Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-191

Appeal M-9300192

Hamilton Board of Education

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ORDER

The Hamilton Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records related to a fall 1991 appealof a named student's eligibility to participate in a specific program.

The Board indicated that no responsive records were in its custody or under its control. The appellant appealed the Board's decision, claiming that the Board had not conducted a reasonable search for records responsive to the request.

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. Written representations were received from both parties.

The sole issue to be decided in this appeal is whether the Board has conducted a reasonable search for the requested records.

Upon receipt of a request, the Board must first be satisfied, pursuant to section 17(1) of the Act, that the request is sufficiently clear that "an experienced employee of the institution, upon a reasonable effort, [could] identify the record." If the request is not sufficiently clear, the Board is required by section 17(2) to offer the requester assistance in reformulating the request so as to comply with section 17(1).

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that a Board prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

The appellant submits that there is a direct contradiction between information previously communicated to him by the Board and the Board's response to his access request. He submits that the Board took no notice of nor provided any explanation for the contradiction, and believes that to stop the search for records based on conflicting information is unreasonable.

The Board submits that its Freedom of Information Co-ordinator (the Co-ordinator) met with the three Board employees likely to have knowledge of the subject matter of the request to ascertain the location of any records responsive to the request. Searches of the three employee's files were conducted, as well as a search of the Co-ordinator's files, the student's Ontario Student Record, the files within the office responsible for the program, and all appeal records that the Board has on file. No records were located.

In addition to its representations, the Board has provided affidavits from two employees, detailing their knowledge of the student's desire to appeal his eligibility, and confirming that no records were generated to their knowledge. One of the employees providing an affidavit is the one who previously communicated the contradictory information to the appellant. In his affidavit, this employee takes note of the contradiction, and explains that the information previously communicated to the appellant was incorrect, as it was based on an assumption. The employee indicates that the investigations he made following the access request now cause him to conclude that his original assumption was mistaken.

Having carefully reviewed the representations of both parties, and the affidavit evidence submitted to me, I am satisfied that the search conducted by the Board for the requested records was reasonable in the circumstances.

POSTSCRIPT:

Section 22 of the Act imposes only two requirements on institutions regarding the issuance of a notice of refusal to give access to a record where no such record exists. Section 22 requires that the institution inform the requester that there is no such record, and that the requester may appeal the question of whether a record exists to this office.

The standard applied on appeal in such cases is to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. To achieve this standard, the institution is required to show that the search undertaken was conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In my view, a bare statement that the record does not exist or could not be located does not put a requester in a reasonable position to decide whether or not to appeal the institution's decision, and is not a response which is in keeping with the spirit of the Act, one of the purposes of which is to make government information more accessible. While the Board did go beyond simply informing the appellant that the record did not exist and that he had the right to appeal, it is my view that a more fulsome explanation of the conclusion that the requested records do not exist, such as an explanation of the Board's conclusion that the previous information (which was specifically referenced in the request) was not correct, would have been helpful.

Original signed by: September 24, 1993
Holly Big Canoe
Inquiry Officer