Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4095

Appeal MA20-00139

York Region District School Board

August 18, 2021

Summary: The sole issue in this appeal is whether the York Region District School Board (the board) conducted a reasonable search for records responsive to the appellant's access request made under the *Municipal Freedom of Information and Protection of Privacy Act.* The access request was for his children's Ontario School Records over a specified time period. In this order, the adjudicator finds that the board's search for records was reasonable and the appeal is dismissed.

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

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an appeal of an access decision made by the York Region District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for the requester's children's Ontario School Records (OSR), during a specified time period as well as "all documents" during a specified time period.[1] The board contacted the requester and advised that the request did not provide sufficient details to identify what the "all documents" were, and also instructed the requester to contact the principal of the children's school to obtain a copy of the OSR. The requester responded that he was not required to access the OSR through the school and that he could not be expected to provide an itemized list for a full student record.

[2] Six months later, the requester submitted a second request under the *Act* to the

[1] From September 2014 to the date of the request, which was June 16, 2019 and received by the board on June 24, 2019.

board for the same records. In response, the board issued a decision to the requester, granting full access to the responsive records. The requester, now the appellant, appealed the school board's decision to the office of the Information and Privacy Commissioner/Ontario (the IPC).

[3] During the mediation of the appeal, the appellant advised the mediator of his belief that additional responsive records exist.

[4] Following discussions with the mediator, the board provided the appellant information about its retention policy and conducted an additional search. No further records were found.

[5] The file then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. Both the board and the appellant submitted representations to the IPC, which were shared in accordance with the IPC's *Practice Direction 7*.

[6] For the reasons that follow, I find that the board conducted a reasonable search for records responsive to the appellant's access request. I dismiss the appeal.

DISCUSSION

[7] The sole issue in this appeal is whether the board conducted a reasonable search for records that respond to the access request. 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.[2] 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.

[8] 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.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[9] 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.[5]

[10] 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.[6]

[11] 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

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[2] Orders P-85, P-221 and PO-1954-I.
[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.

concluding that such records exist.[7]

[12] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[8]

[13] The board was required to provide a written summary of all steps taken in response to the request, and asked the following questions, which you may address in your representations:

1. Did the board 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 board did not contact the requester to clarify the request, did it:

    a. choose to respond literally to the request?

    b. choose to define the scope of the request unilaterally? If so, did the board 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 board inform the requester of this decision? Did the board 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.

[14] The board provided its evidence by way of representations, as well as an affidavit sworn by its Manager of Legal, Legislative and Administration Services who has personal knowledge of the facts of the access request and the issue of search.

[15] The board submits that it received two access to information requests for the appellant's children's Ontario Student Records (OSR's). The board contacted the appellant in order to request clarification and to offer to answer questions or assist in reformulating the request. The board's position is that the first request did not provide sufficient detail to identify the records being sought. Board staff also advised the appellant that the records he was seeking could be obtained by contacting the school principal. After further communication with the appellant, the board advised the appellant that it was not necessary to file an access to information request to obtain documents contained in the children's OSR's and provided a link to its website that outlined the process for obtaining OSR documents.

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[7] Order MO-2246.
[8] Order MO-2213.

[16] The board further submits that the appellant responded that he could still access the records through an access to information request, that he did not wish to involve the school principal and that he would be filing an appeal with the IPC as soon as possible. The board goes on to state that six months later, it received a new access to information request from the appellant for the same records. The board subsequently issued a decision letter to the appellant, granting access to the records, in full. The appellant then filed an appeal with the IPC.

[17] The board goes on to submit that during the mediation of the appeal, it was advised that the appellant's position was that there existed one or more Student Accident Reports involving the appellant's children. As a result, the board conducted further searches. In particular, the affiant states that one of her colleagues conducted a manual search by searching all Student Accident Reports stored on-site centrally at the board's office. A search was also conducted of a file respecting legal services, where a Student Accident Report may have been misfiled. No Student Accident Reports relating to the appellant's children were identified as a result of these searches.

[18] The affiant then advises that she searched all electronic records saved on the board's secure network. No Student Accident Reports relating to the appellant's children were identified as a result of this search. She then visited the children's school and searched the children's OSR's, but there were no Student Accident Reports in the OSR's (which are located at the school).

[19] The affiant also submits that the board has a Records and Information Policy that sets out the records management expectations, as well as a Classification and Retention Schedule, which contains records classification, retention, disposition, responsibility and authority expectations. These policies were provided to the IPC. The board's position is that, according to the Classification and Retention Schedule, the timeframe for the retention of a Student Accident Report is two years, following which it is shredded. The affiant goes on to argue that the appellant suggested that a Student Accident Report existed from June 2017, and that, based on the Classification and Retention Schedule, it would have been removed from the student's OSR in or about June 2019 and confidentially destroyed.

[20] The board provided a partial copy of its records retention schedule as well as its records and information management board procedure. According to the retention schedule, injury logs in schools are retained for 12 months, then shredded, and kept at the board's location for two years, then shredded. One exception is referred to as a "legal hold," in which information is preserved when litigation is reasonably anticipated.

[21] The appellant submits that he was not able to file an appeal of the first access request because of family issues. He also argues that the board's position that he had to obtain the OSR's from the school principal outside of the freedom of information scheme was an effort to thwart any appeal to the IPC and to the protections of the IPC.

[22] The appellant also provided emails to the IPC in which he was communicating with the board. In these emails, he stated that the board was uncooperative with him, particularly when he made the first access request, in that the board rejected the access request with "nonsensical reasoning," which was not applied by the board in the second access request.

[23] The appellant also submits that a Student Incident Report should exist for June 22, 2017 and that he has possession of other records that he obtained years after the fact that were intentionally removed by the board from his children's OSR's. In one of the emails the appellant provided to the IPC, the board advised the appellant that the retention policy for student incident reports held at the school is that they are held for the school year and an additional year prior to being destroyed. The appellant submits that this seems to be a reasonable policy, and this would explain the missing records. However, the appellant goes on to argue that this policy has not been applied in the past.

[24] The appellant further states that he is waiting to complete a process in which he could gain permission to publicly use board records relating to his children he obtained through a Human Rights Tribunal proceeding, and that an ensuing and far-reaching media campaign would help the lives of disabled children. In addition to this order deciding the issue of reasonable search, the appellant would like me to initiate any disciplinary action I can against the board for its handling of the situation as a whole.

[25] In reply, the board submits that incident records may be retained in circumstances where they continue to be necessary for legal purposes or because they continue to inform educational programming and services. The board goes on to submit that it is possible that a record was inadvertently not destroyed despite its record retention policy. The board states:

> Further, the [board] does not dispute that a record retained in an OSR might be removed. An OSR does not contain nor does a school board retain all records ever generated about a student. In accordance with the Ontario Student Record Guideline and s. 266 of the *Education Act*, a record may be removed from a student's OSR when it is no longer conducive to the improvement of instruction of a student [see s. 266(4)].

[26] The board reiterates that its search for records was reasonable and that it was reasonable for it to interpret the appellant's first access request as being for the OSR and all other records during a specified time period. As a result, the board argues, it was reasonable to seek clarification of the request reasonable to redirect the appellant to his children's school to obtain copies of their OSR's.

[27] Lastly, the board's position is that the appeal is for a different and inconsistent purpose. In particular, the board argues that the appellant is attempting to seek a remedy with respect to his broader complaint against it, and not with respect to the reasonableness of the search conducted for the alleged incident report.

[28] I am satisfied that the board conducted a reasonable search for records responsive to the appellant's access request. In particular, I find that the board conducted a manual search for records at it central office, including a search of a legal services file. In addition, I find that the board conducted a search in its electronic record holdings. Finally, I find that the board visited the relevant school and conducted a search of the OSR's at that location.

[29] The *Act* does not require the board to prove with absolute certainty that further records do not exist. However, the board must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In this case, I find

that two experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records. As a result, I find that the board has made a reasonable effort to identify and locate responsive records.

[30] Lastly, I make no finding regarding the board's response to the appellant's first access request, and I accept the board's explanations for the issues raised by the appellant.

ORDER:

I uphold the board's search for records responsive to the access request and dismiss the appeal.

Original signed by: August 18, 2021
Cathy Hamilton
Adjudicator