



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

# **FINAL ORDER MO-2618-F**

**Appeal MA08-295**

**Toronto District School Board**



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## NATURE OF THE APPEAL:

This order disposes of the issues still to be resolved from my interim decision in Order MO-2581-I.

This appeal arises out of a request submitted to the Toronto District School Board (the Board) 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 requester attended various Board schools between 1994 and 2008 and she has made this “all encompassing request” due to “concerns about the accuracy of [her student] records.”

The Board issued a decision letter in which it stated that records responsive to part 1 of the request had been located and would be disclosed to the requester in their entirety. With respect to part 2 of the request, no responsive documents were found.

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 and she identified additional records that she believed should exist. The Board conducted a second search for records and advised the mediator of the details of those search efforts. The Board informed the mediator that during the second search for records, no

additional records were 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 outlined her reasons for taking the position that the Board failed to conduct a reasonable search as follows:

**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 of the appeals process for an inquiry where the issue to be determined was whether the Board had conducted a reasonable search for records responsive to the appellant's request.

I conducted an inquiry by way of written representations. I first sought and received representations from the Board. The Board's representations included an affidavit sworn by its Freedom of Information Coordinator (FOI Coordinator). I shared the Board's representations with the appellant and sought representations from her. The appellant responded with representations, which I shared with the Board. I invited the Board to respond to the appellant's representations, which it did by way of a letter and a supplementary affidavit sworn by the FOI Coordinator. I then shared the Board's reply representations with the appellant and invited her 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 subsequently issued Order MO-2581-I in which I concluded that the Board had not conducted a reasonable search for records responsive to the appellant's request under section 17 of the *Act*. I arrived at this conclusion for two reasons.

Firstly, I found that the Board had not provided me with sufficient evidence to establish that it had conducted a reasonable search. In particular, I concluded that the two affidavits provided by the FOI Coordinator lacked 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, while it was apparent that several other past and present Board employees 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, the Board's representations, including the FOI Coordinator's affidavits, were deficient regarding the nature, scope and outcome of the respective searches carried out by the identified Board employees. While I acknowledged that 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), I concluded that it would be reasonable to expect the FOI Coordinator to describe in greater detail the searches completed by all of the individuals referred to in his affidavits. I found that the Board had provided only cursory and general statements regarding the results of its searches and had 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.

Secondly, I was not satisfied with the Board's explanation regarding the gaps in page numbering regarding the 248 pages of records disclosed to the appellant. It appeared to me that more than 40 pages of records were unaccounted for (pages 1, 144 and 160-199). Although the Board stated that these gaps are consistent with its own version of the records and attributed the gaps to inadvertence in the numbering of the records. I found this explanation rather implausible, particularly due to the large number of unaccounted for pages involved.

Pursuant to my decision, Order MO-2581-I contained the following order provisions:

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.

The Board submitted representations in response to my interim order, comprised of a detailed 15-page affidavit prepared by the Board's Senior Manager of Board Services and current FOI Coordinator (the Current FOI Coordinator). In light of the Board's response to my order I chose not to seek further submissions from the appellant.

## **DISCUSSION:**

Having ordered the Board to conduct a further search, the issue to be determined is whether, as a result of its additional search efforts, the Board has conducted a reasonable search for records as required by section 17 of the *Act*.

### **Board's additional search efforts**

As alluded to above, I have received an affidavit from the Board's current FOI Coordinator. In her affidavit, the current FOI Coordinator provides a detailed account of the additional search

efforts undertaken by the Board between February 28, 2011 and March 16, 2011 to comply with paragraphs (a) through (e) of Provision 1 of my interim order.

In her affidavit, the current FOI Coordinator identifies the current and past Board employees who conducted searches in response to Provision 1, identifying them by name and title, and documenting the dates upon which they completed their searches, where they searched, who they consulted and the results of their searches. Overall, the current FOI Coordinator documents the search efforts of 27 past and present Board employees in her affidavit.

Pursuant to these additional searches, the current FOI Coordinator reports that two additional records responsive to paragraph (b) of Provision 1 of the interim order were located. These records are attached as exhibits to her affidavit. The current FOI Coordinator also submits that no further responsive records were found as a result of the Board's additional search efforts. Also attached as an exhibit to the current FOI Coordinator's affidavit is a copy of a decision letter to the appellant, dated April 4, 2011, in which she confirms the completion of a further search and outlines the results of the search. The current FOI Coordinator confirms that two records responsive to paragraph (b) of Provision 1 of the interim order had been located and that the Board was providing the appellant with access to one record in its entirety and partial access to the second record.

With regard to the issue of gaps in page numbering, as set out in paragraph (e) of Provision 1 of my order, the current FOI Coordinator submits in her affidavit that she consulted with the former FOI Coordinator, who advised that the Administrative Liaison, Board Services (the Administrative Liaison), had numbered the 248 pages of records previously disclosed to the appellant. The current FOI Coordinator states that the Administrative Liaison's responsibilities include preparing correspondence in response to requests for information under the *Act*. The current FOI Coordinator further advises that on March 16, 2011 the Administrative Liaison confirmed that she had conducted searches on March 9, 2011 and March 16, 2011 for pages 1, 144 and 160-199 of the 248 pages previously disclosed to the appellant. The Administrative Liaison found that pages 1, 144 and 160-199 did not exist in the copy of the 248 pages previously disclosed to the appellant. The current FOI Coordinator states that the Administrative Liaison also "searched the files in her office, the computer in her office and the storage area" for files pertaining to requests for information under the *Act*, and was unable to find any records relating to the appellant. The Administrative Liaison also advised that the appellant's file had not been sent to the Board's off site storage facility, and that the "files/records" relating to requests for information under the *Act* would not be kept anywhere outside the locations searched.

### **Analysis and findings**

I have carefully reviewed and considered the evidence presented to me by the Board in response to my Interim Order MO-2581-I. I am satisfied that the Board has complied with the provisions of my interim order and has conducted a reasonable search for records responsive to the appellant's request.

The issue for me to decide is whether the Board has taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. A reasonable search is 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]. The key is, therefore, *reasonableness*. An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

In this case, the affidavit evidence presented to me by the current FOI Coordinator demonstrates that the Board has undertaken a systematic and comprehensive search for records relating to the appellant's request. While the number of people consulted is not necessarily determinative of the quality of a search, in my view, the 27 past and present Board staff consulted in this case conveys a level of thoroughness that meets, if not exceeds, the reasonableness standard required of an institution in completing a search.

For each category of record set out in Provision 1 of my interim order, the Board has provided the names, titles and qualifications of all individuals who completed searches and has thoroughly described 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 I share the appellant's concerns regarding the gaps in page numbering regarding the 248 pages of records previously disclosed to the appellant, I am satisfied that the Board undertook all reasonable steps to locate any missing pages.

In the circumstances of this case, I find that the Board has made a reasonable effort to respond in good faith to the issues raised in my interim order and has complied, in an appropriate way, with Provisions 1, 2 and 3 of my interim order. Accordingly, I am satisfied that the Board has conducted a reasonable search for records responsive to the appellant's request.

**ORDER:**

On the basis of the Board's compliance with Interim Order MO-2581-I, I uphold the Board's new searches for records responsive to the appellant's request and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ May 4, 2011