



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

INTERIM ORDER MO-2581-I

Appeal MA08-295

Toronto District School Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télec: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following information:

1. **To determine the extent of the problem:** Access to *all* personal information contained in any and all TDSB records. We intend this to be interpreted as an all encompassing request. We would like full access to all information, including but not limited to any OSR and non-OSR records, all assessments (educational or otherwise), consultations, incident reports, trustee/superintendent/principal/vice-principal/teacher/guidance notes and records, documentation files, special education files, correspondences, investigation reports, third party records/reports/correspondences, personal information provided to the TDSB from outside sources or agencies, etc. This should include records filed under name, student number or any other identifying access key, or combination of identifiers that together uniquely identify an individual (e.g. postal code plus date of birth, address, phone number) etc.

2. **To determine the extent of propagation of the problem.** A full and complete audit of all requests for [the named person's] personal information. We would like full information on all disclosures that have been made routinely, as well as all disclosures that have been made pursuant to any legislative or regulatory authority. We would like a clear indication of what information was disclosed and to whom it was disclosed, dates, reasons for disclosure, etc. In addition, we would like full information on any access to information requests made regarding [the named person's] personal information, including full details of any access requests that are pending or have been denied.

The Board issued a decision letter, in which it stated as follows:

By letter dated July 2, 2008, I extended the response time to your request to July 18, 2008 as additional time was required to complete the document search and to finalize review of the documents and related work. I have enclosed a copy of this letter as requested by you.

Records responsive to your request have been located. I have decided to release these records in their entirety.

With respect to the second part of the request, no responsive documents have been found.

By way of background, I understand that the requester attended various Board schools between 1994 and 2008 and that she has made this "all encompassing request" due to "concerns about the accuracy of [her student] records."

The requester (now the appellant) appealed the Board's decision advising that she believed additional records should exist.

During the mediation stage of the appeal process, the appellant confirmed that both parts 1 and 2 of her request remain at issue in this appeal and identified additional records that she believed should exist. The Board conducted a second search for records and advised the mediator of the details of the Board's additional search efforts. The Board advised the mediator that during the second search for records no additional records had been located. The Board also provided the mediator with a copy of the Board's Records Management Retention Guidelines, dated September 10, 2007. The Board advised the mediator that the appellant could review this document on the Board's website.

After the mediator advised the appellant of the above, and after the appellant had an opportunity to review the Board's Records Management Retention Guidelines, the appellant advised the mediator that she still believed additional records should exist. The appellant stated that the Board's failure to do a reasonable search was evidenced in each of the following ways.

i. They have failed to provide routine records that their record keeping protocols and retention schedules indicate should have been created and should still exist.

Examples include the following:

- EO5 (field trips/programs outside the classroom) Retention: 4 years
- SO1 (OSR records, documentation files...) Retention: subject to OSR guideline/permanent/55 years
- SO3 (office index cards/student master records) Retention: permanent
- SO4 (student attendance registers) Retention: current +3
- SO6 (transfers/exits/admittances/demits) Retention: permanent
- S07 (student registrations/applications (including university applications)) Retention: 5 years
- S28 (bursaries and awards/student recognition) retention: permanent/55 years
- S31 (intellectual, including anecdotal notes, for students enrolled in programs such as giftedness) Retention: 10 years after graduation.

ii. They have failed to provide non-routine records that their retention schedules indicate should have been created under specific relevant circumstances and that these records should still exist.

Examples should include the following:

- SO9 (attendance counselling records) Retention: 10 years after graduation
- G11 (complaints to trustees) Retention: permanent
- S26 (student Harassment) Retention: permanent

- S16 (psychological assessments) Retention: 10 years after graduation
- a guidance counsellor met with [the named individual] at [a named secondary school] and there were “interventions” regarding significant harassment and abuse happening at that school. It is unclear from the scope notes where such records would be stored. Possibilities include S17 (Social Work), S20 (Student Support Services), S22 (Behavioural) Retention: Permanent or 10 years after graduation.
- E-32-34 (Safe Schools, Programs) there is a notation that these may be divided by case files. Retention: 7 years or unstated.

iii. They have looked in the wrong places and/or asked the wrong people, given their own policies and practices.

The appellant advised that the above lists were not exhaustive, but were offered by way of demonstration that there was a strong expectation that records in such categories should still exist.

The parties were unable to resolve the appeal during mediation and the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Board. The Board responded with representations.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Board’s representations. The appellant responded with representations.

I then shared the appellant’s representations with the Board in their entirety and I invited the Board to respond to the appellant’s representations by way of reply.

The Board provided reply representations, which I shared with the appellant. I invited the appellant to provide sur-reply representations, which she did.

Shortly after receiving the appellant’s sur-reply representations, I received a letter from the appellant in which she enclosed a copy of a new decision letter received from the Board along with additional severed records responsive to her request that had been disclosed to her. The appellant indicated that despite the Board’s new disclosure, she still believed that the Board had not conducted a reasonable search for responsive records.

With the appellant’s consent, I shared the appellant’s letter with the Board and invited it to respond to the views expressed in her letter. The Board provided a letter in response.

I note that in the appellant’s initial representations she indicated that she would prefer that my decision in this matter not be made public and that if this is not possible that my decision contain as little detail as possible. I have tried to take the appellant’s request into account in the preparation of this order, while at the same time providing sufficient detail to support my findings.

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.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Parties' representations

As set out above, the parties' engaged in a lengthy exchange of representations regarding the reasonable search issue.

The representations provided by the Board are rooted in two affidavits submitted by the Board's Senior Manager, Board Services and FOI Coordinator (the FOI Coordinator). The first affidavit, sworn August 26, 2009, was submitted in response to my initial Notice of Inquiry. It describes the scope of the Board's initial search efforts and the results of those searches. A supplementary affidavit, sworn December 4, 2009, was submitted in reply to the representations submitted initially by the appellant. It responds to the appellant's views regarding the Board's search for responsive records and is supported by a letter prepared by its legal counsel, which addresses in greater detail issues raised by the appellant in her initial representations.

FOI Coordinator's August 26th affidavit

In this affidavit, the FOI Coordinator lists several current and former senior Board employees that he contacted due to their "specific knowledge of the records maintained in various facilities within the institution." He lists these individuals by name and position and sets out the basis for asking each of these individuals to conduct a search. These individuals include the current

Associate Director of Education, Executive Superintendent, Special Education and Support Services (the Executive Superintendent), System Superintendent, Special Education and Support Services (System Superintendent), Senior Manager, Professional Support Services (Senior Manager), and the Superintendent of Education, as well as individuals who formerly filled some of these positions. With regard to their independent search efforts, the FOI Coordinator states that he understands that each individual “oversaw and conducted a specific search of their facility.” In the same affidavit, the FOI Coordinator submits that he also conducted a “search of the Board’s records with respect to any access requests made under the [Act].” The FOI Coordinator states that he was “provided” with records totalling approximately 248 pages, which he disclosed to the appellant in their entirety. The FOI Coordinator submits that he believes that each of the individuals he contacted disclosed to the appellant a complete set of the records they located during the course of their searches.

The FOI Coordinator states that after the disclosure of the records the appellant provided information about “schools and individuals” who, she claimed, may have records responsive to the request. He submits that in each case he conducted a “direct search” by “speaking with the named individuals or requesting that the appropriate facility official conduct a search.” In his affidavit, the FOI Coordinator provided a table that sets out the name of the person or facility that had been identified by the appellant as a potential search target, the steps undertaken for each search and the basis for undertaking each search. The FOI Coordinator states that he was advised by each of the named individuals that no responsive records were located as a result of their searches.

Appellant’s representations

The appellant expresses concern regarding the Board’s “delay” in responding to her request and questions whether this may have impacted the search process.

The appellant notes that her request was received by the Board on May 28, 2008, but that the FOI Coordinator acknowledged receipt effective June 2, 2008 in a letter to the appellant dated June 10, 2008. The appellant also notes that the Board extended the deadline for responding to the request to July 18, 2008. It is the appellant’s view that the Board’s June 10th acknowledgement and subsequent extension to July 18th effectively meant that the request was responded to after the appellant had ceased to be a Board student (she completed grade 12 in June 2008) and she questions whether the searches completed took into account her transitional status with the Board when she went from being a student to a former student. The appellant submits that the Board has different record retention protocols for current and past students. She raises this issue because of her interest in seeking a correction of some of her school records and she fears her move from student to former student status may have jeopardized her ability to locate all records and accurately determine which ones require correcting.

Additionally, the appellant states that at no time during the course of processing her request did the FOI Coordinator contact her for any clarification or narrowing of her request. The appellant notes that she specifically listed “correspondences” in part 1 of her request. The appellant also notes that the definition of “record” in section 2(1) of the *Act* includes electronic records, yet the

FOI Coordinator failed to locate and disclose electronic records that she feels are responsive to her request.

The appellant submits that part 2 of her request was particularly important to her as the timing of her request coincided with the university application process, and she is aware that her secondary school shares information with universities during the application process. She states that she wanted to ensure that in the event there were erroneous entries in her records that corrections could be made in a timely manner. The appellant states that she requested information about any sharing of her personal information, including the “routine sharing” of her personal information. She submits that there were routine disclosures of her personal information immediately preceding her access request, citing two emails from the Ontario University Application Centre, confirming that her secondary school had reported her high school courses and grades in support of her application. In the appellant’s view, this communication, and the Board’s conclusion that there are no records responsive to part 2 of the request, demonstrates to her that the Board did not conduct a reasonable search for records responsive to that part of the request.

With respect to the FOI Coordinator’s affidavit evidence of the Board’s search efforts, the appellant notes that the Coordinator’s affidavit “does not describe the search, nor does [it] say whether or not any records were found as a result of [the] search [...]”

With regard to the searches completed by other individuals, the appellant states that while it is “reasonable [for the FOI Coordinator] to delegate the search to employees with expertise at the particular location being searched,” the Board “did not provide affidavits from the individuals who did the actual searches, and in some cases, the search was done by unnamed individuals whose expertise is not established.” The appellant notes that there is “no indication of the amount of time or effort expended by the employees who [conducted] the actual searches.” The appellant also submits that there is no indication of the level of experience of the individuals who conducted the searches referred to by the FOI Coordinator in his affidavit. Because the request was processed in the summer, at a time when many staff are on vacation, the appellant questions whether the additional searches were completed by individuals with experience and familiarity with the Board’s record keeping practices.

The appellant also raises the possibility that the Board failed to disclose all of the records that were part of the batch of records that it initially disclosed. The appellant notes that the records the Board disclosed were numbered sequentially up to page 248, but that pages 1, 144 and 160-199 were missing. The appellant questions the whereabouts of these records.

In addition, the appellant questions the Board’s adherence to its own records retention guidelines and raises questions about the whereabouts of records that she understands are required to be maintained pursuant to the Ministry of Education’s Ontario Student Record (OSR) Guideline for a period of 55 years, such as the OSR folder and the Office Index Card.

The appellant lists a number of categories of records, which she believes should have been located if the Board had undertaken a reasonable search for responsive records. These include:

- Attendance counselling records

- Records documenting the transfer of the appellant out of a special education placement in 2004
- Correspondence regarding an investigation, conducted in October 2004, into allegations of inappropriate online contact with the appellant by a third party
- Records relating to communication between an identified counsellor and the Board regarding issues that the appellant was having at a named school

It is the appellant's view that the Board has failed to provide details of the searches it has conducted and has not offered any "reasonable or substantive explanation for the general failure to find responsive documents that [its] own guidelines state should have been produced and should still exist."

Board's reply

The Board responded to the appellant's representations by providing a supplementary affidavit of the FOI Coordinator, sworn December 4, 2009. This affidavit is supported by a letter prepared by the Board's legal counsel, which addresses in greater detail issues raised by the appellant in her initial representations.

In its reply submissions, the Board describes the further search efforts undertaken by the FOI Coordinator, based on information received from the appellant in her representations including the names of Board staff that had not previously been mentioned by the appellant. The Board reports that no further responsive records were found.

With respect to the page numbering gaps reported by the appellant, the Board reports that these gaps are consistent with the gaps in its copy of the records. The FOI Coordinator adds that while it is "not possible to determine conclusively the cause of the gap[s]," the Board has not been able to locate any missing pages and believes that the gaps may have occurred through "inadvertence" when the page numbering was completed.

Appellant's sur-reply

The appellant reiterates her concerns regarding the Board's efforts to search for records responsive to her request. She states that the additional submissions provided by the Board only provide insight into the information collected by the FOI Coordinator from others who allegedly completed searches. The appellant argues that the supplementary representations do not provide specific information about what was searched (and by whom) and the results of those specific search efforts.

The appellant also states that she never intended to narrow the scope of her request to records held by any particular Board employee. She submits that she framed her request broadly to cover the categories of information that are of interest to her, but that the Board has the "expertise, knowledge and access to better direct the search." The appellant submits that in providing names it was not her intention to narrow the search to records held only by these

individuals, but merely to provide examples that might assist the Board in conducting its searches.

The appellant suggests that the Board's inability to account for the gaps in page numbering points to an overall "lack of care" and vigilance on the part of the Board in responding to her request.

Board's letter in response to appellant's sur-reply

As stated above, shortly after receiving the appellant's sur-reply representations, I received a letter from the appellant in which she enclosed a copy of a new decision letter received from the Board along with additional severed records responsive to her request that had been disclosed to the appellant. I shared the appellant's letter with the Board and invited it to respond to the appellant's views expressed in it. The Board provided a letter in response.

The Board acknowledges in its letter that the additional records provided to the appellant were "within the scope of the request and were not initially provided to the appellant." The Board explains that these records only came to the Board's attention after reviewing the appellant's initial representations in this inquiry, in which she makes mention of a named social worker who the appellant had consulted. The Board states that the appellant had not previously identified this social worker when asked to provide particulars in order to facilitate the search. However, according to the Board, once this person's name was provided to the Board, it conducted a further search and located additional records.

The Board notes that the appellant's request is "extremely broad" involving "all records related to the [appellant] who attended a variety of schools within the Board over a 14 year period."

The Board concludes that searches under the *Act* "need not be exhaustive but merely reasonable." The Board adds that it is "incumbent upon the requester to assist in this process." The Board states that by "failing to provide adequate initial assistance to the Board, it had no reason to contact the [social worker]." Finally, the Board states that it only became reasonable to contact the social worker after "sufficient particulars were provided by the requester" and that this does not reflect upon any failure on the part of the Board to conduct a reasonable search in the first instance.

Analysis and findings

As stated above, the issue for me to determine in this case is whether the Board has conducted a reasonable search for records responsive to the appellant's request. While the *Act* does not require the Board to prove with absolute certainty that additional records do not exist, it must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. If, based on the evidence before me, I am not satisfied that the Board's search efforts were reasonable then I can order further searches.

In this case, having carefully considered all of the parties' representations, I conclude that the Board has not conducted a reasonable search for records responsive to the appellant's request for the following reasons.

Firstly, in my view, the Board has not provided me with sufficient evidence to establish that it has conducted a reasonable search. In the Notice of Inquiry I initially issued to the Board to commence my inquiry, I requested the Board to provide me with a "written summary of all steps taken in response to the request." In particular, I asked the Board to provide this information "in affidavit form" from the "person or persons who conducted the actual search[es]." I acknowledge that the Board has furnished affidavit evidence from the FOI Coordinator and that this individual has provided some information regarding his own search efforts. However, in my view, the FOI Coordinator's affidavit evidence lacks sufficient detail regarding the steps he took to respond to the appellant's request, specifically what he searched, where he searched, the results of his searches and the dates upon which he completed them.

In addition, it is apparent that there were several other past and present Board employees who were consulted by the FOI Coordinator to conduct searches, including the Associate Director of Education, Executive Superintendent, System Superintendent, Senior Manager, Superintendent of Education and a social worker. While the names and titles of those individuals are valuable in assessing whether the Board's search was reasonable, this information alone is not helpful without additional information regarding their search efforts. Unfortunately, the Board's representations, including the FOI Coordinator's affidavits, are deficient regarding the nature, scope and outcome of the respective searches carried out by the identified Board employees.

The appellant has listed a number of categories of records in her representations (attendance counselling records, records documenting the transfer of the appellant out of a special education placement in 2004, correspondence regarding an investigation, conducted in October 2004, into allegations of inappropriate online contact with the appellant by a third party, and records relating to communications between an identified counsellor and the Board regarding issues that the appellant was having at a named school) that the Board has not, in my view, adequately addressed in its representations.

The Board has provided only cursory and general statements regarding the results of its searches, including searches of the categories of records listed above. In my view, the Board has not provided adequate detail about the searches completed by the FOI Coordinator and the other Board employees identified in the FOI Coordinator's affidavits, including what was actually searched by each individual, when each search was completed, who was consulted during the course of each search and the results of each search. While it would be impractical to ask the Board to furnish affidavits from each of the Board employees identified by the FOI Coordinator (this would amount to, by my count, in excess of 14 affidavits), it would be reasonable to expect the FOI Coordinator to document in an affidavit the details regarding the searches completed by all of the individuals referenced in his previous two affidavits.

Secondly, I am not satisfied with the Board's explanation regarding the gaps in page numbering regarding the 248 pages of records disclosed. It appears that more than 40 pages of records are unaccounted for (pages 1, 144 and 160-199). The Board states that these gaps are consistent

with its own version of the records and it attributes the gaps to inadvertence in the numbering of the records. I find this explanation rather implausible, particularly due to the large number of unaccounted for pages involved.

Accordingly, for the reasons set out above, I conclude that the Board has not conducted a reasonable search for records responsive to the appellant's request and I will order the Board to conduct further focussed searches and to provide a reasonable amount of detail regarding the results of those searches.

Despite my finding on the search issue, I would also caution the appellant regarding her expectations and role in the search process. I acknowledge the appellant's view that the Board failed to adequately consult her during the course of processing her request to narrow the request or to seek clarification. The appellant's request is detailed but broadly framed, and it spans 14 years of educational history. While an institution should consult a requester to clarify a request where clarification would be helpful in better understanding the information being sought, a requester also has an onus to assist an institution in providing direction regarding what and where to search when she is seeking her own personal information. This onus is documented in section 37(1)(b) of the *Act*, which states:

An individual seeking access to personal information about the individual shall,

identify the personal information bank or otherwise identify the location of the personal information; and

In my view, the appellant in this case had a responsibility to provide the Board with as much information as possible about the possible location of responsive information, particularly due to the broad nature of the information sought and the extended timeframe of the request. I note that when the appellant provided - during the course of making her representations - the names of possible Board staff that might have insight into the whereabouts of responsive records, the Board was able to locate additional responsive information in the hands of a social worker. In my view, this demonstrates the importance of the appellant assisting the Board in identifying the possible location of her personal information.

ORDER:

1. I order the Board to conduct a further search for the following records, as referenced in the appellant's representations, whether in printed form, on videotape, by electronic means or otherwise:
 - a) attendance counselling records
 - b) records documenting the transfer of the appellant out of a special education placement in 2004
 - c) correspondence regarding an investigation, conducted in October 2004, into allegations of inappropriate online contact with the appellant by a third party
 - d) records relating to communication between an identified counsellor and the Board regarding issues that the appellant was having at a named school

- e) pages 1, 144 and 160-199 of the 248 pages of records previously disclosed to the appellant

In conducting these searches, the Board is asked to consult all Board staff named by either the Board or the appellant in their respective representations.

2. With regard to Provision 1, I order the FOI Coordinator to prepare and submit a further affidavit by **January 14, 2011** setting out the details of all further searches completed, including the following:
 - a) information about all employee(s) who conducted searches, describing their qualifications, position and responsibilities;
 - b) a statement describing each employee's knowledge and understanding of the subject matter of the request;
 - c) the date(s) each employee conducted his or her 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 searches, and the steps taken in conducting each search;
 - e) the results of each search;
 - f) if as a result of these 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.
3. If further responsive records are located as a result of the searches referred to in Provision 1, 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.
4. The affidavit referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit 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.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original signed by: _____
Bernard Morrow
Adjudicator

December 15, 2010