

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3871-F

Appeal MA17-493-2

Toronto District School Board

December 6, 2019

Summary: This final order relates to the Toronto District School Board's (the board's) exercise of discretion to withhold information under sections 38(a) and 38(b) and the reasonableness of the board's further search for responsive records. In Interim Order MO-3805-I, the adjudicator found that the board was able to claim the discretionary exemption at section 38(b), and upheld the board's application of section 38(a) in conjunction with section 12. Also, the adjudicator found that the board did not conduct a reasonable search, and ordered it to conduct further searches and to exercise its discretion with respect to the records withheld under sections 38(a) and 38(b).

In this final order, the adjudicator upholds the board's further searches. She also upholds the board's exercise of discretion under sections 38(a) and 38(b), and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 38(a) and 38(b).

OVERVIEW:

[1] The Toronto District School Board (the board) received a six-part access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for records relating to one of the appellant's children.

[2] The board granted access, in part, and relied on the discretionary exemption at section 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) to withhold information. The board also found some information not to be responsive to the request.

[3] During mediation, the appellant raised the issue of the reasonableness of the board's search.

[4] During the inquiry, the appellant also disputed the board's late raising of a discretionary exemption (section 38(b)).

[5] In Interim Order MO-3805-I, I found that the board was able to claim the discretionary exemption at section 38(b). I upheld the board's application of the mandatory and discretionary personal privacy exemptions at section 14(1) and 38(b). I also upheld the board's application of section 38(a) in conjunction with section 12. Finally, I found that the board did not conduct a reasonable search, and ordered it to conduct further searches and to exercise its discretion with respect to the records withheld under section 38(a) in conjunction with section 12 and section 38(b).

[6] In compliance with the interim order, the board conducted further searches and exercised its discretion, and submitted representations detailing its further search efforts and its considerations in the exercise of that discretion. The board maintained its decision to withhold the information under section 38(a) in conjunction with section 12 and section 38(b).

[7] I invited the appellant to provide submissions in response to the board's representations. She did not provide submissions.

[8] In this final order, I uphold the board's further searches and its exercise of discretion under sections 38(a) and (b).

RECORDS:

[9] The records at issue consist of email chains, case logs, and handwritten notes contained in batch #2, 3, 4, 5, 7, 8, 9 and 10.

ISSUES:

- A. Was the board's further search for responsive records reasonable?
- B. Should the board's exercise of discretion under sections 38(a) and 38(b) be upheld?

DISCUSSION:

A: Was the board's further search for responsive records reasonable?

[10] In Interim Order MO-3805-I, I ordered the board to conduct further searches for records responsive to the request.

[11] Following the issuance of Interim Order MO-3805-I, two board officials conducted a further search for responsive records as they realized that they had not searched for records in Microsoft Outlook Email. They both discovered duplicate records, which were previously included in the group of responsive records. Regardless, these duplicate records were disclosed to the appellant.

[12] The board also submitted 10 affidavits sworn by board officials (including for the two board officials mentioned above) and staff in support of its position that its further search was reasonable.

[13] These affidavits state the following information for each individual:

- Affiant's position with the board and his or her functions
- Portion(s) of the request he or she considered based on their personal knowledge of the records
- Affiant's previous search, date of search, and location of search
- Description of the records holding searched
- Results of the search and whether a further search was conducted

[14] As stated earlier, although the appellant was given an opportunity to respond to the board's submissions on its further searches, she did not do so.

Analysis and findings

[15] 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.

[16] 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 To be responsive, a record must be "reasonably related" to the request.³

[17] 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

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

are reasonably related to the request.⁴

[18] 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.⁵

[19] 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.⁶

[20] In Order MO-3805-I, I found that the board did not conduct a reasonable search for responsive records. In particular, I found that the board's evidence lacked details about when the search was conducted, what places were searched, and what type of files were searched. I also found that the board was unclear as to the types of records that were searched by the named board officials.

[21] I have reviewed the board's submissions, along with its supporting 10 affidavits, and am satisfied its further searches were reasonable. In particular, I find that the affidavits provided fulsome details about when the search was conducted, what places were searched, what type of files were searched, and the types of records that were searched by the board officials and staff. These were the details that were lacking in the affidavit of the Freedom of Information and Privacy Analyst and the affidavit of the Freedom of Information Analyst (Acting) provided initially. Accordingly, I find the board has now provided sufficient evidence of its searches to establish it has conducted a reasonable search.

B: Should the board's exercise of discretion under sections 38(a) and (b) be upheld?

[22] In the interim order, I set out a list of the considerations generally relevant to the exercise of discretion by an institution, noting that additional unlisted considerations could also be relevant.⁷ The list of relevant considerations includes:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Orders P-344 and MO-1573.

- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[23] In its representations, the board submits that it properly exercised its discretion under section 38(a). The board submits that it considered the following factors:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- the age of the information
- the historic practice of the institution with respect to similar information

[24] It submits that the Ontario courts have underlined the critical public interest in protecting solicitor-client privilege in order to permit parties and their counsel to operate in candor within a protected sphere of confidentiality when communicating for the purposes of legal and practical advice from counsel. As well, the board submits that

the appellant has retained counsel, which raises the potential prospect of potential litigation and strengthens the need for it to be able to operate within a sphere of confidentiality for the purposes of communicating in order to obtain legal and practical advice from counsel.

[25] In addition, the board relies on the age of the information, and the fact that it does not have a regular practice of waiving solicitor-client privilege on documents that fall within its sphere. It submits that although some time has passed since the creation of the records, they are not of an excessive age sufficient to eliminate considerations of confidentiality and sensitivity. Therefore, the board submits that it decided to exercise its discretion not to grant access to the information withheld under section 38(a).

[26] With respect to the personal privacy exemption at section 38(b), the board also submits that it properly exercised its discretion under this section. It submits that it considered the purposes of the Act, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, and exemptions from the right of access should be limited and specific. The board points out that the personal information falls into two categories: (a) personal information of board staff; and (b) personal information of children who are students of the board. In this regard, it submits that it has already attempted to strike a balance between the competing interests of the appellant and her child and the affected individuals (staff and students) by minimizing the redactions employed in the records. The board also submits that the personal information of staff and some portions of the personal information of student would be of little or no importance to the appellant as they do not relate to her or her child.

[27] In addition, the board submits it considered a number of factors in exercising its discretion. The personal information about other students is highly sensitive and the board has an obligation to protect the privacy of all students. The records were relatively contemporaneous at the time of the request and, while some time has passed, the records still address relatively recent events. Finally, the board does not have a historic practice of disclosing personal information about its students to other parties. Therefore, the board submits it decided to exercise its discretion not to grant access to the information withheld under section 38(b).

[28] As stated earlier, although the appellant was given an opportunity to respond to the board's submissions on its exercise of discretion, she did not do so.

[29] I have considered the circumstances surrounding this appeal and the board's recent representations which detail the factors that it considered when determining whether it should exercise its discretion to disclose the withheld information to which sections 38(a) and 38(b) apply. I am satisfied that the board has not erred in its exercise of discretion with respect to its application of sections 38(a) and section 38(b) of the Act regarding the withheld information. The board has considered the purposes of the Act; the wording of the exemptions and the interests they seek to protect; whether the appellant is seeking her own personal information; the age of the

information; and the historic practice of the board with respect to similar information. The board has also given due regard to the nature and sensitivity of the withheld information in the context of this appeal. Accordingly, I find that the board took relevant factors into account and I uphold its exercise of discretion in this appeal.

ORDER:

1. I uphold the board's exercise of discretion to withhold the information to which section 38(a) in conjunction with section 12 and section 38(b) apply.
2. I find that the board's search for responsive records to be reasonable, and I dismiss the appeal.

Original signed by _____

Lan An
Adjudicator

December 6, 2019 _____