Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3645

Appeal MA16-753

Toronto District School Board

August 8, 2018

Summary: The appellant sought records relating to French Immersion programming that were received or sent by, or authored by, a named individual who is a former superintendent with the board. In response, the board granted partial access to several hundred pages of records. The appellant appealed the board's decision, including on the basis there ought to exist additional email records associated with the former superintendent's personal email address. By the end of mediation, the sole issue for determination was the reasonableness of the board's search for records. In this order, the adjudicator finds that the board expended reasonable efforts to locate responsive records, including those sent to or from the personal email address of the former superintendent. She dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

Orders Considered: Orders MO-3281 and MO-3467.

OVERVIEW:

[1] The appellant made a request to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records dating from January 1, 2012 relating to French Immersion programming and two named schools. Specifically, the appellant sought correspondence received or sent by, and reports authored by, a named individual that contain the words "French Immersion" (or "FI") and the name of either of the two schools. The individual named in the request is a former superintendent with the board.

[2] The board issued a decision granting partial access to responsive records. It disclosed 576 pages in full and 757 pages in part, and denied access to 178 pages in full. In denying access to records or parts of records, the board relied on a number of exemptions and an exclusion in the *Act*; it also claimed that some information in the records is not responsive to the appellant's request.

[3] The appellant appealed the board's decision to this office. He expressed concerns about some of the claims made by the board to deny access, and asserted that there ought to exist additional responsive records.

[4] Through the mediation process, the parties were able to resolve the issues around the board's severances to the records. However, the appellant continues to believe that there exist additional records that have not been located by the board. The appeal proceeded to the adjudication stage for a written inquiry on the sole issue of the reasonableness of the board's search for records, including particularly the board's search for records associated with the personal email address of the former superintendent. At this stage, the parties provided written representations that were shared with one another in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[5] The appeal was transferred to me during the inquiry stage. For the reasons that follow, I conclude that the board conducted a reasonable search in satisfaction of its obligations under the *Act*. I dismiss the appeal.

DISCUSSION:

[6] 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.[1] 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.

[7] 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.[2] 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.[3]

[8] 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

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Orders M-909, PO-2469 and PO-2592.

basis for concluding that such records exist.[4]

[9] At the adjudication stage, there remained two categories of records of interest to the appellant. They are:

1. Email records sent to or from the personal email account of the former superintendent; and

2. Records relating to a December 2014 agenda concerning a Local Feasibility Study.

[10] The board provided a summary of all steps taken to search for these items, and an affidavit of the freedom of information and privacy analyst who coordinated the searches.

[11] I will address the second item first.

[12] The board explains that the December 2014 agenda relates to a study of the feasibility of French Immersion programming in Etobicoke schools, and was the subject of a meeting conducted by the former superintendent. The board disclosed to the appellant responsive records generated from that meeting, including reports that document the outcome of meeting discussions and incorporate visual aids that were displayed during the meeting. The board reports that the former superintendent confirmed that no other minutes, notes or records were produced in relation to that meeting or the agenda.

[13] The appellant does not address this topic.

[14] I am satisfied that this aspect of the board's search was reasonable. Through its initial search, the board located responsive records and disclosed these to the appellant. In trying to determine whether additional records exist, it was reasonable for the board to make inquiries with the former superintendent, who conducted the meeting, and to rely on her assurance that no other records exist. The appellant has not provided any basis for his belief that there may be additional records on this topic that have not been located by the board.

[15] I now turn to the board's search for the first item, which is the focus of the appellant's representations.

[16] The board analyst explains that she organized the search for responsive email records through the board's Information Technology (IT) department. The IT department conducted a search of the former superintendent's board-issued email account, and located responsive records. After a review of these records, it became apparent that some emails had been copied to the former superintendent's personal email address. Accordingly, the analyst asked the former superintendent to conduct a search of her personal emails for any records responsive to the appellant's request. The

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[4] Order MO-2246.

former superintendent advised that there are no additional responsive records in her personal email account.

[17] The appellant argues that a fair and reasonable search in the circumstances would include a search of the board's entire database for any emails sent to or from the former superintendent's personal email address. He focuses on the particular status of the former superintendent as a person knowledgeable in board matters, and not merely a private citizen with no connection to the board. He reports that after her retirement, the former superintendent continued to correspond with board staff and to provide advice on board-related issues. As evidence, the appellant directs my attention to a particular page in one of the records disclosed to him.

[18] This page is part of an email exchange between a principal at the board and the former superintendent, containing the principal's request for input from the former superintendent on a board matter, and her response. While it is unclear from the email whether it post-dates the former superintendent's retirement, it is evident that she responded from her board-issued email account, and copied the response to her personal email address. I will address this email in more detail later in this order.

[19] In the appellant's submission, this record proves that the former superintendent communicated with the board from her personal email account on board matters, and not only on personal matters. He asserts that this type of communication should have been included in the board's search because it relates to board matters, and that, in this context, her personal emails are no longer those of a private citizen outside the scope of the *Act*. He states that he has reviewed past decisions of the IPC and believes that this type of correspondence between the board and the former superintendent, even when sent to or from her personal email address, are within the custody and control of the board.

[20] The appellant has raised two separate, but related, issues: custody or control of emails associated with the superintendent's personal email address, and the reasonableness of the board's search for these records. In my view, custody or control is not the issue to be decided in this case. The board did not deny access to (or refuse to conduct searches for) additional responsive records associated with the former superintendent's personal email address on the basis it lacks custody or control of these records. The board's position, instead, is that no such records exist. It is evident from the scope of the board's searches that the board considered the possibility that responsive personal emails that may not be within its custody may nonetheless be under its control, and so subject to the appellant's access request under the *Act*.[5] In any event, because the former superintendent did not locate any additional responsive records through her search of her personal email account, it was not necessary for the board to decide whether such records would, in fact, be in its custody or under its control.

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[5] In some circumstances, emails sent or received through personal email accounts may be under an institution's control: see, for example, Orders MO-3281 and MO-3467. This office has recognized that, in every case, determining custody or control is a contextual, fact-specific exercise.

[21] The real issue raised by this appeal is whether the board conducted a reasonable search for responsive records, including those associated with the former superintendent's personal email address, and reasonably concluded that no additional records exist. Based on the evidence before me, I am satisfied that it did.

[22] The board's search was conducted in two parts. The first part was a search of the former superintendent's board-issued email account, which is part of the board's own record-holdings. The appellant does not appear to take issue with this search.

[23] The second part of the search was a search of the former superintendent's personal email account conducted by the former superintendent, at the board's request, for responsive records sent to or from her personal email address. The appellant's dissatisfaction with this search appears primarily to relate to the fact that it was conducted by the former superintendent, rather than by the board. He appears to suggest that it was not reasonable for the board to rely on the former superintendent's search of her own personal email account, or that the former superintendent's search was deficient in some way, or both.

[24] I find it was reasonable in the circumstances for the board to conduct its search in the manner that it did, including by asking the person with direct access to the personal email account to search that account. The board submits that the alternative search proposed by the appellant—a search of all the board's email databases for responsive records that include the former superintendent's personal email address—would produce the same records already located through the searches of her board-issued email account and her personal email account. I agree. Moreover, as described below, the board provided evidence of the complexity of the alternative search proposed by the appellant. It was reasonable for the board to fulfil the search for the same records through a more efficient means.

[25] By arguing that additional email records should exist in the board's own record-holdings, the appellant implies there is reason to doubt the thoroughness of the former superintendent's search. If I find that the former superintendent conducted an inadequate search, I may order the board to conduct further searches. In this case, however, the appellant has provided no support for his belief, and there is nothing in the materials before me that would lead me to this conclusion. The fact the former superintendent conducted the search does not, in itself, raise a reasonable basis for concluding the search was inadequate.

[26] I have considered the email exchange cited by the appellant, which he says can and should have been part of a search under the *Act*. In this email, the former superintendent responds to a request from a board principal for her input on a board matter, and indicates that she has copied the email to her personal email address because she will soon cease to have access to her board-issued email account. While she closes her email by inviting the principal to contact her with any questions, there is no evidence that discussion of this matter, or any other board-related matter, continued beyond this exchange.

[27] I do not agree that this email establishes the existence of an ongoing relationship between the board and the former superintendent, using her personal email address, on board matters. I also observe that, through its search, the board identified this email as a responsive record and disclosed it to the appellant under the *Act*. This undermines the appellant's claim that the board treated this email (and others associated with the former superintendent's personal email address) as being outside the scope of the *Act*.

[28] I conclude that the appellant has not established a reasonable basis to believe that additional responsive records exist. It is therefore unnecessary for me to address the board's evidence about the various risks and difficulties that would be involved in conducting the further search proposed by the appellant. It was the board's submission that, in addition to being redundant (which I accepted, above), the broad search of the board's computer systems proposed by the appellant would involve global filtered searches across approximately 51,000 email accounts, operated internally and through third-party email providers, that would risk destabilizing the board's email servers and disrupting board operations. As I will not be ordering a further search, I need not consider the impact, if any, this factor may have on the scope of another search. As I noted above, however, the board's evidence bolsters my conclusion that it was reasonable for the board to search for responsive email records in the manner that it did.

[29] For all these reasons, I find the board conducted a reasonable search for records in satisfaction of its obligations under the *Act*. I dismiss the appeal.

ORDER:

I uphold the board's search for records. I dismiss the appeal.

Original Signed by: August 8, 2018

Jenny Ryu
Adjudicator