Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3219-R

Appeal MA14-64

Order MO-3149

Durham District School Board

July 7, 2015

Summary: Following the compliance of the Durham District School Board (the board) with Order MO-3149, the Ministry of Government and Consumer Services and the Ministry of Education (the ministries) sought the removal of the reference to the *Archives and Recordkeeping Act, 2006* (the *ARA*) in paragraphs 55 and 56 of Order MO-3149. It submitted that the *ARA* does not apply to school boards. This reference to the *ARA* in Order MO-3149 referred to the board's practice of providing its staff with the choice of creating emails that are not retained.

The adjudicator reconsidered Order MO-3149 under the section 18.01 of the IPC's *Code of Procedure* to order the removal of the reference to the *ARA* in Order MO-3149. The removal of the reference to the *ARA* does not affect the finding in Order MO-3149 that the board's practice of providing staff with the choice to not retain emails undermines the purposes of *the Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) concerning transparency and accountability.

Statutes Considered: *Archives and Recordkeeping Act, 2006*, sections 2, and 13(2); IPC's *Code of Procedure*, section 18.01(c).

Orders and Investigation Reports Considered: Order MO-3149.

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 any records about the requester in the board's email records.

[2] 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.

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

[4] During mediation, the appellant explained that he believed that the board had not conducted a thorough search for records.

[5] The board conducted another search of its email system for records, including records that may have been archived.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.

[6] 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 the mandatory personal privacy exemption in section 14(1) of the *Act*.

[7] 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 discretionary personal privacy exemption in sections 38(b) of the *Act*.

[8] After the exchange of representations between the parties, I issued Order MO-3149, which contained the following order provisions:

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)[2] to refuse to confirm or deny the existence of responsive records in this appeal.

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

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.

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.

[9] The board then issued a supplementary decision letter to the appellant in compliance with order provision 2.

[10] On May 15, 2015, I received the following letter from the Ministry of Government and Consumer Services and the Ministry of Education (the ministries) stating:

> …we are writing to you about Order MO-3149 which you issued on January 15, 2015. We believe that the Order contains an error in law that we would like to bring to your attention.
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> In paragraph 55 of the Order, you stated:
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> > [55] The board, as a public school board, is administered the Ontario Ministry of Education.[3] 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.
>
> In the paragraph copied above, the conclusion is that the Durham District School Board is administered by the Ontario Ministry of Education and therefore a public body under the *Archives and Recordkeeping Act, 2006* ("ARA"). It appears that this stems from a misreading of the following line from the webpage that was cited, under the subtitle 'Who We Are": 'We

[2] Section 8 is the law enforcement exemption.
[3] http://www.edu.gov.on.ca/eng/about/

are the ministry that administers *the system* of publicly funded elementary and secondary school education in Ontario" [emphasis added].

The statement in Order MO-3149 that school boards are administered by the Ministry of Education is not in fact consistent with the legal relationship between the Ministry and School Boards. School boards are legally and functionally separate from the Ministry. Although the Ministry is responsible for administering the system of publicly funded education in Ontario, it does not in fact control school boards; they are run by municipally-elected school trustees. Further, pursuant to section 58.5 of the *Education Act,* school boards have corporate status and have all the powers and duties of corporations under that Act and other legislation.

School boards have consistently been recognized by our courts as being legally separate from the Ministry of Education in numerous cases; see, for example, *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 at para. 87 (C.A.), leave to appeal to S.C.C. dismissed [2006] S.C.C.A. No. 441. As the Ontario Court of Appeal held in that case,

> In general, ...the Minister of Education does not directly provide education programs to students.... This reflects the broad scheme of the Act which provides for a decentralized system of local school boards managed by elected trustees to administer the educational system at the operational level.

Coming back to the finding set out in paragraph 55 of the Order, as noted in that paragraph, the ARA applies to public bodies. Section 2 of the ARA defines "public body" as:

> (a) the Executive Council or a committee of the Executive Council,
> (b) a minister of the Crown,
> (c) a ministry of the Government of Ontario,
> (d) a commission under the *Public Inquiries Act, 2009,* or
> (e) an agency, board, commission, corporation or other entity designated as a public body by regulation.

For the reasons set out above, school boards are not part of, nor administered by, Ontario's Ministry of Education. Accordingly, school boards are not subject to the ARA because they are not part of the Ministry of Education.

Entities other than ministries can be made subject to the ARA through Ontario Regulation 336/07. Notably, the Regulation does not designate

> any school board as a public body subject to the ARA. In particular, the Durham District School Board is not listed in the Regulation.
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> Similarly, the school board does not fall within any of the other categories of a "public body" listed in section 2 of the ARA. Accordingly, the finding set out in paragraph 55 of Order MO-3149 that the Durham District School board is subject to the ARA is legally incorrect.
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> Our concern with the Order is limited to this discrete point of law. We do not object, for example to any of the other findings in the Order, including the analysis set out in paragraph 56 regarding the Durham District School Board's policy which allowed staff *not* to retain copies of sent emails as being counter to the spirit and intention of the *Municipal Freedom of Information and Protection of Privacy Act.*

[11] Based on this letter from the ministries, I will consider in this order whether I should reconsider the reference to the *ARA* in paragraphs 55 and 56 of Order MO-3149.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider paragraphs 55 and 56 of Order MO-3149?

[12] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. This section states:

> 18.01 The Commissioner may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.
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> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.
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> 18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

(a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or

(b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

18.05 A reconsideration request should include all relevant information in support of the request, including:

(a) the relevant order and/or appeal number;

(b) the reasons why the party is making the reconsideration request;

(c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;

(d) the desired outcome; and

(e) a request for a stay, if necessary.

18.06 A reconsideration request does not automatically stay any provision of a decision. A decision must be complied with within the specified time period unless the IPC or a court directs otherwise.

18.07 A reconsideration request does not preclude a person from seeking other legal remedies that may be available.

18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

18.09 Before deciding whether to reconsider a decision, the IPC may notify and invite representations from the parties.

> 18.10 Where the IPC decides to grant or decline a reconsideration request, the IPC will make a written decision in the form of a letter or order and send a copy to the parties.

[13] As stated above, under section 18.03 of the *Code*, the IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

[14] I find in this appeal, based on the letter from the ministries, that they have an interest in this appeal. They are asking for a reconsideration under section 18.01(c) of the *Code* of paragraphs 55 and 56 of Order MO-3149 on the basis that there was an accidental error in the decision.

[15] In particular, the ministries are seeking the removal of the reference to the *ARA* in paragraphs 55 and 56 of Order MO-3149. It does so by submitting that the institution in Order MO-3149, the Durham District School Board, is not part of, nor is it administered by, Ontario's Ministry of Education, and is, therefore, not subject to the *ARA*.

[16] I note that the removal of any reference of the applicability of the *ARA* to the Durham District School Board from Order MO-3149 does not affect the reasoning, the findings, or the outcome of this order.

[17] Order MO-3149 has been complied with by the board. The ministries, in particular the Ministry of Education which administers the system of publicly funded elementary and secondary school education in Ontario, agrees with all of the findings in the order, other than the reference of the applicability of the *ARA* to the board in paragraphs 55 and 56.

[18] In particular, I note that both ministries, even with the removal of the reference to the *ARA* in Order MO-3149, agree with the findings in paragraph 56 that do not mention the *ARA*, namely:

> [56] …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 [*MFIPPA*]. 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 … *MFIPPA*.[4]

[4] Paragraph 56 of Order MO-3149 reads:

> 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

[19] I find that even if any reference to the *ARA* is removed from Order MO-3149, none of the other order provisions change. As well, my findings about the transparency and accountability principles of *MFIPPA* and requesting the board to review its record-keeping and record retention practices in paragraph 56 remain the same.

[20] The reference to the *ARA* in Order MO-3149 was obiter and was inserted in that order to emphasize the inappropriateness of the board allowing its staff the choice of retaining emails.

[21] I find it is not necessary to hear from the parties on the issue of the revocation of paragraph 55 and the removal of the reference to the *ARA* in paragraph 56 in Order MO-3149, as the removal of the reference to the *ARA* in Order MO-3149 does not affect the order provisions or the other findings in that order. Nor does this reconsideration order make a determination as to whether the *ARA* does or does not apply to school boards in Ontario.

[22] The reference to the *ARA* in Order MO-3149 was obiter and was not a factor in the determination of each of the listed issues in that decision.

[23] As my findings about the applicability of the *ARA* to the board represent an accidental error, I am reconsidering my inclusion of the reference to this statute in my order under section 18.01(c) of the *Code*. Therefore, paragraph 55 and the references to the *ARA* in paragraph 56 in Order MO-3149 are reconsidered and I revoke both paragraph 55 and the references to the *ARA* in paragraph 56 of Order MO-3149.

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record-keeping practices are in compliance with the requirements of both *Archives and Recordkeeping Act, 2006* and *MFIPPA*.

ORDER:

Order MO-3149 is amended by deleting paragraph 55 and by removing the references to the *Archives and Recordkeeping Act, 2006* (the *ARA*) in paragraph 56 of Order MO-3149.

Original Signed By: July 7, 2015
Diane Smith
Adjudicator