

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4207-I

Appeal MA20-00405

Waterloo Region District School Board

June 7, 2022

Summary: The appellant, a Waterloo Region District School Board (the board) employee, sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to all personal information about himself, including Human Resources Services department records about discipline action taken against him by the board.

The board disclosed some records to the appellant outside of the *Act*, but denied access to other records, relying on the labour relations and employment records exclusion in section 52(3)3 of the *Act*. The appellant appealed the board's decision to withhold records under section 52(3)3 to the Information and Privacy Commissioner of Ontario and also claimed that additional responsive records should exist.

In this interim order, the adjudicator does not uphold the board's search for responsive records as reasonable. She orders the board to conduct another search for responsive records and defers her decision on the applicability of the section 52(3)3 exclusion until after the board has concluded this search.

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

OVERVIEW:

[1] This interim order concerns whether a school board had conducted a reasonable search for responsive records about an employee who had sought access to all personal information about himself.

[2] The appellant submitted an access request to the Waterloo Region District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) seeking:

...all personal information recorded about [the appellant], including, but not limited to:

a) All records of Human Relations at Waterloo Region District School Board whatsoever and whenever stored including records made, kept or maintained by [the board's Employee Wellness Officer, the board's Interim Manager, Human Resource Services, and the board's Senior Manager Human Resource Services];

b) all statements and information provided by third parties to Human Relations at Waterloo Region District School Board including, but not limited to, those statements referenced by Human Relations in a meeting with [the appellant] conducted in or about [first date];

c) all documentation related to the suspension of [the appellant], with pay, on or about [second date]

d) all documentation related to the reasons for and the demand for a neuropsychological assessment of [the appellant].

[3] The board issued a decision letter dated August 20, 2020 denying access to the emails it had identified as responsive to the request. Access to these records was denied based on the labour relations and employment records exclusion in section 52(3)3 of the *Act*.

[4] The appellant appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt to achieve a resolution of this appeal with the parties.

[5] During mediation, the board advised the mediator that it had already disclosed to the appellant, outside of the *Act*, the appellant's 140-page employment file (also known as the appellant's human resources - central file), in accordance with his collective agreement.

[6] The appellant explained to the mediator that the 140-page package he received did not contain all of the records that he was seeking access to under the *Act*. As a result, the reasonableness of the board's search for responsive records was added as an issue on appeal.

[7] During mediation, the board conducted another search for records and located additional records. The board issued a supplementary access decision letter dated April 23, 2021 to the appellant, disclosing another complete copy of his employment file and denying access to the additional responsive records (emails and meeting notes) it had

located as being excluded from the *Act* in accordance with section 52(3)3.

[8] The parties were unable to resolve the issues under appeal through the process of mediation. Accordingly, the file was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the board's representations initially, which were shared with the appellant. The appellant provided representations in response.

[9] In this interim order, I do not uphold the board's search for responsive records as reasonable. I order the board to conduct another search for responsive records and I defer my decision on the applicability of the section 52(3)3 exclusion until after the board has concluded this search.

DISCUSSION:

Did the board conduct a reasonable search for records?

[10] 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.

[11] 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

[12] 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.⁴

[13] 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

[14] 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

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

[15] 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.⁷

[16] The board was asked in the Notice of Inquiry to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution 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 institution 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 institution 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 institution inform the requester of this decision? Did the institution 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.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

Representations

[17] The board states that the records it has located are specific to its Human Resources Services department's investigation into a complaint that was made against the appellant and include email threads, meeting notes, and correspondence related to the investigation and the board's subsequent request that the appellant undertake a neuropsychological assessment.

[18] Regarding the records it has disclosed to the appellant, the board states:

⁷ Order MO-2213.

In accordance with board procedures and the collective agreement of the appellant, the board has granted the appellant access to his human resources - central file, including emails which the appellant received during the process of trying to setup the neuropsychological assessment.

[19] Regarding its search for records, the board states that it did not contact the appellant for additional clarification of the request, as the request was very detailed and described the records that were being requested. It states that it responded literally to the request.

[20] The board states that the following searches were conducted:

- Searches by the Employee Wellness Officer, the Interim Manager, Human Resource Services, and the Senior Manager, Human Resource Services [the three board employees named in the request (the three employees)] of "human resources employee files", which located emails, notes, employee [human resources-] central file, wellness file, meeting notes, a discipline letter and a letter of expectation.⁸
- Searches of Google Vault⁹ by the Privacy Officer of Human Resource Services of the three employees' emails, which located emails.
- Searches by the Co-ordinating Superintendent, Human Resources Services department that located no responsive emails.
- Searches by the Secretary, Human Resource Services, which located emails.

[21] The board states that all records have been included in its indices of records and that no records have been destroyed. It further states that no other responsive records exist.

[22] In response to the board's representations on the records it had located, the appellant refers to an email dated February 12, 2021 that he received from the board's Senior Manager, Human Resources Department, which reads:

... You have received all of the discipline documentation which is contained in your HR [human resources] file. For the purposes of the collective agreement and Procedures [#], disciplinary documentation is simply the document which records that discipline has been imposed. This never includes the various items which you are requesting. These items are never placed in an employee file. You are not entitled to receive items from the Board which are not part of your employee file.

⁸ The discipline letter and the letter of expectation were sent to the appellant by the board and are not at issue in this appeal.

⁹ Google Vault is a records storage system as described at: <https://support.google.com/vault/answer/2462365?hl=en>

[23] The appellant submits that this email demonstrates that the board has responsive records outside of his human resources file, which he describes as a "secret file". He submits that the board has not searched for and located non-disciplinary records that were located outside of the human resources file.

[24] The appellant submits that the board should:

- ...produce all of [the appellant's] personal information, including but not limited to the contents of any files contained within Employee Records, the Site File, the Central file, the Wellness file, the secret file(s), emails, Google Vault, the secret file referenced by [the] Senior Manager, Human Resources Department in her February 12, 2021 email, all other emails and working notes; and
- ...produce a listing of any and all records containing [the appellant's] personal information which are no longer in existence and provide an explanation for any loss or destruction thereof...¹⁰

Findings

[25] As described above, in his request, the appellant, an employee of the board, sought access to all personal information about himself including, but not limited to, Human Resources Services department records.

[26] In response, the board searched for records, disclosed some records outside of *MFIPPA*, and issued two access decisions under *MFIPPA* withholding certain records on the basis that they are excluded from the application of the *Act*.

[27] Specifically, the board claimed the application of the exclusion in section 52(3)3 of the *Act* to the records it had located and had not disclosed to the appellant. This section reads:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[28] For the reasons that follow, I am ordering the board to conduct another search for records. I have decided to wait for the results of the board's new search before determining which withheld responsive records are subject to the section 52(3)3 exclusion.

¹⁰ The appellant also asked that I order the board to provide information about its personal information bank index. As the appellant's request did not seek access to information about a personal bank index, I will not be adjudicating about this in this interim order. For more information on personal information bank indices see section 34 of *MFIPPA*.

[29] As set out above, in response to his access request, the first decision letter issued by the board to the appellant is dated August 20, 2020. This letter advised the appellant that a search was conducted and access to the responsive records, which were identified as emails by the board, was denied on the basis of the exclusion in section 52(3)3. This decision letter did not refer to the wording of the appellant's request.

[30] Regarding its first search for records, the board provided the IPC with a 125-page package, consisting of a one-page cover letter, a one-page access request form, a one-page August 20, 2020 decision letter, and a three-page index, with the remainder of this package being records. The three-page index identifies the records in that package as emails.

[31] After issuing the first decision letter to the appellant, on November 24, 2020, the board disclosed a complete copy of the appellant's 140-page employment file (the appellant's human resources - central file), in accordance with the appellant's collective agreement.

[32] The board then conducted another search for records during the mediation of this appeal, and issued a second decision letter dated April 23, 2021. This decision letter did not identify that the appellant was seeking access to all of his personal information with the board, as the request states in its introductory wording. Instead, this decision letter identified the appellant's request as seeking access to only the four items specifically listed in the appellant's request after the introductory wording, as follows:

- a. All records of Human Relations¹¹ at Waterloo Region District School Board whatsoever and whenever stored including records made, kept or maintained by [the board's Employee Wellness Officer, the board's Interim Manager, Human Resource Services, and the board's Senior Manager Human Resource Services];
- b. all statements and information provided by third parties to Human Relations at Waterloo Region District School Board including, but not limited to, those statements referenced by Human Relations in a meeting with [the appellant] conducted in or about [first date];
- c. all documentation related to the suspension of [the appellant], with pay, on or about [second date]
- d. all documentation related to the reasons for and the demand for a neuropsychological assessment of [the appellant].

[33] The second decision letter, unlike the first decision letter, included an index of records, which identifies the records located as emails and meeting notes. According to this decision letter, access to the responsive records was denied by reason of the

¹¹ The appellant refers to human resources as "human relations" in his request.

section 52(3)3 exclusion. However, the index of records that accompanied the second decision letter included emails that were disclosed to the appellant, as they were emails that were sent to the appellant by the board.

[34] After its second search for records, the board provided the IPC with a 65-page package that included a cover letter to the IPC and a five-page updated index of records dated May 4, 2021. The remaining 59 pages are identified in the updated index of records as records located during the April 2021 supplementary search.

[35] The May 4, 2021 updated index of records listed the records as being emails, meeting notes, and a 33-page school site file that had also been disclosed to the appellant outside of *MFIPPA*.¹²

[36] Therefore, the board has provided the following records to the appellant outside of the *Act*:

- The appellant's 140-page employment file (the human resources – central file);
- The appellant's 33-page school site file;
- The emails it sent to the appellant; and,
- A discipline letter and a letter of expectation it sent to the appellant.

[37] The records already provided to the appellant are not at issue in this appeal, either regarding the search for them, nor the application of the exclusion in section 52(3)3 to them.

[38] Not disclosed to the appellant on the basis of the board's claim that section 52(3)3 applies to them are records identified in the updated May 4, 2021 index of records as emails (with a date and time for the top email in each email chain) and meeting notes (with a date for each).

[39] The records provided by the board to the IPC in both packages are not numbered or paginated and the board's May 4, 2021 updated index of records lists many more pages for the records at issue than the total number of pages in both packages of records sent to the IPC.

[40] The board indicated in its representations that the records it has located are specific to its Human Resources Services department's discipline investigation into a complaint that was made against the appellant. I find that the board limited its searches to human resources files and emails, and the appellant's wellness file. It has not differentiated what records were located in each of these two files. Nor is there any

¹² The school site file is identified by the board as being 34 pages, but my counting indicates that it is 33 page. The May 4, 2021 updated index of records does not indicate when the appellant received the school site file, nor can I ascertain this from my review of the board's or the appellant's representations and the records.

indication in the board's representations that it undertook a search for other records outside these two files that contain the appellant's personal information as requested by the appellant.

[41] Based on my review of the two decision letters sent to the appellant, the parties' representations, the updated index of records, and the records located thus far by the board, I find that the board has not conducted a reasonable search for responsive records.

[42] I find that the appellant has provided a reasonable basis for me to conclude that further responsive records exist. Therefore, I am not upholding the board's search for records.

[43] I find that the board has not conducted a search under *MFIPPA* in its record holdings for all personal information of the appellant. Instead, the board has restricted itself to searching for discipline records about the appellant in what it identifies as "human resources files." This is because, in my view, the board has taken the position that the appellant cannot receive records about himself that are not part of his employee file. As such, I find that the board chose to define the scope of the request unilaterally.

[44] In summary, my finding that the board has not conducted a reasonable search for responsive records is based on my conclusions above that the board has:

- provided representations, the April 23, 2021 decision letter, and an email to the appellant indicating that it restricted its search to human resources and/or discipline records;¹³
- not conducted a general search for records that contain the appellant's personal information, as requested by the appellant; and,
- listed more pages for the records in its May 4, 2021 updated index of records than the number of pages of records provided to the IPC.

[45] Therefore, I am going to order the board to conduct another search for all records that contain the personal information of the appellant and to issue another access decision to him. I am also going to order the board to provide an affidavit to the IPC and to the appellant setting out the details of the locations searched and the records located in each location.

[46] As well, I am going to order the board to provide me with a paginated copy of any withheld records, with the applicable exemption or exclusion marked on the portions withheld. I am also going to order the board to provide me with a detailed index of these records containing page numbers that correspond to these records, detailing where each record was located and the reason the records, or portions of

¹³ The board in its representations indicated that it located records in the wellness file, but it appears that this file may be part of the appellant's human resources files.

these records, are being withheld.¹⁴

ORDER:

1. The board is ordered to conduct a search to locate additional records that contain the appellant's personal information.
2. I order the board to provide the appellant and me with an affidavit sworn by the individual(s) who conducts this search or searches by **July 8, 2022** deposing its search efforts. At a minimum, the affidavit(s) should include information relating to the following:
 - a. The names and positions of the individuals who conducted the search or searches;
 - b. Information about the types of files searched, the nature and location of the search and the steps taken in conducting the search, and
 - c. The results of the search or searches set out in an index of records that includes the board location or files where any additional responsive records were located.
3. If the board locates additional records as a result of its further search or searches, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act* by **July 8, 2022**.
4. I order the board to provide me by **July 8, 2022** with the following:
 - a. A copy of any access decision sent to the appellant in accordance with order provision 3.
 - b. An index of records identifying each record withheld by the board in response to the appellant's request. This index should reference these records by title and page numbers and include where each withheld record was located in the board holdings, and the applicable exemption or exclusion under *MFIPPA*. I may share this index with the appellant.
 - c. A paginated copy of all of the withheld records identified in this index of records, with the applicable exemption or exclusion marked on the records or portions of records withheld.
5. I remain seized of this appeal in order to deal with any outstanding issues, including the application of the section 52(3)3 exclusion to any withheld records.

¹⁴ For more guidance on providing this index of records the board should refer to Practice Direction 1 under the IPC's *Code of Procedure* at https://www.ipc.on.ca/wp-content/uploads/2004/10/code-nov_2021.pdf and Order MO-2282-I.

Original Signed by: _____
Diane Smith
Adjudicator

_____ June 7, 2022