

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4449

Appeal MA22-00551

Durham District School Board

October 12, 2023

Summary: The appellant sought access to records from the Durham District School Board (the board) related to educational software used by the board. The board searched for and disclosed responsive records to the appellant. The appellant maintained that the board did not conduct a reasonable search for responsive records.

In this order, the adjudicator upholds the board's search for responsive records and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, section 17(1).

OVERVIEW:

[1] This issue in this appeal is whether a school board conducted a reasonable search for responsive records related to educational software.

[2] Durham District School Board (DDSB or the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act) for access to the following information:

... all records associated with the approval of the software that appears on the Approved Software List as well as the Technology Approval Process

referred to in correspondence with [the Chief Technology Officer at DDSB].

[3] The requester subsequently provided further clarification of his request explaining that he sought particular information about the approval of Flipboard software, that he was aware of instances when teachers had requested that students used software that was not on the Approved Software List, and that he sought records about how use of unapproved software by teachers was addressed during the specified time period.

[4] Following a time extension decision and subsequent appeal to the IPC (MA22-00509), the board issued a decision.¹ In its decision, the board indicated that a preliminary search for responsive records had been conducted, and that 78 pages were found to be responsive to the request. The board granted the requester with full access to the responsive records.

[5] The requester (now the appellant) appealed the board's decision, on the basis that additional records should exist in response to the request, to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt a resolution of this appeal.

[6] The board then issued a revised decision to the appellant indicating that a further search for responsive records had been conducted, and that it located five new pages responsive to the request. The board's revised decision was to withhold the five new pages of records pursuant to section 12 (solicitor-client privilege) of the *Act*.

[7] The appellant advised the mediator that he believed additional records should exist in response to his request. Accordingly, the reasonableness of the board's search was raised as a key issue in this appeal. The board then agreed to conduct an additional search for responsive records.

[8] The board advised that following its additional search, no new responsive records were located.

[9] The board specifically addressed some of the information provided by the appellant about instances where teachers requested that students use unauthorized software.

[10] In a subsequent discussion with the mediator, the appellant advised that he was not satisfied with the explanation provided by the board, and that he believed there should be additional records responsive to the request. Accordingly, the reasonableness of the board's search remained an issue in dispute. The appellant also advised the mediator that he wished to pursue access to the five pages of records that were withheld pursuant to section 12 of the *Act*.

¹ MA22-00509 was closed as resolved.

[11] The board then advised the mediator that it was withdrawing its reliance on section 12 and disclosed the five pages remaining at issue to the appellant in a supplementary decision letter. Accordingly, section 12 is no longer an issue in dispute in this appeal.

[12] As no further mediation was possible on the issue of the reasonableness of the board's search for responsive records, this file was transferred to adjudication, where an adjudicator may conduct an inquiry. I sought the board's representations initially, which were provided to the appellant. The appellant provided representations in response.

[13] In this order, I uphold the board's search for responsive records and dismiss the appeal.

DISCUSSION:

[14] The sole issue in this appeal is whether the board conducted a reasonable search for responsive records.

[15] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.² If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[16] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.³

[17] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁴ that is, records that are "reasonably related" to the request.⁵

[18] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁶ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to

² Orders P-85, P-221 and PO-1954-I.

³ Order MO-2246.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

identify and locate all of the responsive records within its custody or control.⁷

Representations

[19] The board provided both representations and an affidavit from its freedom of information co-ordinator (FOIC).

[20] In her affidavit, the FOIC states that she asked the following board staff to search for responsive records:

- The Superintendent of Education (the Superintendent),
- The Manager, Application & Development Services and the Team Leader, Information Security of the Information Technology (IT) Department (collectively referred to as the "IT Department").

[21] The FOIC states that she provided both the Superintendent and the IT Department with a copy of the appellant's request.

[22] The FOIC states that she contacted the Superintendent to search for records because she was directly named in the request and that she contacted the IT Department because they are the board officials who oversee and implement the board's Technology Approval Process (TAP), and would have records related to this for Flipboard, as requested.

[23] In her affidavit, the FOIC provides extensive details of the searches undertaken and advises that the results of these searches were that no additional responsive records were located.

[24] She indicates that the Superintendent and the IT Department have each conducted at least three additional separate searches for additional responsive records as the result of the clarifications provided by the appellant. The FOIC states that inclusive of the Superintendent's search, the Superintendent canvassed a number of other named board officials who then conducted their own extensive search efforts.

[25] In its representations, the board states that no responsive records have been destroyed as the request seeks access to records that date back no earlier than November of 2019. It states:

Based on the board's retention schedule and the nature of the how responsive records would be stored, either through its email servers or its IT Security Database (which houses all TAP data), there is no reason to believe that any responsive records would have ceased to exist.

⁷ Order MO-2185.

[26] The appellant's representations state that the board's representations only seem to consider one of his concerns relating to one particular software. He also summarizes the three items at issue in his request, as follows:

1. Flipboard was approved via the Technology Approval Process (TAP), even though the Flipboard license clearly indicated it was not for use by children. We requested records to substantiate how this was approved through the TAP process.
2. The Superintendent committed to follow up with staff to ensure guidelines were followed.
3. The Superintendent stated that she would follow up with our children's teachers to ensure they would stop recommending software that is not present on the Approved Software List.

Findings

[27] After clarification, the appellant sought records about the approval of Flipboard software, including whether consideration was given to its appropriate use, and records about how use of unapproved software by teachers was addressed during the specified time period.

[28] Regarding the use of Flipboard, the appellant specifically sought access to records associated with the Superintendent's follow up, to ensure how the Flipboard guidelines were being followed. During mediation, the board advised the appellant that it did not have any responsive records regarding "follow-up" from the Superintendent or "records associated with how this matter was addressed", as such communication was done verbally.

[29] As indicated above, the board provided very detailed representations as to its multiple searches for responsive records. In his representations, the appellant does not specifically identify any records that have not been located, other than repeating the three items (noted above) that he wants access to.

[30] The appellant acknowledges in his representations that the board's representations address his concerns about these records, as he states that the board's representations "...only seems [sic] to consider the Flipboard concern."

[31] Based on my review of the board's detailed representations and its accompanying affidavit, I find that the board has conducted a reasonable search for responsive records. This included multiple searches of its record holdings by numerous board staff knowledgeable in the subject matter of the records. I am also satisfied that the board understood the clarifications provided by the appellant and sought to locate additional records.

[32] Considering the searches undertaken already, I find that the appellant has not provided a reasonable basis for concluding that additional responsive records exist.

[33] As the board has provided sufficient evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control, I am upholding its search and dismissing the appeal.

ORDER:

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

Original Signed by: _____
Diane Smith
Adjudicator

_____ October 12, 2023