Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3149

Appeal MA14-64

Durham District School Board

January 14, 2015

Summary: The Durham District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for emails about the requester. The board refused to confirm or deny the existence of responsive records, citing sections 8(3) and 14(5) of the *Act*. This order upholds the board's decision under section 14(5) and its search for responsive records and does not uphold the board's decision to refuse to confirm or deny the existence of records under section 8(3).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1), 8(2), 8(3), 14(5), 17, 38(a); *Archives and Recordkeeping Act, 2006*, section 13(2).

Orders and Investigation Reports Considered: Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff – A Special Investigation Report* (Toronto: Information and Privacy Commissioner, Ontario, June 5, 2013) and *Addendum to Deleting Accountability* (August 20, 2013); Order PO-3304.

OVERVIEW:

[1] The Durham District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for emails of nine named individuals about the requester.

[2] The board asked the requester to clarify his request. The requester narrowed his request to include seven individuals and provided timeframes for each individual. In addition, the requester asked the board to include access to an attachment to an email to the scope of his request. The requester had received the email through a prior request, but not the attachment to the email.

[3] The board then issued a decision granting access to records related to three of the individuals named in the request. The board advised the requester that records were not found for the remaining four individuals.

[4] The board stated further:

> … we are unable to grant access to information that may have been provided, should it exist, to the Durham Regional Police Services [the police] under Section 8(1)(2)(3) of *MFIPPA*, Law Enforcement exemption or any records, should they exist, covered under Section 14(1)(2)(3)(5) of *MFIPPA*, personal privacy.
>
> In your email of December 9, 2013 you had two additional requests related to your first FOI request [#]. The first request was access to an attachment on one of the emails provided to you. In my letter of July 11, 2013 I indicated that we are unable to grant access to some records under Section 14(1), (2), (3) and (5) of MFIPPA, personal privacy. This attachment is one of those records.

[5] The requester's father,[1] who represents the requester, appealed the decision of the board to deny access to the withheld records.

[6] During mediation, the appellant explained to the mediator that he is concerned that the board did not find records for four named individuals. The appellant believed that the board had not conducted a thorough search for records.

[7] The appellant did not agree with the board's decision to refuse to confirm or deny the existence of records the board may have provided to the police. The appellant indicated that the principal of his son's school told him that the board had contact with the police regarding his son. The appellant believes that he has a right to know what information the board may have shared with the police.

[8] The appellant also advised the mediator that he wanted to pursue access to the record withheld under the mandatory personal privacy exemption in section 14(1) of the *Act* (the attachment to an email received through another freedom of information (FOI) request).

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[1] Referred to as the appellant in this order.

[9] The board conducted another search of its email system for records, including records that may have been archived. As a result of this search, additional records were located related to three named individuals. The board granted full access to the additional records. The board explained that further records could not be located for one individual as he had retired in 2011, and any emails relating to him would have been purged from its computer system.

[10] The board continued to refuse to confirm or deny the existence of records that may have been shared with the police, and to deny access to an email attachment pursuant to section 14(1) of the *Act*.

[11] The mediator raised the possible application of section 38(a) (right of access to one's own personal information) and the discretionary personal privacy exemption in section 38(b) of the *Act* to the records that may have been shared with the police, should they exist, as they may contain the personal information of the appellant and other affected parties. The mediator also raised the possible application of section 38(b) of the *Act* to the withheld email attachment. The board agreed that sections 38(a) and 38(b) of the *Act* applied to the records, as described above.

[12] The appellant continued to believe that more records should exist, arguing that the board had not properly searched its archived emails. The appellant also advised that he wanted to pursue access to any records, if they exist, which the board shared with the police concerning his son, as well as any records that were withheld pursuant to the personal privacy exemption in sections 38(b) of the *Act*.

[13] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues, to the board seeking its representations. The board provided me with representations which were shared with the appellant, less the confidential portions. The appellant provided representations in response, portions of which were confidential. In his representations, the appellant provided a copy of the email attachment at issue in this appeal. Therefore, this record and the personal privacy exemption at section 38(b) are no longer at issue in this appeal.

[14] I then sought and received reply representations from the board, in which it reaffirmed its initial representations and stated that the appellant's assumptions and inferences are irrelevant.

[15] In this order, I uphold the board's decision under section 14(5) and its search for responsive records. I do not uphold the board's decision to refuse to confirm or deny the existence of records under section 8(3), however.

ISSUES:

A. Has the board properly applied section 14(5) (refusal to confirm or deny the existence of a record) of the *Act*?

B. Has the board properly applied section 8(3) (refusal to confirm or deny the existence of a record) of the *Act*?

C. Did the board conduct a reasonable search for records?

DISCUSSION:

A. Has the board properly applied section 14(5) (refusal to confirm or deny the existence of a record) of the *Act*?

[16] Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[17] Section 14(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[18] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[2]

[19] The board states that it has applied section 14(5) properly as disclosure of the record, if it exists, would constitute an unjustified invasion of another individual's personal privacy. It states that in situations where a record contains the personal information of a third party, it is protected from disclosure by *MFIPPA*, and is outside of the scope of the requester's entitlement of access.

[20] The appellant states that the board has not properly applied section 14(5) of the *Act* in the circumstances of this appeal, for the following reasons:

> 1. Refusing to confirm or deny the existence of this record is absurd because all parties know it exists.

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[2] Order P-339.

> 2. There is no unjustified invasion of personal privacy because [he] knows the content and author of the document in question.
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> 3. The author of the document has already consented to the school Principal to disclose the information to [him].
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> 4. Protecting a document from disclosure which has already been discussed by a member of the board, i.e. [the] Principal, with the appellant is absurd.

Analysis/Findings

[21] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

> 1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
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> 2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[22] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5)[3] requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[4]

[23] In the circumstances of this appeal, based on my review of the parties' confidential and non-confidential representations, I agree with the board that under part one of the test, disclosure of the record (if it exists) would constitute an unjustified invasion of another individual's personal privacy. I also find that disclosure of the fact that the record exists (or does not exist) would in itself convey information to the

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[3] of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the equivalent to section 14(5) of *MFIPPA*.

[4] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy under section 14(1).

[24] I find that the author of the document has not consented to disclosure, if such a document exists, as alleged by the appellant. The appellant has not provided any details of a specific document that might exist, nor has he provided any evidence of any consent to disclose, other than a vague assertion that consent has been granted to him.

[25] I also find that under part two of the section 14(5) test, the board has demonstrated that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy under section 14(1).

[26] Accordingly, I find that the board has properly applied section 14(5) of the *Act* to refuse to confirm or deny the existence of a record in the circumstances of this appeal.

B. Has the board properly applied section 8(3) (refusal to confirm or deny the existence of a record) of the *Act*?

[27] Section 8(3) states:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[28] In this case, the board relies on section 38(a) in conjunction with the law enforcement exemptions in sections 8(1)(a) to 8(1)(e) and 8(2)(a) and (c).

[29] Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

[30] Sections 8(1) and (2) state in part:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

[31] Section 8(3) acknowledges the fact that in order to carry out their mandates, in certain circumstances, law enforcement agencies must have the ability to be less than totally responsive in answering requests for access to information. However, it would be the rare case where disclosure of the existence of a record would communicate information to the requester that would frustrate an ongoing investigation or intelligence-gathering activity.[5]

[32] The board states that it has applied section 8(3) properly in the circumstances of this appeal since if records that were shared between the board and police exist, then disclosure of such records would likely be directly connected to a law enforcement proceeding. It states that if the appellant was deemed not to be entitled to them under section 8(1) or (2), then the board would rely on section 8(3) and that it would not be appropriate for the board to interfere or disclose information that pertains to police processes.

[5] Orders P-255 and P-1656.

[33] The appellant states that the board has not properly applied section 8(3). He states that sections 8(1)(a) and (b) do not apply because the matter in question is completed. He also states that section 8(1)(c) does not apply because any technique or procedure would be generally known to the public because the matter in question was a summary charge, not an indictment. He states that section 8(1)(d) does not apply because all information and sources were included in the Crown's disclosure and that he is aware of all sources. He also states that section 8(1)(e) does not apply because the matter in question was withdrawn and that there was no evidence to establish that a reasonable basis for believing that endangerment would result as no sanctions were imposed by court.

[34] The appellant further states that section 8(2) does not apply as the document in question is not a report, nor could disclosure reasonably create an expectation of exposure of the author to civil liability as the requester was a minor, the record is over two years old and would have already been forwarded in Crown disclosure.

[35] In reply, the board relied on its initial representations.

Analysis/Findings

[36] For this section 8(3) to apply, an institution must provide detailed and convincing evidence to establish that disclosure of the mere existence of records would convey information that could compromise the effectiveness of a law enforcement activity.[6] The institution must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1) or (2), and

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[7]

[37] The board was asked to explain with reference to each applicable subsection of sections 8(1) and (2):[8]

- Whether the records (if they exist) qualify for exemption under sections 8(1) or (2)?

[6] Order P-344.
[7] Order P-1656.
[8] Sections 8(1)(a) to (e) and 8(2)(a) and (c), set out above.

- Whether disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[38] The board did not respond to these specific questions as requested. It did not identify how the records, if they exist, would qualify for exemption under sections 8(1) or 8(2). It also did not provide representations on how disclosure of the fact that records exist (or do not exist) itself would convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.

[39] Based on my review of the parties' confidential and non-confidential representations, I agree with the appellant that the board has not provided detailed and convincing evidence to establish that disclosure of the mere existence of records would convey information that could compromise the effectiveness of a law enforcement activity.

[40] Accordingly, I am not upholding the board's decision under section 8(3) and I will order the board to issue an access decision to the appellant identifying any records, if they exist, that are responsive to the request that may be subject to sections 8(1) and 8(2).

C. Did the board conduct a reasonable search for records?

[41] 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.[9] 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.

[42] The board was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked the following questions:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

[9] Orders P-85, P-221 and PO-1954-I.

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[43] In response, the board states that its search process involved retrieving and accessing a number of staff e-mail accounts to retrieve relevant data, as follows:

> The Superintendent of Education/Employee Relations requested that the [the board's] IT Department release the individual e-mail data bases in question to the board's Labour Relations Assistant. The Labour Relations Assistant opened each data base and conducted a search using the criteria "[versions of requester's name]". The search reviewed the to:, from:, subject line and body contents of all the emails for any incidents of the criteria and subsequently generated a list of results.
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> At that point, the specific dates of [his] request were narrowed down and all of the emails in the search criteria were printed. The emails were reviewed by Superintendent of Education/Employee Relations, and the [board's] in-house legal counsel to determine whether they could be released. The [board] properly considered all the privacy, health and safety, and law enforcement implications of disclosing the records. All

> decisions to withhold records, as supported by these representations, were appropriate, complete and consistent with the provisions of *MFIPPA*.

[44] The appellant states that he believes that the board has conducted a reasonable search for records, except for emails sent to or received by a particular board staff member who retired in 2011. The appellant refers to a copy of an email header which contained this individual's name as proof that additional responsive records relating to this individual ought to exist.

[45] In reply, the board reiterates that it has conducted a full and reasonable search.

Analysis/Findings

[46] At issue are emails exchanged by a board staff member about the requester between September 6 and November 30 2010. The appellant provided a copy of an email header dated September 17, 2010 that contained the staff person's name with his Notice of Appeal.

[47] 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.[10] To be responsive, a record must be "reasonably related" to the request.[11]

[48] 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.[12]

[49] 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.[13]

[50] 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.[14]

[51] In its decision letter, the board addressed the existence of emails from the individual listed in the appellant's representations. It stated that some board staff set their email to save and send, while others set their email to send only. In the latter case, no record of a sent email is saved to the system maintained by the board.

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[10] Orders P-624 and PO-2559.
[11] Order PO-2554.
[12] Orders M-909, PO-2469 and PO-2592.
[13] Order MO-2185.
[14] Order MO-2246.

[52] At mediation, the board also referred to the emails of this individual as having been purged from its computer system as he retired in 2011.

[53] In *Deleting Accountability: Records Management, Practices of Political Staff, A Special Investigation Report*,[15] former Commissioner Ann Cavoukian discussed the situation where records, in particular emails, have not been retained by a public body. She stated that:

> …the practice of indiscriminate deletion of all emails sent and received by the former Chief of Staff was in violation of the *Archives and Recordkeeping Act, 2006* (*ARA*) and the records retention schedule developed by Archives of Ontario for ministers' offices. In my view, this practice also undermined the purposes of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*),[16] and the transparency and accountability principles that form the foundation of both Acts…
>
> It is difficult to accept that the routine deletion of emails was not in fact an attempt by staff in the former Minister's office to avoid transparency and accountability in relation to their work. Further, I have trouble accepting that this practice was simply part of a benign attempt to efficiently manage one's email accounts.
>
> While I cannot state with certainty that there was inappropriate deletion of emails by the former Premier's staff as part of the transition to the new Premier in an effort to avoid transparency and accountability, I concluded that the email management practices of the former Premier's office were in violation of the obligations set out in the *ARA*.

[54] In Order PO-3304, Assistant Commissioner Brian Beamish,[17] reviewed this report and its addendum[18] and then referred to former Commissioner Cavoukian's discussion of retention of emails by public bodies. He states that:

> The Commissioner also raised this matter in her opening statement to the Standing Committee on Justice Policy at its June 25, 2013 hearing to consider her Deleting Accountability report. In response to earlier testimony of the former Chief of Staff to the former Premier in which he suggested that rules requiring destruction and deletion of records prompted him to delete all his emails, she argued against the routine classification of email records in this manner:

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[15] The report. See http://www.ipc.on.ca/images/Findings/2013-06-05-Ministry-of-Energy.pdf
[16] The provincial equivalent to *MFIPPA*.
[17] Now Acting Commissioner.
[18] See http://www.ipc.on.ca/images/Findings/2013-08-20-Ministry-of-Energy-addendum.pdf

> [E]mail records are not necessarily transitory or duplicate records. Their context must be reviewed before they may be deleted, in order to determine whether they should be retained, in accordance with the retention schedules. In other words, the content of the email, as with any document, is what determines whether it should be retained or deleted - substance over form. This was made abundantly clear in the retention schedules and in the training materials developed by the Ministry of Government Services.
>
> There are clear requirements to retain records relating to the following areas: policy development, program development, stakeholder relations, legislative activity and Minister's and Premier's correspondence. These are critical categories of documents, particularly when government is dealing with important issues of public policy. It is simply not credible that documents falling within these categories would not have been in the possession of political staff, at some point in the decision-making process, or that staff would not be aware of their obligation to retain any of these documents. By adopting a "delete all" email policy, political staff were not addressing the requirement that government business records must be retained, with the exception of transitory, personal or duplicate records.

Given all the above, I am satisfied that the appellant's concerns about the recordkeeping practices of staff in the office of the former Premier have been fully addressed by the Commissioner in her investigation report and addendum on these matters, and that I do not need to revisit these issues.

I note in closing that the Commissioner made extensive recommendations to address the deficiencies she identified in the email management and other records management practices of political staff. These recommendations propose improvements to recordkeeping and records management across the public service, including a complete review of records retention and management policies and practices applicable to all ministers' offices, improved training for political staff, and amendments to the *Act* and its municipal counterpart to address institutions' responsibilities concerning recordkeeping and records management. These recommendations, if implemented, should go some way toward addressing the appellant's broader concerns about records management practices throughout the public service.

In light of all the foregoing, I dismiss the appellant's appeal.

[55] The board, as a public school board, is administered the Ontario Ministry of Education.[19] Section 13(2) of *Archives and Recordkeeping Act, 2006* (the *ARA*) requires every public body, including ministries, to ensure that their public records are preserved and that the information in their public records is accessible until they are transferred or otherwise disposed of in accordance with their approved records schedule. I find that the board's practice of providing its staff with the choice of creating emails that are not retained violates the *ARA* and the records retention schedule developed by Archives of Ontario for ministries of the Government of Ontario.

[56] In my view, as was the case in the report cited above, the board's practice of allowing emails to be sent without retaining copies also undermines the purposes of *MFIPPA*, and the transparency and accountability principles that form the foundation of both Acts. The board should review its record-keeping and record retention practices to ensure that its record-keeping practices are in compliance with the requirements of both *Archives and Recordkeeping Act, 2006* and *MFIPPA*.

[57] I find that in this appeal, the board has provided information as to what searches it conducted for the records responsive to the request. The board provided explanations as to the reason for the non-existence of responsive emails of the individual who retired in 2011. I find that the board has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive emails of this individual which are within its custody or control. Accordingly, I am upholding the board's search for these records.

ORDER:

1. I uphold the decision of the board to apply section 14(5) to refuse to confirm or deny the existence of responsive records in this appeal.

2. I do not uphold the decision of the board to apply section 8(3) to refuse to confirm or deny the existence of responsive records in this appeal.

3. I order the board to issue an access decision to the appellant identifying any records responsive to the request that may be subject to sections 8(1) and 8(2), if they exist, as well as setting out the particular exemptions that may be applicable to any such records that are located, treating the date of this order as the date of the request.

[19] http://www.edu.gov.on.ca/eng/about/

4. In order to verify compliance with order provision 3, the board is ordered to provide me with a copy of the access decision issued to the appellant pursuant to order provision 3, above.

5. I uphold the board's search for responsive records.

Original signed by: January 14, 2015
Diane Smith
Adjudicator