



Information and Privacy
Commissioner/Ontario

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

ORDER M-148

Appeal M-9200343

Toronto Board of Education



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ORDER

The Toronto Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for:

Copies of an audit that looked into [the Board's] operations. The audit was commissioned to the Peat, Marwick, Thorne firm and was worked on by [a named member of the forensic division of the accounting firm] during 1990 and possibly part of 1991 ... I would require the findings and recommendations that Peat, Marwick, Thorne found and arrived at during this operation.

The requester also provided the Board with a vendor account number through which the Board allegedly paid the accounting firm and the name of a Board employee who was allegedly interviewed by the member of the accounting firm. In his request, the appellant stated: "It has come to my attention that Peat, Marwick, Thorne holds a duplicate copy [of the audit report] in its entirety."

The Board sent a letter to the requester advising him that a search of its records, including consultation with the Board employee referred to in the request, indicated that "the record, if it exists, is not within the Board's custody." The Board, however, also advised that it was attempting to consult further with a person outside of the Board to determine whether the record existed. Subsequently, the Board sent the requester a second letter which stated that "we have failed to locate the record" and that "even if such a record exists and it is located, access to it would be denied under section 12." The requester appealed the Board's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant and the Board. Representations were received from both parties.

The sole issue in this appeal is whether the Board has conducted a reasonable search to locate the record responsive to the request.

The Act does not require the Board to prove with absolute certainty that the requested record does not exist; however, in my view, in order to properly discharge its obligations under section 17(1) of the Act the Board must provide me with sufficient evidence that it has made a **reasonable** effort to identify and locate records responsive to the request (Orders 59, P-337, P-457, P-458).

The Board's representations are accompanied by an affidavit sworn by its Freedom of Information Co-ordinator (the Co-ordinator) who also serves as the Board's Superintendent of Administrative Services. It appears from the Board's representations that there was no search conducted to locate the requested record since its position is that the record was never created. The steps taken by the Board in reaching this conclusion consist of a conversation between the Co-ordinator and the Board's Comptroller of Buildings and Plant (the Board employee referred to in the request) and consultation with its solicitors.

Attached to the Co-ordinator's affidavit is a letter to the Co-ordinator from the Board employee which states that during 1990 and 1991 the Board employee had a number of discussions with the named member of the accounting firm but that "at no time did I request an audit of our operations, nor was an audit carried out by [the member of the accounting firm]. Accordingly, there is nothing in writing here which pertains to the above referenced inquiry."

In addition, the Board provided an affidavit from a lawyer who practices with the firm who are solicitors for the Board in matters related to the former employment of the appellant by the Board and to the termination of that employment. This affidavit states that the law firm's file related to the appellant's termination of employment was searched and no record as described in the request was found. This affidavit also explains that another law firm acts on occasion for the Board and attached to the affidavit is a letter from a lawyer at that other law firm which states that his firm "... did not receive any audit report concerning [the appellant] ..."

The Board's representations do not indicate that the named member of the accounting firm or any other person in the firm was consulted during the processing of the appellant's request. In addition, the Board has provided no evidence to enable me to conclude that the named Board employee is a person who would have knowledge of and understands the subject matter of the request.

Furthermore, the affidavit provided by one of the Board's solicitors and the letter attached to that affidavit, which was written to him by a lawyer in another law firm, clearly indicate that in conducting their searches both lawyers misunderstood or misinterpreted the request. The appellant's request was not for an audit report concerning himself or his termination. Although these issues could conceivably be part of such a report, the request is clearly not worded that narrowly: the appellant's request was for an audit report which looked into the operations of the Board.

In summary, it is my opinion that the Board has not provided me with sufficient evidence to enable me to conclude that it has discharged its statutory obligation to conduct a reasonable search for records responsive to the request. Accordingly, I find that the Board's search for responsive records was not reasonable in the circumstances.

ORDER:

1. I order the Board to conduct a further search for responsive records and to notify the appellant by letter as to the results, within 15 days of the date of this order.
2. In undertaking this search, the Board should obtain further information about the responsive records from individuals who have knowledge of and understand the subject matter of the request. These should include (a) an experienced employee of the Board familiar with the records (b) an official

from the forensic division of the accounting firm of Peat, Marwick, Thorne, and (c) the Board's solicitors.

3. If, as a result of the further search, the Board identifies any records responsive to the request, I order the Board to provide a decision regarding access to the records in accordance with the Act.
4. In order to verify compliance with this order, I order the Board to provide me with a copy of its letter sent to the appellant pursuant to Provision 1 within 20 days of the date of this order. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ June 21, 1993