

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4106-I

Appeal MA18-151-2

Toronto Catholic District School Board

September 29, 2021

**Summary:** This second interim order determines whether the board conducted a reasonable search for responsive records in response to Interim Order MO-4002-I. In the first interim order, the adjudicator upheld the board's decision to withhold portions of the records under section 38(b) (personal privacy), but ordered the board to conduct a further search for responsive records. In this order, the adjudicator finds that the board has not conducted a reasonable search for responsive records following Interim Order MO-4002-I, and orders it to conduct a further search.

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

**Orders and Investigation Reports Considered:** Interim Order MO-4002-I.

### OVERVIEW:

[1] This interim order addresses the reasonableness of the Toronto Catholic District School Board's (the board) search for responsive records related to alleged bullying incidents at an elementary school after having been ordered to conduct a further search in Interim Order MO-4002-I.

[2] By way of background, the board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any and all records related to the requesters' son and specified incidents involving several other named elementary school students for the time period of May 23, 2017 to the date of the

request (January 27, 2018). The board issued a decision granting partial access to the responsive records, while withholding information under the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] The requesters, now the appellants, appealed the board's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution. During mediation, the appellants took issue with the board's decision to withhold information under section 38(b) of the *Act* and the adequacy of the board's search, claiming that further records responsive to their request exist.

[4] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, and I conducted an inquiry. In Interim Order MO-4002-I, I upheld the board's decision to withhold portions of the records under section 38(b), but found that the board had not conducted a reasonable search. I ordered the board to conduct a further search for responsive records, to issue a decision to the appellants with respect to any new records located, and to provide me with an affidavit outlining its new search.

[5] The board conducted a further search and issued an access decision to the appellants with respect to the new records located. The board also provided an affidavit outlining its search efforts. After receiving the board's affidavit, I shared it with the appellants and invited their representations. I then shared the appellants' representations with the board, inviting its reply. However, the board declined to submit any further representations.

[6] In this interim order, I find that the board has not conducted a reasonable search for responsive records, and order it to conduct a further search.

## **DISCUSSION:**

### **Did the board conduct a reasonable search for responsive records following Interim Order MO-4002-I?**

[7] The appellants claim that further records responsive to their request exist. Where a requester claims 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.<sup>1</sup> If I am satisfied 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

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

show it has made a reasonable effort to identify and locate responsive records.<sup>2</sup> 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.<sup>3</sup>

[9] 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 such records exist.<sup>4</sup>

### ***Representations of the board***

[10] The board submits that it conducted a reasonable search for responsive records. In support of its position, the board submitted the affidavit of its Senior Manager of Archives, Records Management, and Freedom of Information (SM). The relevant portions of the SM's affidavit are as follows:

- The SM's role is to coordinate board responses to requests for information under the *Act*. He has facilitated a further search conducted by himself and by relevant individuals within the board as ordered by Interim Order MO-4002-I.
- The individuals selected to conduct further searches were individuals named by the appellants as potentially holding records responsive to their request. These individuals are as follows:
  - Former Director of Education #1;
  - Former Director of Education #2;
  - A Superintendent;
  - A ward trustee;
  - Former principal of the school;
  - Former vice-principal #1 of the school;
  - Former vice-principal #2 of the school;
  - M.K., a teacher at the school;
  - M.C., a teacher at the school;
  - D.D., a former teacher at the school; and

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<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Orders M-909, PO-2469 and PO-2592.

<sup>4</sup> Order MO-2246.

- W.N., a former teacher at the school.
- These individuals were instructed to search for:
  - Any paper record, from May 23, 2017 – January 27, 2018, related to investigations into the alleged bullying of [the appellants' son], including handwritten notes, meeting notes, written correspondence, assessments relating to the alleged incidents, evaluations, investigative reports, printed material, or any other paper file related to the alleged incidents.
- Paper records were searched for in locations based on the individual school and board business records practices.
- These individuals were instructed not to limit their search to only direct correspondence between themselves and the appellants, or between themselves and other board employees, but to also to determine whether any correspondence or other records may exist between them and a third party (such as other parents or any parties external to the board) containing matters related to the alleged incidents.
- The SM arranged a centralized search for electronic records through the board's Technical Services Department (TSD). The TSD searched for records containing the last names of the appellants, or their son's first name, from May 23, 2017 – January 27, 2018. The TSD searched all email folders and personal network drives of the individuals who were asked to conduct further searches.
- The SM noted that as the electronic records search was keyword-based, all electronically searchable file types containing the keywords were captured.
- The SM noted that all individuals who conducted a further search are aware of their obligations under the *Education Act*, the board's records management policies with regard to the retention of active files relevant to principals' investigations, as well as their legal obligations with regard to retention of the board's business records in general.
- These further searches located 19 responsive email threads, 1 principal's investigative summary report, and 1 handwritten teacher's note.
- The SM noted that:

“While I am satisfied that records of this nature have not been destroyed, I cannot confirm with certainty that transitory paper records and draft notes have not been destroyed as a matter of general file maintenance based on individual record-holders' determination of ongoing relevance to [board] business. With regard to email correspondence records containing the appellants' personal information specifically, I cannot confirm with certainty that all records relating to the forgoing further search

have been retained, as more than one year has passed since the date of the original date range of the search. It is possible that transitory emails and/or email records that each individual record holder determined to be no longer relevant to [board] business were disposed of as a matter of general file maintenance.”

***Representations of the appellants***

[11] The appellants submit that the board has not conducted a reasonable search and further records responsive to their request must exist.

[12] The appellants note that the further search only produced 17 unique email threads, 15 of which were provided and two of which were withheld, not 19 as the board submits.

[13] In response to the board’s list of individuals who conducted a further search, the appellants submit that four other individuals: two teachers (Mrs. M and Mr. P), a corporate counsel of the board (P.M.), and a board mediator (I.V.), should have been selected to conduct further searches. The appellants submit that Mr. P was on “yard duty” during one of the specified incidents involving their son and Mrs. M took a statement from their son about a specified incident. The appellants submit that there are multiple references in the (disclosed) records about individuals engaging with the specified corporate counsel of the board, and the board mediator is the individual identified to lead the mediation between the appellants, the superintendent, and the principal.

[14] The appellants appear to concede that the specified criteria for the paper-based records search were reasonable. However, the appellants submit that the keyword list and date range specified by the board for the search of electronic records are the minimum search criteria to identify records (emails) on which the appellants were not originators or recipients. The appellants further submit that the board’s email search could have been enhanced by changing the date range to within 10 days of each incident report, and including the principal, superintendent, and director of education as the sender/recipient.

[15] The appellants submit that the search for email records should have been conducted in the board’s email archives, because it is unclear if deleted emails, or emails located in an individual’s computer would have been detected by the search.

[16] The appellants also submit that the board’s search for email records would not have identified emails in which the specified keywords only appear in the content of attachments. The appellants submit that the board does not identify what types of records it means by “electronically searchable file types”, because there could have been file types whose content are not electronically searchable and would need to be searched by other means. The appellants allege that the software used by the board to conduct the centralized electronic search is not able to perform a keyword search within

the file content of all file types. The appellants submit that the board has not identified any search exclusions, but voice recordings, image files, and PDFs could represent examples of such files. The appellants also submit that the board has not requested the listed individuals search their mobile devices for responsive records. The appellants submit that in the responsive records there are multiple references to messages, which could be voicemails or text messages.

[17] The appellants submit that it is unclear what the board meant by “personal network drives” and therefore, the location of the search is unclear. The appellants further submit that local drives on the individuals’ computers were not within the scope of the board’s centralized search, and since these individuals only searched for paper-based records, this is a gap in the board’s search. The appellants submit that a manual search of the listed individuals’ local hard disks should be conducted.

[18] The appellants submit that Mrs. M, a teacher, took handwritten notes of the statement of the appellants’ son, but these notes are not part of the responsive records.

[19] The appellants submit that policies establish that incidents that require medical attention be reported to the Ministry of Education. The appellants specify one incident which, they believe, should have been reported and note that records related to it were not included in the responsive records.

[20] The appellants also question the absence of written investigative notes by the principal from a specified incident, when the appellants heard him interviewing students. The appellants argue that the principal wrote a report sometime after the interviews and without notes, he would have to have written the report completely from memory.

[21] The appellants submit that the meeting minutes of the board’s June 8, 2017 Corporate Affairs Strategic Planning and Property Committee Board meeting should exist. The appellants submit that during this meeting, they presented and spoke about specific incidents involving their son, and a ward trustee questioned the superintendent and principal about these incidents. The appellants also submit that email correspondence between the ward trustee, the former Director of Education #1, and another specified individual, pertaining to that meeting, should exist.

[22] The appellants’ representations go on to list specific incidents, which the responsive records do not include, as well as two incidents that the appellants allege are documented with “extremely superficial information”.

[23] Based on the above, the appellants argue that further responsive records exist and the board should conduct a further search.

### ***Analysis and findings***

[24] In Interim Order MO-4002-I, I ordered the board to conduct a further search for

both electronic and physical records, because I found that the board's affidavit failed to specify who carried out the search, where they searched and what they searched. Because of this failure, I was unable to determine what the board instructed the principal to search for, whether the principal conducted the search personally, what types of records he searched or where he searched for them. Therefore, I ordered the board to conduct a further search and provide an affidavit outlining the following:

- a. the names and positions of the individuals who conducted the searches;
- b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
- c. the results of the search; and
- d. details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

[25] The board has provided the affidavit of its Senior Manager of Archives, Records Management, and Freedom of Information, which outlines the board's search efforts in response to the appellants' request and Interim Order MO-4002-I. The board has listed the individuals involved in the search, where they searched, how they searched, and the results of their search. Strictly speaking, the board's affidavit outlines all the details that I requested in Interim Order MO-4002-I, and satisfies me of the reasonableness of certain aspects of the board's further search.

[26] In particular, I am satisfied that the board selected individuals knowledgeable in the subject matter of the request to conduct further searches and that the searches conducted by these individuals for paper records were reasonable. There is one exception regarding a teacher, Mrs. M, being excluded from the search, which I will address below.

[27] The appellants identified three other individuals, apart from Mrs. M., in the representations they provided after the interim order. These individuals were not included in their previous representations, and I accept that it was reasonable for the board not to have included them as part of its further searches. Additionally, based on the appellant's representations, I find that they have not provided a sufficient basis to establish that these three individuals may hold further responsive records. I am satisfied that communications between the board's counsel or the board mediator and the other individuals specified by the appellants would have been located by the board's electronic search for records, especially email correspondence.

[28] While the appellants question the absence of written investigative notes by the principal for a specified incident, I accept the board's submission regarding the possible destruction of "transitory paper records and draft notes" as a reasonable explanation for the board not having located records of this nature. The *Act* does not require that information be retained in a particular format, only that information be retained. As the

appellants note, the principal prepared a report about this incident, and it is reasonable to expect that the report included the information from any handwritten investigative notes he made while interviewing the students. As such, I am satisfied that the board's search for paper records was reasonable overall.

[29] I am also satisfied for the most part with the board's search for email and electronic records. The board searched for records containing the last names of the appellants, or their son's first name, from May 23, 2017 – January 27, 2018, in all email folders and personal network drives of the individuals who were asked to conduct further searches. I am satisfied with the keywords and timeframes used by the board in conducting its search and I find these to be reasonable. However, I am not satisfied that the board searched all relevant locations for email and electronic records, which I will expand on below.

[30] From the appellants' representations, it is clear that they have many questions about the board's documentation and document management practices, but this is an area that is not within my authority under the *Act*. Additionally, while the appellants' representations outline specific methods that they argue the board should have used in its search, I note that the *Act* does not stipulate how a search should be undertaken, nor does it require the board to prove with absolute certainty that further records do not exist. The only issue before me is whether the board conducted a reasonable search for responsive records.

[31] As I noted above, although an appellant 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.<sup>5</sup> The appellants provided several examples of records they submit ought to be have located, including the principal's written investigative notes about the specified incident, which I addressed above. As another example of records the appellants believe should have been found, they claim that meeting minutes of the board's June 8, 2017 Corporate Affairs Strategic Planning and Property Committee meeting should exist. They also assert that email correspondence between the ward trustee, the former Director of Education #1, and another specified individual, pertaining to that meeting, should exist. However, I note that the ward trustee and the former Director of Education #1 were both individuals the board selected to conduct further searches. And while it is not clear to me that the minutes of the specified meeting would be responsive to the request, I am satisfied that these records would have been captured by the board's further electronic search for records using the last names of the appellants or their son's first name as keywords.

[32] Based on the evidence before me, however, I am satisfied that the appellants have established a reasonable basis to conclude that other additional responsive records may exist.

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<sup>5</sup> Order MO-2246.



[33] I note that Mrs. M, the teacher the appellants allege took a statement from their son, was previously identified by the appellants in their representations provided before Interim Order MO-4002-I was issued. In my view, this teacher should have been included in the board's further search and the evidence before me does not establish that she was asked to participate in it.

[34] The appellants also question a specific aspect of the board's search for email and electronic records. While the board conducted a search for responsive records on the "personal network drives" of the named individuals, as the appellants point out, it is unclear whether this included records that were stored "locally" – that is, on the individuals' computer hard drives. If records are not stored locally or the board did not conduct a local search of the individuals' hard drives, it would have been helpful for the board to clarify this by providing reply representations when asked to do so. Based on the board's affidavit, and given that the board did not provide reply representations, it is unclear if local hard drives were included as part of the further searches conducted following Interim Order MO-4002-I, and I accept the appellants' argument that further responsive records may be located there. Therefore, I will order the board to search for responsive records that may be stored locally on the computer hard drives of the individuals it selected to conduct further searches, if it did not already do this, and provide an explanation in the affidavit I am ordering below. To be clear, Mrs. M should also be included in this search.

[35] As noted above, the board was given an opportunity to respond to the appellants' detailed representations, including their position on the existence of additional records responsive to their request. However, the board declined to submit reply representations. In the absence of a reply from the board sufficient to counter the appellants' representations, and what I find to be a reasonable basis for believing that further responsive records may exist, I find that the board has not yet conducted a reasonable search for responsive records. Accordingly, I order the board to conduct a further search in accordance with the provisions of this second interim order.

## **ORDER:**

1. I order the board to conduct a further search for electronic and paper records related to the appellants' son and specified incidents involving the other named students for the time period of May 23, 2017 to the date of the request (January 27, 2018).
2. I order the board to include Mrs. M, teacher, in its further search for both electronic and paper records. The individuals that have already conducted further searches following Interim Order MO-4002-I are not required to repeat their previous searches for paper records.

3. I order the board to search its record holdings for electronic records, including emails, which may be stored locally on the computers of the individuals the board selected to conduct further searches (as listed in its affidavit) following Interim Order MO-4002-I and Mrs. M, the teacher listed in order provision 2.
4. I order the board to issue an access decision to the appellants with respect to any further responsive records located as a result of the searches ordered in provisions 1-3, in accordance with the *Act*, taking into consideration the notice provisions under section 21(1). The board should treat the date of this order as the date of the request.
5. I order the board to provide me with a copy of the decision sent to the appellants in accordance with order provision 4.
6. The board shall send its representations on the new search referred to in provisions 1-3 and an affidavit outlining the following, by **November 29, 2021**.
  - a. the names of the individuals who conducted the further searches;
  - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the further search;
  - c. the results of the further search; and
  - d. details of whether the records could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

The board's representations, including the affidavit, will be shared with the appellants, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The board should indicate whether it consents to the sharing of its representations with the appellants.

7. I remain seized of this appeal in order to deal with any other outstanding issues arising from provisions 1-3 and 6 of this interim order.

Original signed by: \_\_\_\_\_

Anna Truong  
Adjudicator

September 29, 2021