Board conducted a reasonable search for records within its possession that are responsive to the request. I agree that part of the Board's affidavit (in particular, the first part of paragraph 2) appears to misconstrue his request, in that it suggests that the appellant is seeking a copy of the January 14, 2000 letter. However, the Board later clarifies its understanding as to the nature of the request, which is consistent with the appellant's understanding. I am satisfied that this initial discrepancy does not affect the reasonableness of the Board's search for responsive records.

In response to the request, various individuals within the Board searched its archives/freedom of information records, the relevant Ontario Student Record (OSR), the office of the former Superintendent of Human Resources, the office of the secretary to the former Superintendent of Human Resources, and the records of two staff members at an elementary school, for the letter and any other records that may relate to the letter. The Administrator confirms that the Board located no records in response to this request in these searches.

I agree with the appellant that some of the searches referred to appear to pre-date this specific request, and may have been conducted in response to his previous request. However, I am satisfied that given the breadth of those searches, they would have covered any records responsive to this request.

It is not surprising that the Board did not locate any responsive records in its search of its own files. To the extent that the appellant seeks a record or records relied on by one of the Board's lawyers, it would be reasonable to conclude that such records (if they exist) would be in the possession of the law firm. I have reviewed the affidavit submitted by the Board's law firm, and I am satisfied that it establishes that it conducted a reasonable search for responsive records. It confirms that a search was conducted of the files in the possession of the lawyer who wrote the January 14, 2000 letter, as well as all other documentation in the possession of the firm related to this matter. As indicated above, the person conducting the search examined all documents and correspondence contained in the files and all sub-files that are in the possession of the author of the letter and in the law office and which may have been, either directly or indirectly, related to this matter. The affidavit states that no records as requested exist.

Although the appellant takes issue with the person who conducted the search of the law firm's files, there is no reason to believe that this individual would not have had the same access to the files in which responsive records might be located, as the other individual he names.

Again, although I agree with the appellant that the attachment to the law firm's affidavit does not appear to be consistent with the reference to it in the affidavit, I am satisfied that this apparent discrepancy does not affect the substance of the issues before me.

I have reviewed the documents submitted by the appellant in support of his position. I am satisfied that they do not cast doubt on the reasonableness of the Board's search. The appellant states that these are documents that are in the possession of the Board or its lawyers, and should have been identified in its search. It should be noted that the Board's position that no records exist is not inconsistent with the existence of these other documents. The appellant's request is very specific – he seeks access to a record or records upon which a statement was based. The Board's response in effect confirms that the documents referred to by the appellant were not the source of this statement.

An unusual aspect of this request is that it may be interpreted more in the nature of a question rather than a request for records. The appellant clearly disputes the statement made about him in the January 14, 2000 letter, and he seeks to find out the basis of that statement. In a sense, the appellant is looking for information about the thought process of the lawyer who drafted the letter. Alternatively, it is possible that the information he seeks is not in the form of a record under the *Act*. Normally, the *Act* does not require institutions to produce information from an individual's memory or knowledge (see Order MO-1724). It also does not impose a specific duty on an institution to transcribe oral views, comments or discussions (see Order M-33). In this case, the Board did not take the position that it was not required to respond to the request, and carried out a search for records containing the information sought. I am satisfied that Board fulfilled its obligations in searching for records both within its possession and in the possession of its lawyers that were the source of the statement in the January 14, 2000 letter, and in confirming that no records exist.

**ORDER:**

I uphold the decision of the Board.

Original signed by: \_\_\_\_\_  
Sherry Liang  
Adjudicator

\_\_\_\_\_  
June 9, 2004