



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

# **ORDER MO-2549-I**

## **Appeal MA10-63**

### **Thames Valley District School Board**



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## NATURE OF THE APPEAL:

This interim order is intended to address the issues raised by the Thames Valley District School Board's (the board) response to an access request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act).

The requester sought access to "a detailed budget and financial statement for TVRAA [Thames Valley Recreation Athletic Association] for the current 2009/2010 school year and the 2 (two) previous years." In response, the board provided copies of general ledgers showing revenue and expenses for the years 2007 to 2009 and explained that the TVRAA did not prepare balance sheets and projected statements. The requester was not satisfied with the information produced in response to the request and continued to request budget information from the board. The board subsequently clarified that the TVRAA does not prepare annual budgets or financial statements of its own because it operates from a specific budget line included in the board's budget.

As the requester believes that additional responsive records ought to exist, he appealed the board's decision respecting the nature and quality of its search to this office. A mediator was appointed to explore resolution of the issues raised by the appeal. Following discussion with the mediator, the board undertook a further search for financial records in addition to the general ledgers for 2007-2009. As a result of that search, the board identified a three-page record titled "Multi-Year Preliminary Budget Review", a handout from the May 13, 2008 TVRAA meeting, but denied access to it under section 8(1)(b) (law enforcement investigation). The appellant is also appealing the denial of access to the record.

A mediated resolution was not possible and the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. Upon review of the file materials, I concluded that the appellant may already have a copy of the sole responsive record currently at issue. Accordingly, I asked staff from this office to contact the appellant to inquire. The appellant advised that he does not have a copy of the record, but rather has only information extracted from the record.

On July 20, 2010, I sent a Notice of Inquiry to the board seeking its representations on the issues before me in this appeal: the board's claim of section 8(1)(b) to deny access to the record, as well as the adequacy of its search for records responsive to the request. Based on the information available to me in the file regarding the board's response to the access request, I stated the following in the introductory section of the Notice of Inquiry:

**In addition, and based on the information in the appeal file, it appears that the board may have suggested to the appellant that it would not deal (further) with his access to information request under the *Act* while the police investigation related to the TVRAA was ongoing. The board should be aware that the police investigation does not have the effect of suspending the board's obligations and responsibilities under the *Municipal Freedom of Information and Protection of Privacy Act* [emphasis in original].**

The board's representations were originally due on August 11, 2010. On August 9, I received faxed correspondence from the board's external legal counsel, indicating that because the Notice of Inquiry had not been received at their offices until August 6, it would not be possible to meet the initial deadline for submission of representations. The board also advised that it was currently looking into obtaining an affidavit respecting the nature and extent of its search, as required by the Notice of Inquiry, from an individual now retired from the board. The board requested a 30 day extension for the submission of its representations, which I granted in consideration of the reasons given.

On September 7, 2010, I received the board's representations. The board's representations do not directly address the issues as outlined in the Notice of Inquiry document; nor did the board provide an affidavit respecting the search which describes its efforts to locate records responsive to the appellant's request. Rather, the board advises that it is prepared to disclose the one record identified (to date) as responsive to the request "but only upon the conclusion of the ongoing Crown prosecution" of an individual formerly associated with the TVRAA.

In view of the position taken by the board, I decided that it would be necessary to issue an interim order to determine certain issues.

## **DISCUSSION:**

### **WOULD DISCLOSURE OF THE RECORD INTERFERE WITH A LAW ENFORCEMENT INVESTIGATION?**

As there is otherwise no basis for the board's denial of access, it appears that the board is seeking to maintain its claim of section 8(1)(b) to the record pending conclusion of a specified criminal prosecution in which the board is involved as an "interested party."

In the Notice of Inquiry, I set out the applicable provision and this office's usual approach to reviewing its application to records withheld by an institution. Specifically, section 8(1)(b) of the *Act* states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

The Notice of Inquiry outlined the requirements of section 8(1)(b). In particular, I asked the board to explain how the record – “Multi-Year Preliminary Budget Review”, a handout from the May 13, 2008 TVRAA meeting created by board staff in December 2007 – could be considered a law enforcement record for the purpose of the section 8 exemption. I advised the board that it was required to provide “detailed and convincing” evidence to establish a “reasonable expectation of harm” resulting from disclosure of the record, and that evidence amounting to speculation of possible harm would not be sufficient.<sup>1</sup>

With more specific reference to section 8(1)(b), I stated the following:

The board’s representations should address the following concepts related to the interpretation of section 8(1)(b):

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations [Order PO-2085]. The investigation in question must be ongoing or in existence [Order PO-2657]. ...

**Based on the information available to me in the appeal file, it appears that the law enforcement investigation the board relies upon in claiming this exemption is completed.** The individual has been charged and has, in fact, appeared in court on those charges [emphasis in original].

The board provided submissions on the ongoing prosecution of the criminal matter in which it claims to be an “interested party,” requesting that I keep the content of those submissions confidential. I am prepared to maintain that confidentiality largely because the board’s representations do not directly address the application of section 8(1)(b) of the *Act* as outlined in the Notice of Inquiry, or as past orders of this office have interpreted the provision. Generally, however, it may be said that the board provided the record to the London Police Service for the purpose of its investigation. Further, the board submits that the record “may be relevant to the Crown’s case.” As I understand it, therefore, the board is relying on the ongoing nature of the criminal *prosecution* as the basis for withholding the record at issue, at least until the prosecution is completed.

On my review of the record, it is clear that it was created by the board for the purpose of making decisions related to funding secondary school athletics. In my view, the possibility that the

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<sup>1</sup> Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

record may have been used by the police in its (law enforcement) investigation of issues arising from the management of TVRAA funds does not establish the application of section 8(1)(b). What has been presented to me by the board is not sufficiently “detailed and convincing” evidence to establish that disclosure of the record could reasonably be expected to interfere with a specific or ongoing law enforcement matter.

In my view, the board’s representations conflate the concepts of investigation and prosecution. As I identified in the Notice of Inquiry based on my review of the file, the law enforcement *investigation* into a possible violation of the *Criminal Code* has been completed and the prosecution of an individual is underway. Indeed, the completion of a law enforcement investigation is a precondition to the commencement of criminal prosecution. However, the same completion also precludes the application of section 8(1)(b) since the exemption can only apply to a specific, ongoing law enforcement *investigation* (Order PO-2085). In the circumstances, the board’s evidence is clearly insufficient to persuade me that disclosure of the record reasonably be expected to interfere with a specific, ongoing law enforcement investigation. Accordingly, I find that section 8(1)(b) does not apply, and I will order the board to disclose the record to the appellant.

To conclude, section 8(1)(b) is not available to the board as a temporary shield from its obligation to disclose the record in circumstances where the exemption does not apply. As I advised the board in the Notice of Inquiry, its obligations under the *Act* are not suspended by the collateral criminal proceeding.

### **DID THE BOARD CONDUCT A REASONABLE SEARCH FOR RESPONSIVE RECORDS?**

In the Notice of Inquiry, I provided an outline of the background of this appeal similar to the one appearing in the introductory section of this order. Specifically, I stated that the appellant was not satisfied by the board’s explanation respecting why it had not located any other records responsive to his request for financial and budget information for the TVRAA in the years specified.

In the Notice of Inquiry, I provided the outline of the search issue as it is usually set out when seeking representations from an institution. I required the board to provide a written summary in affidavit form of all steps taken in response to the request. Indeed, in its own request for an extension, the board stated that it required the extension, in part, because it was trying to contact an individual to swear the affidavit. However, in the representations ultimately provided to this office, the board provided no submissions outlining the nature and extent of its search(es) for responsive records, and no affidavit evidence as required. In doing so, the board appears to have interpreted the identification of a specific record (the Multi-Year Preliminary Budget Review) as the “sole record at issue” as being conclusive of the search issue. The board states:

It was initially our understanding that the requester was challenging the Board’s statements regarding its searches and the availability of records that related to his initial request for detailed budget and financial statement for TVRAA for the 2009/2010 school year and the two prior years. *We now understand that the sole*

*record at issue is the Multi-Year Preliminary Budget Review which was first raised in discussion with the mediator in May [2010] [emphasis added].*

As the sole record at issue is the Multi-Year Preliminary Budget Review, which the Board has in its possession and which the requester seeks, it is our expectation that the Commissioner does not require a search history at this time.

The board's conclusions respecting the search issue are both puzzling and, unfortunately, incorrect. As stated, part of the reason given by the board in its request for an extension for the submission of its representations was that it was seeking out the assistance of an individual to execute the search affidavit required by me in the Notice of Inquiry. It appears that the board reconsidered this issue in the interim period, but reached the wrong conclusion about what was required of it.

It perhaps bears emphasis at this point that it is the Notice of Inquiry that presents the issues to be decided in an appeal, as determined by the adjudicator, not any documents which may have preceded it during the appeals process, including those created during mediation. The adequacy of the board's search for responsive records would not have been included in the Notice of Inquiry if not for the appellant's insistence that additional records responsive to his request ought to exist and my conclusion that the issue must be reviewed at adjudication through the submission of written representations (and a sworn affidavit) by the board to determine the issue with finality.

Had the board provided written representations, including the affidavit, on the search issue as required, these may have offered sufficient evidence for me to reach conclusions as to the adequacy of the search, or searches, conducted by the board in response to this request. In the face of the misunderstanding on the board's part apparent from the submissions outlined above, I am unable to conclude that the searches conducted were reasonable in the circumstances.

Accordingly, I will order the board to conduct further searches for records reasonably related to the request and to provide the previously requested affidavit evidence and written submissions respecting the searches ordered by me in this interim order, as well as past searches conducted by board staff in response to the initial request. To be clear, the board should search for records reasonably related to TVRAA financial or budget information for the 2007-2008, 2008-2009, and 2009-2010 school years. In addition to the order provision outlined below, the board may refer back to the outline of the search issue provided in the July 20, 2010 Notice of Inquiry for assistance in preparing its affidavit and written submissions.

## **ORDER:**

1. I order the board to disclose the record to the appellant **by September 29, 2010.**
2. I order the board to conduct further searches for responsive records within its record holdings, and to provide evidence with respect to searches conducted previously in responding to the appellant's request initially.

3. With regard to this provision, I order the board to provide me with affidavits sworn by the individuals who conducted the searches **by October 6, 2010**. At a minimum, the affidavit should include information relating to the following:
  - (a) information about the employee(s) swearing the affidavit describing his or her qualifications, position and responsibilities;
  - (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
  - (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
  - (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
  - (e) the results of the search;
  - (f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
4. If further responsive records are located as a result of the searches referred to in provision 2, I order the board to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
5. The affidavits referred to in provision 3 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.
6. I remain seized of this appeal in order to deal with the resolution of the search issue, and any other outstanding issues.

Original Signed By: \_\_\_\_\_

Daphne Loukidelis  
Adjudicator

September 9, 2010 \_\_\_\_\_