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

ORDER MO-2590

Appeals MA10-58 and MA10-141

Ottawa-Carleton District School Board

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NATURE OF THE APPEALS:

The appellant submitted two related requests to the Ottawa-Carleton District School Board (the Board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to her son. The requests were made and dealt with separately, and two appeal files were opened to address the issues raised in them. Because the parties and issues are the same and the records are very similar, I have decided to join these two files and dispose of them in one order.

Appeal MA10-58

In her first request, the appellant asked for a, "… copy of [the appellant's son's] entire speech-language file at OCDSB."

The Board responded by granting partial access to the requested records stating:

> In response to your request I enclose a copy of all documents contained in [your son's] speech-language file save and except for the questions and results of the Peabody Picture Vocabulary Test document contained in the file. I am refusing to disclose this document on the basis that it falls within the disclosure exemption contained in section 11(h) [examination questions] of the *Municipal Freedom of Information and Protection of Privacy Act*.

The appellant appealed the Board's decision.

During mediation, the appellant indicated that she believes there are additional records which were not provided to her by the Board. Specifically, the appellant believes that there should be records of sound/word imitation and exercises, which the appellant believes were part of her son's school speech-language program. She provided a copy of an "Autism Spectrum Disorders Consultation Report," which she believes proves that additional responsive records should exist.

The Board maintained that there are no additional records responsive to the appellant's request.

Appeal MA10-141

In her second request, the appellant asked for the, "… entire psychological file/services for [the appellant's son], which is at OCDSB."

The Board similarly responded to the appellant, granting partial access to the requested records stating:

> In response to your request I enclose a copy of all documents contained in [your son's] speech-language file save and except for the questions and results of the SIB-R Scales of Independent Behaviour (Adaptive Behaviour Testing) which is contained in the file. I am refusing to disclose this document on the basis that it

> falls within the disclosure exemption contained in section 11(h) of the *Municipal Freedom of Information and Protection of Privacy Act*.

Again, the appellant appealed the Board's decision.

During mediation, the Board clarified that its decision letter erroneously referred to a "speech-language" file. Instead, the correct wording should have been the "psychological" file.

The appellant requested answers to a number of questions about the SIB-R Scales of Independent Behaviour (Adaptive Testing) test. Subsequently, the Board provided a response to the appellant's questions. Ultimately, the appellant believes that additional records responsive to this second request should also exist. The Board maintained that there are no additional responsive records.

I note that these two files were extensively mediated, that the Board had forwarded additional (or resent information already provided) to the appellant. Further, the Board offered to invite the appellant to its offices to review the complete files on site and to choose the records that were of interest to her.

As further mediation was not possible in either appeal, the files were forwarded to the adjudication stage of the appeal process on the issues of the reasonableness of the Board's search for records, and the Board's application of section 11(h) to the withheld records.

I sought and received representations from the Board, initially. I then sought representations from the appellant, and provided her with a complete copy of the Board's submissions. The appellant also provided submissions.

After reviewing the appellant's submissions, I decided that they raised issues to which the Board should be given an opportunity to reply. I provided the Board with a complete copy of the appellant's representations.

After reviewing the appellant's submissions, the Board contacted this office to advise that it had decided to amend its decision regarding access to the two records at issue, and had now decided to disclose them to the appellant. As a result, the application of the discretionary exemption in section 11(h) to these records is no longer at issue in this appeal.

The Board also indicated that, in an attempt to resolve the remaining issue, it would again offer to arrange a meeting between the appellant and the OCDSB speech pathologist and psychologist "in order to allow her to specifically inquire about documents that she believes exist that have not been produced." The Board indicated that it was willing to make all of the files available for the appellant to review. The appellant declined to accept the Board's offer.

After receiving the appellant's letter declining its offer to meet with her to clarify her request, the Board submitted representations in reply.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

Moreover, a requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

In its initial representations, the Board indicated that it had copied and delivered to the appellant, copies of all documents in the two files relating to the appellant's son that she requested (except for the two records that were at issue, but which have now also been disclosed).

In her representations, the appellant asserts that:

> I have not received the records of special speech-language exercises designed by the [Board] speech language pathologists in order to improve my son's verbal and expressive language skills and which were part of my son's speech-language program. Those records, I saw in my son's [Board] speech-language file during the meeting with the Board speech-language pathologist [named] on [a specified date].

The appellant indicates that there was communication during mediation relating to this record that justifies her belief that the Board is deliberately concealing other records from her. She

states that the Board claims that the only record that exists relating to the results of the Peabody Picture Vocabulary Test is entitled "Communication Summary 2005-2006." It appears the Board provided the appellant with a copy of this record. She states further, however, that on review of her son's Ontario School Record (OSR), she discovered another record entitled "Autism Spectrum Disorders Consultation Report." She states that the Board refused to provide her with this record, I assume in response to her access request.

The appellant indicates further that one of the records refers to two other files, and has provided a copy of the Autism Spectrum Disorders Consultation Report, which indicates that it was copied to her son's OSR, his parents and to two "Systems Files (Blue File, Rainbow File)."

The appellant states further that after reviewing her son's psychological file, she became aware that her son had been given the SIB-R Scales of Independent Behaviour Test (Adaptive Behaviour Test). Consequently, she asked for the comprehensive report based on her son's score of this test. She indicates that the Board told her that a report does not exist and would not be prepared, and that she had already been provided with a Psychological Assessment Report, which contained some data relating to the Adaptive Behaviour Test. The appellant is not persuaded that a separate report does not exist.

The appellant indicates that during discussions with a Board psychologist, she was told that the psychologist had visited her son in the class and states, "according to the professional requirements she was supposed to prepare reports on each classroom visit." The appellant asserts that she has not received any of these reports.

The appellant acknowledges that the Board has offered to show her the records that it originally withheld from disclosure, but does not believe that the Board would do so. Although the Board has changed its decision regarding these records, the general position of the appellant is that viewing records on site is problematic. In this regard, she states:

> I would like to note from my experience with the [Board] that I may not find the above-mentioned records I would like to obtain. The problematic issues with reviewing documents at the sites are now in process of other separate mediations between the Information and Privacy Commissioner of Ontario and the [Board].

Following receipt of the appellant's submissions, the Board issued a supplementary decision in which it disclosed the two records at issue to her and invited her to attend the Board's premises. In this regard, the Board stated:

> In reviewing your submission … and having regard to my dealings with the IPC mediator, it strikes me that we are having a communication problem in clearly identifying the documents that you wish to receive. I can assure you that it is not the intention of the [Board] to withhold documents from you as suggested in your submission. The difficulty that I face in providing disclosure to you is that with each set of new productions I receive another set of requests for additional documents. All of which is to say that if I could arrange a face-to-face meeting between you, [the consultant and psychologists involved with her son] I believe

> we could very quickly identify the documents that you want and, in all likelihood, arrange for the production of that documentation.

In response to this invitation, the appellant wrote to the Board and takes issue with the manner in which the Board has characterized her requests for information. The appellant goes on to identify records that she believes should exist (in relation to another access request she made to the Board, which was at the mediation stage at the time her letter was written). Because these records appear to relate to her other appeal, I will not consider them in this discussion.

The outstanding records at issue, as identified by the appellant in her letter responding to the Board's final invitation to attend at its premises, appear to be "the special speech-language exercises (sound/word imitations and pronunciations) for development of my son's verbal skills (Appeal MA10-58), the results of the SIB-R test and the psychological reports by [Board psychologist] on her several classroom observations of my son in spring 2007 at [named school]" (Appeal MA10-141). It appears that the existence of other files pertaining to her son is also of concern to her.

Following receipt of the appellant's letter, the Board submitted representations in reply. The Board attached an affidavit, sworn by the Freedom of Information Co-ordinator (the Co-ordinator), in which the history of the requests made by the appellant and the Board's efforts to obtain and provide records is outlined.

In its representations, as confirmed in the sworn affidavit, the Board referred back to the appellant's original requests, which were for records contained in her son's "entire speech-language file at OCDSB" and "entire psychological file/services." The Board points out that "[a]t no time prior to filing the appeals did the Appellant contact the [Board] to indicate that she was seeking records that existed outside of the specific files that had been requested." The Board goes on to describe the discussions held during mediation:

> The process for seeking the additional documents became one involving [the mediator] asking the Appellant what additional information she was seeking, have [the mediator] convey that information to the [Board], and then having the [Board] search for the specific information. Every request passed on to the [Board] through [the mediator] was dealt with and responses were provided. In addition, the institution made [the mediator] aware of its willingness to meet with the Appellant to discuss and identify records that would be responsive to her requests.

Some of the difficulties in responding to the appellant's requests were outlined in the Co-ordinator's affidavit. For example, the Co-ordinator describes the identification and location of one record provided to the appellant as follows:

> I was advised by [the mediator] that the Appellant was seeking a copy of a Communication Summary for the school year 2005-2006 which contained a summary of the Peabody test scores. This was not a record contained in [her son's] speech and language file. The document was obtained from [a named]

> speech and language consultant for [the appellant's son's school] and was sent to the Appellant…

The Co-ordinator refers to the Board's supplementary decision in which it disclosed the two records at issue and invited the appellant to attend a meeting with the speech and language pathologist in order to discuss such further records as she may wish to receive. He noted that, in the alternative, he asked the appellant to identify any other records she is seeking.

Noting that the appellant identified the records she was seeking in her letter responding to his invitation (as described above), the Co-ordinator indicates that he communicated with the named speech-language pathologist regarding speech-language exercises. He states that the pathologist was unable to identify what records the appellant might be seeking because the appellant did not specify a date or person who might have made such records. The pathologist confirmed that she did not make any records relating to speech/articulation work.

With respect to the SIB-R test results and psychological reports by the Board psychologist on her classroom observations of the appellant's son, the Co-ordinator stated that during mediation, he met with the Board psychologist and was advised that the results of the SIB-R test could be found in the psychologist's assessment report, which had already been provided to the appellant. The Co-ordinator states further that after receiving the appellant's letter declining his invitation to come and speak with the individuals she identified, he communicated again with the psychologist. The psychologist responded that classroom observations were very informal and no specific reports were made of them.

The Co-ordinator also confirmed that the "rainbow file" had been copied and provided to the appellant.

Findings

It is apparent that there are a number of files within the Board's custody and control relating to the appellant's son, including the OSR, the "rainbow file," the speech-language file and the psychological file. There may well be more files concerning the appellant's son. The Board has indicated that the appellant was provided with access to her son's school records in their entirety, and the appellant's submissions themselves indicate that she obtained one record she was seeking after reviewing her son's OSR (the Autism Spectrum Disorders Consultation Report).

It is clear that the appellant has been given access to her son's files on numerous occasions (to which she is entitled as a parent and *via* access requests). It is also clear that she obtained the records from these two avenues of access. I am not persuaded that the misunderstanding and subsequent confusion that arose because of the fact that the Board maintained a number of files pertaining to her son establishes that the Board is deliberately withholding records from the two files that have been identified relating to the appellant's son. Nor am I persuaded that the disclosures made to her lead to such a conclusion.

Moreover, it is apparent that the appellant had specifically requested records from only two of those files (speech-language file – appeal MA10-58 and psychological file/services – appeal MA10-141).

In determining whether an institution's search for responsive records was reasonable, the parameters of search are determined by the wording of the request. Although the Board may have a number of files pertaining to the appellant's son, the appellant requested records from just two of them. Despite this, the Board has provided her with additional records she identified during mediation that were contained in other files in an attempt to facilitate resolution of these appeals and to be responsive to her needs more generally. Nevertheless, the issue I must determine is whether the Board's search for records contained in the two files referred to above was reasonable. I will only consider, therefore, whether the Board has made a reasonable effort to locate records that were (or should have been) contained in those two files.

As I noted above, the Board has consistently reiterated its position that it has provided the appellant with all documents contained in the two files that the appellant identified relating to her son. In the Notice of Inquiry, the appellant was asked to specifically identify those records that she believes should exist, where they might exist and why she believes that they exist. Although the appellant has indicated that she has seen records relating to speech-language exercises in her son's speech-language file, the Board indicates that she has been provided with access to all of the records contained in that file. Moreover, the speech-language pathologist identified by the appellant has stated that she did not make any records of this nature. She indicated further that the appellant has not provided sufficient information to enable her to conduct a further search for such records, which may include contacting other individuals who may have worked with the appellant's son.

With respect to the SIB-R tests, although the appellant may not have been aware, initially, that these tests were conducted, she has received information about them. Despite the appellant's belief that more records should exist, the psychologist responsible for this testing has confirmed that the only record that contains information about the testing has already been provided to the appellant and that no other record was created. In addition, the psychologist has confirmed that she did not prepare reports arising from her classroom visits with the appellant's son because these visits were "very informal."

It is significant that the Board has made several attempts to engage the appellant in a dialogue with the individuals who would reasonably be expected to have the records that she is seeking in order to determine what she is looking for and where such records, if they exist, might be located. However, the appellant has declined to assist the Board to identify and/or locate the records she is seeking. The appellant's lack of diligence in pursuing her requests by not responding to requests from the Board for clarification is a factor that I have considered in determining whether the Board's search was reasonable.

Based on the submissions provided by the Board, including the Co-ordinator's affidavit and the responses by the individuals contacted by the Board during its search for responsive records, I am satisfied that the Board has made a reasonable effort to identify and locate responsive records. As I noted above, the *Act* does not require the Board to prove with absolute certainty

that further records do not exist. It only requires that the Board provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. I am satisfied that the Board has conducted a search through the appropriate files and that it has contacted the individuals who are not only knowledgeable about the records, but who would have been responsible for creating them. Accordingly, I find that the Board's search for records responsive to both requests was reasonable.

ORDER:

The Board's search for records was reasonable and these appeals are dismissed.

Original signed by: January 20, 2011
Laurel Cropley
Adjudicator