

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER 4272-I

Appeal MA20-00405

Waterloo Region District School Board

November 15, 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 Interim Order MO-4207-I, the adjudicator did not uphold the board's search for responsive records as reasonable and ordered the board to conduct another search for responsive records. She deferred her decision on the applicability of the section 52(3)3 exclusion until after the board has concluded this search.

In this interim order, the adjudicator upholds the board's search for records following Interim Order MO-4207-I. She remains seized of this appeal to adjudicate on the applicability of the section 52(3)3 exclusion to all of the records located by the board.

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

Orders Considered: Interim Order MO-4207-I.

OVERVIEW:

[1] This interim order concerns whether a school board had conducted a reasonable search following an interim order that required it to conduct another 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 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 the relevant 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 Interim Order MO-4207-I (the interim order), I did not uphold the board's search for responsive records as reasonable. I ordered the board to conduct another search for responsive records and I deferred my decision on the applicability of the section 52(3)3 exclusion until after the board has concluded this search.

[10] In response to the interim order, the board conducted a further search for records and additional responsive records were located. The board made a supplemental decision to deny access in full to these newly-located records as being excluded from the *Act* by reason of section 52(3)3.

[11] The appellant responded to the board's search, claiming that the board has still not conducted a reasonable search for responsive records.

[12] I invited and received representations from the board and the appellant on the board's search for records following the interim order.

[13] In this interim order, I uphold the board's search for records. As the search issue has now been concluded, I will continue the inquiry to adjudicate on the applicability of the section 52(3)3 exclusion to all of the records withheld by the board.

DISCUSSION:

Did the board conduct a reasonable search for records?

[14] 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 board's

¹ Orders P-85, P-221 and PO-1954-I.

decision. If I am not satisfied, I may order further searches.

[15] 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

[16] 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

[17] A further search will be ordered, as I did in this appeal, 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

[18] 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

Representations

[19] The board states that in response to the interim order, the following searches were conducted by its Freedom of Information, Privacy and Records Information Management, Officer (the FOIC) and the Senior Manager of Human Resource Services (the manager). It states that the searches began by reaching out to a former principal of the appellant to ensure that no additional site files remain. It included a further search of the Google Vault regarding any personal information of the appellant.

[20] The FOIC provided an affidavit in which she states that she reached out to former schools where the appellant worked to ask for records. She also contacted the Human Resources (HR) Department of the board to locate any additional HR site files that HR would have regarding the employee. She also conducted an expanded search of the Google Vault with the search term specific to the appellant's name.

[21] The FOIC states that additional records were found in the Google Vault and with HR.

[22] The board provided the appellant with an access decision following these searches stating:

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.

...A further search for records was conducted by me and the Senior Manager of Human Resource Services. This search began by reaching out to a former principal of [the appellant] to ensure that no additional site files remain. It included a further search of the Google Vault regarding any personal information of [the appellant]. A meeting was set up with the Senior Manager of Human Resource Services and additional files regarding [the appellant] were presented. I conclude that this search was thorough and additional responsive records have been located and reviewed.

A decision has been made to deny access in full. These records are excluded from "the Act"; they involve meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. See section 52(3)3 of the Act.

This decision and the index of records has been to the Information and Privacy Commissioner office...

[23] In response, the appellant claims that disclosure by the board of the following categories of records under *MFIPPA* is incomplete:

- calendars of appointments, meetings etc. relevant to the accusations, assessment demands, and discipline;
- records arising from the mandatory requirements of Administrative Policy 3740;
- records relating to the disciplinary meeting of January 20, 2020 which involved the appellant, ETFO [Elementary Teachers' Federation of Ontario] and Human Resources;
- communications from the appellant;
- records relating to communications which took place between ETFO and Human Resources;
- disclosure of records between January 17, 2020 and February 28, 2020 is provably incomplete/inadequate;

[24] In reply, the board states that following the interim order, it conducted a further general search of records related to the appellant's personal information. It states that:

- records located included handwritten meeting notes and emails specific to the appellant. This was a search for additional records and not an exhaustive list of records that have been provided to the IPC during this appeal;

- records sent to or received from the appellant would not be included as part of the appeal as the appellant already has this information;
- In disciplining the appellant, it followed the Administrative Procedure 3760 – Progressive Discipline related to the employment related matter presented to the appellant, not the appellant’s referenced AP 3740 Prevention and Resolution of Workplace Harassment or AP 3730 Sexual Harassment Guidelines;
- discussions/conversations regarding the appellant between HR and ETFO were not recorded and would not be a considered a record;
- the grievance pursuant to the discipline issued by the board recently filed by the appellant has been included in the most recent Index of Records provided to the IPC; and,
- in the search for personal information related to the appellant, the records that were discovered relate to a targeted period when it appears that various employment related matters of concern to the board regarding the appellant were occurring. The search included records from both the appellant’s former school and current school along with Human Resource Services records.

[25] In response, the appellant reiterates that he does not believe that the board conducted a complete search in response to the interim order. He questions how many pages of records have been located and from what locations.

[26] The appellant submits that the board has a history, in this matter, that ought to oblige it to unequivocally identify all platforms where records might be stored which relate to the appellant, and provide evidence of search in those platforms, if any.

[27] He further submits that responsive records should exist related to discussions between HR and ETFO as HR personnel would have entered information into its systems arising from these discussions with ETFO.

[28] In response, the board states that it conducted an additional search of records following the interim order and it opened its search to a general records search, beyond the subjects listed in the request by the appellant. This is how it was able to locate the additional records regarding the appellant’s personal information.

[29] The board further states that the additional Human Resource records it located were located due to a misunderstanding around labor relations records and the need for full disclosure during the Freedom of Information request process.

Findings

[30] The appellant’s access request to the board sought all personal information recorded about himself, as more particularly described above.

[31] In response to the appellant's request, the board conducted searches for records and located responsive records. It disclosed 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.

[32] 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.

[33] Prior to the issuance of the interim order, the board also located and did not disclose to the appellant records that it determined were specific to its Human Resources Services department's discipline investigation into a complaint that was made against the appellant. It identified these records 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).

[34] In the interim order, I found that the board limited its searches to human resources files and emails, and the appellant's wellness file and had not undertaken a search for other records outside these two files that contain the appellant's personal information as requested by the appellant.

[35] I found that the board had not conducted a search under *MFIPPA* in its record holdings for all personal information of the appellant as it had restricted itself to searching for discipline records about the appellant in what it identifies as "human resources files."

[36] Therefore, in the interim order, I ordered the board to conduct another search to locate additional records that contain the appellant's personal information. I ordered the board to provide me with a copy of any access decision for the records located as a result of its search in response to the interim order.

[37] I also ordered the board to provide me with an index of all of the records located by the board in response to the appellant's request and to provide me with a copy of all of the withheld records located by the board.

[38] In response to the interim order, the board located additional records and issued a decision to the appellant in which it denied access to them in full under the labour relations and employment records exclusion in section 52(3)3 of the *Act*. 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.

[39] The board advised that in its initial searches the board located 184 pages of records.

[40] The board advised that its further searches pursuant to the interim order located a further 173 pages of records. These records included emails, notes, and a grievance file.

[41] As described above, the board provided two affidavits, a decision letter, a detailed index of the additional records located, and representations on the searches undertaken following the interim order. All of these documents were shared with the appellant, who provided representations in response.

[42] The appellant is concerned about the *bona fides* of the board's search efforts and the location of records between HR and EFTO.

[43] The records located after the interim order include the records identified by the appellant as having not been located, namely, those exchanged between HR and the EFTO and records sent to or received from the appellant. Contrary to the appellant's assertion, I find that the board has made a *bona fides* effort to locate responsive records.

[44] Relying on the board's affidavits and representations made after the interim order, I find that experienced board employees, the FOIC and the manager, both of whom are knowledgeable in the subject matter of the request, expended reasonable efforts to locate records which are reasonably related to the appellant's request for his personal information.

[45] Taking into account the searches undertaken and the records located, it is my view, that the appellant has not provided a reasonable basis for me to conclude that additional responsive records still exist.

[46] Accordingly, I find that the board has now conducted a reasonable search for responsive records that contain the appellant's personal information as set out in his request and as required by the interim order. As I have found that the board has now conducted a reasonable search for records as required by the interim order, I am upholding the board's search for records.

[47] I defer my decision on whether the labour relations and employment records

exclusion apply to the records at issue and will continue this inquiry for that purpose.

ORDER:

1. I uphold the board's search for responsive records.
2. I remain seized of this appeal in order to deal with the outstanding issue of the application of the section 52(3)3 exclusion to the withheld records.

Original Signed By: _____

Diane Smith
Adjudicator

November 15, 2022 _____