Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-3839-F

Appeal MA18-366

Rainbow District School Board

September 24, 2019

OVERVIEW:

[1] In Interim Order MO-3750-I, I upheld the access decision of the Rainbow District School Board (the board) made in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records to both the "in camera" and "public" portions of a record read out at a specified meeting of the board. I upheld the severances made to the responsive record, for the reasons explained in Order MO-3750-I.

[2] However, in Interim Order MO-3750-I, I found that there were two reasons that I could not uphold the board's search as reasonable, and I ordered the board to conduct a further search for responsive records as a result.

[3] Following the issuance of Interim Order MO-3750-I, the board conducted a further search and provided evidence of its search efforts. As a result of its further search, the board identified additional responsive records, and issued the appellant an access and fee decision in relation to those records. The parties exchanged representations about the board's further search. The appellant addressed several issues in his representations that are outside the scope of the only remaining issue in this appeal (the reasonableness of the board's further search). However, this order will only address that remaining issue.

[4] For the reasons that follow, I uphold the reasonableness of the board's further search, and dismiss this appeal.

DISCUSSION:

Did the board conduct a further search that was reasonable?

[5] The only remaining issue to be resolved in this appeal is whether the board conducted a reasonable search for responsive records as required by section 17 of the *Act*.

[6] In Interim Order MO-3750-I, I identified two reasons that I could not uphold the board's search as reasonable: the lack of evidence regarding the search efforts made, and the board's statement that additional responsive records exist but that it would be "absurd" to identify them as such, since they originated from the appellant. At paragraph 103 of Interim Order MO-3750-I, I said, "*For these two reasons*, I do not uphold the board's search as reasonable, and will order a further search" (emphasis added). I will discuss each reason, in turn, below.

Reason 1 – summary of search efforts had not been provided

[7] Although the board had not initially provided a summary of its search efforts, it has now done so, as explained below.

[8] At paragraph 101 of Interim Order MO-3750-I, I said:

> Although the Notice of Inquiry that I sent to the board asked it to provide a written summary of all steps taken in response to the request, in affidavit form, signed by the person or persons who did the actual search, the board did not do so. There is little information before me about who conducted the search for responsive records, what the scope of the search was, or what steps were taken to conduct that search, including any relating to clarification. The appellant rightly points this out. I find that the lack of these requested details alone would be enough for me to order a further search.

[9] After Interim Order MO-3750-I was issued, the board provided an affidavit from its Information and Privacy Co-ordinator and Senior Advisor of Corporate Communications and Strategic Planning. In her affidavit, she attests that:

- upon receiving the Interim Order, she reviewed the scope of the original request in order to provide proper instructions about the search;
- she instructed the Director of Education to conduct a search of all records responsive to the request, in accordance with the Interim Order;

- she is advised and believes that the Director of Education reviewed the scope of the request and conducted a search of all of his email and paper records, which were being held in his office and the board's server; and

- as a result of the search, which took 2.25 hours, the Director of Education located seven responsive records.

[10] The *Act* does not require an 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.[1]

[11] I find that the evidence before me sufficiently addresses my concerns in Interim Order MO-3750-I. I am now able to discern who conducted the search, the scope of the search, and the steps taken to conduct it. The board also identified the results of its further search (seven additional responsive records were identified). 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.[2] I find that the Director of Education is such an employee, given his duties in that role and the history of his involvement with the appellant. I also find it reasonable that he searched both his email and paper records for responsive records, having reviewed the scope of the request and Interim Order MO-3750-I.[3]

[12] 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.[4] The appellant's representations concerning the board's further search do not establish that the employee who conducted the search was not an employee knowledgeable in the subject matter of the request. Nor do they establish that it was unreasonable for this employee to search his email and paper records. I also do not accept as reasonable the appellant's submissions about the adequacy of the affidavit provided, including the concern that the signature on the affidavit was not "more official looking."

[13] The appellant is right that the Interim Order asks that each person who conducted a search provide an affidavit, and that the affidavit before me is not from the Director of Education. However, I accept that this requirement is satisfied by the affidavit of the Information and Privacy Co-ordinator's since she attests to personal knowledge and belief regarding its contents, and was the one who identified the

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[1] Orders P-624 and PO-2559.
[2] Orders M-909, PO-2469 and PO-2592.
[3] The Information and Privacy Co-ordinator clarified that he was given a copy of the Interim Order by way of reply representations.
[4] Order MO-2246.

employee to conduct the search and directed him to do so.

[14] The appellant submits that the Information and Privacy Co-ordinator did not ask board trustees and administration who were present at the board meeting mentioned in his request to search for notes taken at that meeting. However, in reply, the Information and Privacy Co-ordinator explained that a specified board Governance by-law[5] "expressly prohibits" note-taking at in-camera meetings, and that the appellant would be aware of that by-law. The appellant disputes the board's submission that he is aware of the by-law. Regardless of whether or not the appellant would be aware of such a rule, I accept that the board is well–placed to identify its own governance rules. As a result, I find it reasonable that the board did not take steps to search for notes taken at that in-camera meeting. Furthermore, while the appellant did not specify "in-camera" or open meeting, I am mindful that the *Act* does not require the institution to prove with absolute certainty that further records do not exist.

[15] In addition, I do not accept the appellant's representations that because records relating to six sanctions made against him were not identified, additional responsive records exist. I have not reproduced the wording of the request in this public order because it could identify individuals referenced in it. However, I find that the original request does not cover records related to the six sanctions mentioned in the appellant's submissions. I find that such a request is quite specific, and it is not reasonable to expect that the board would have conducted a search with such a far-reaching scope, even with the presence of a broad "catch-all" phrase in the original request. If the appellant would like to pursue access to the records related to the six sanctions, he is free to make a new access request under the *Act* to do so. The fact that the board did not so liberally interpret his request in such a manner is not a basis for a finding that their search was not reasonable.

[16] For these reasons, I find that the board has sufficiently addressed the first reason that I did not uphold its search in Interim MO-3750-I.

Reason 2 – board's statement that other responsive records exist but were not disclosed

[17] At paragraphs 100 and 102 of Interim Order MO-3750, I said:

> The board states, on the one hand, that the record at issue is the only record responsive to the appellant's request, but its representations also refer to records that the appellant is said to have created and provided to the board. The board argues that it would be "absurd" to "give them back

[5] Governance By-Law 10.2, which states: "With the exception of the Executive Secretary or designate, any and all recording and/or note taking of in camera meetings is expressly prohibited."

> to the appellant, in redacted format, in response to the FOI request." In addition, the board states that the records provided by the appellant are now subject to solicitor-client privilege.
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> . . . . given the board's representations regarding the existence of additional responsive records, I cannot uphold the board's search as reasonable. The board was required to identify all responsive records, even if the appellant provided them to the board, and even if the board believes those records are now subject to an exemption under the *Act*. If the board believes that other records that reasonably relate to the appellant's request are exempt under the *Act*, the correct approach is to identify those records as responsive, withhold access to exempt information, and claim the exemption(s) applicable in an access decision. Then, if the appellant disputes the application of an exemption, the appellant can appeal that access decision to this office.

[18] After Interim Order MO-3750-I was issued, the board conducted a further search and identified seven responsive records that it had not previously identified as responsive. The board described six of these records as originating from the appellant. The board issued an access decision relating to these records. The appellant is not pursuing access to these records. The board was asked to identify records as responsive to the request even if they had originated from the appellant. Having done so, the board has satisfied the second concern raised in Interim Order MO-3750-I about its search efforts.

[19] Since the board has sufficiently addressed both reasons identified in Interim Order MO-3750-I, I uphold its further search and dismiss this appeal.

ORDER:

I uphold the reasonableness of the board's further search and dismiss this appeal.

Original signed by — September 24, 2019

Marian Sami
Adjudicator