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

ORDER MO-1591

Appeal MA-020120-1

Halton Catholic District School Board

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NATURE OF THE APPEAL:

The Halton Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

1. A copy of a draft affidavit sent to [a named former principal (the principal)] at [a named school (the school)], from the law office of [a named lawyer (the lawyer)], on December 11, 1998;

2. Copies of any written statements or correspondence made by [the principal] (e.g. incident report) with regard to the "incident" on December 7, 1998; and

3. Copies of any written statements or correspondence made by [a named teacher (the teacher)] (e.g. incident report) at [the school], with regard to the "incident" on December 7, 1998.

The request letter included a copy of a fax cover page dated December 11, 1998 from the lawyer to the principal indicating that a draft affidavit was attached for his review. The request also included a copy of the signed affidavit sworn by the principal.

In its decision letter, the Board stated that it was unable to locate any records responsive to parts 2 and 3 of the request. Regarding part 1, the Board advised the requester that the responsive record was no longer in its control, and in any event would be exempt from disclosure pursuant to section 12 of the *Act* (solicitor-client privilege).

The requester (now the appellant) appealed the Board's decision.

After receiving the decision, the appellant sent a letter to the Board, asking it to contact the principal and the teacher to determine whether either of them created any records relating to the December 7 "incident", and if so, to obtain copies. The Board advised the appellant that both individuals were contacted and that neither created any records relating to the "incident".

In other correspondence to the Board, the appellant clarified that he intended his reference to "incident report" in his original request to mean any report filed as a consequence of his attendance at the school on December 7, 1998, where his child was a student.

During mediation, the Board again wrote to the appellant, clarifying that, although the original decision letter did not make specific reference to any "incident report", it was the Board's position that no such record exists, because all efforts to locate incident reports had been fruitless. The Board therefore amended its decision letter to read as follows:

> Regarding any information requested in #2 and #3, our office was not able to locate any written statements and/or correspondence, up to and including any incident report. (Furthermore, it is the position of the Board that no such incident report ever existed)…

Mediation was not successful in resolving the search issues relating to any of the three parts of the appellant's request, so the appeal was transferred to the adjudication stage.

I sent a Notice of Inquiry to the Board, initially, outlining the facts and issues in the appeal, and seeking representations. The Board provided representations, the non-confidential portions of which were shared with the appellant, together with the Notice. The appellant also provided representations.

DISCUSSION

In appeals involving a claim that responsive records exist, the issue to be decided is whether the Board conducted a reasonable search for responsive records, as required by section 17 of the *Act*. If I am satisfied that the various search activities were reasonable in the circumstances, I will uphold the Board's decision. If I am not satisfied, I will order additional searches.

In dealing with appeals of this nature, it is my responsibility to ensure that the Board has made a reasonable search to identify all responsive records. The *Act* does not require the Board to prove with absolute certainty that responsive records do not exist. In my view, in order to properly discharge its obligations under the *Act*, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate all responsive records.

Part 1

As far as the draft affidavit is concerned, the Board submits:

> The draft affidavit that the appellant seeks was drafted by [the lawyer], counsel for the appellant's former partner, … . At no time was [the lawyer] acting as counsel for the Board, nor was the principal acting on the Board's behalf in swearing the affidavit. The affidavit was used in family law litigation between [the appellant's former partner] and the appellant - the Board was not a party to nor did it participate in the proceedings. The affidavit was one of approximately 30 affidavits that was used in the proceedings. As discussed below, [the principal] advised the Board when contacted that he did not retain a copy of the draft affidavit for his records, nor did he keep a copy for the Board. The Board therefore does not have a copy of the document.
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> …
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> The Board further submits that the appellant has not provided any evidence that such records do exist, apart from a copy of a fax cover page dated December 11, 1998 from [the lawyer] indicating that a draft affidavit was attached for his review. [The principal] advised the Board when contacted that he did not retain a copy of the draft affidavit for his records, nor did he keep a copy for the Board. This is understandable given that the document requested by the appellant was a draft version of the document.

The appellant disagrees. In his representations, he attaches a copy of a fax cover page sent by the principal to the lawyer, which appears to refer to the draft affidavit. The appellant submits, "[t]his document proves that the draft affidavit certainly did exist". He points to this document, in addition to the other fax cover sheet previously identified by him, as evidence that the draft affidavit should be in the custody or control of the Board. The appellant also makes extensive representations regarding his dealings with the Board and his former partner in the context of various legal matters.

I do not find the appellant's arguments to be persuasive. It is clear that the Board has been involved in a dispute with the appellant stemming from the "incident" referred to in his request. The appellant's representations provide details concerning various aspects of this dispute, however, I find that they are not relevant to the narrow issue before me in this appeal, namely whether the Board has made reasonable efforts to locate a specific document, the draft affidavit prepared by the lawyer for signature by the principal.

There would appear to be no dispute between the parties as to whether the draft affidavit existed at one time. Clearly, it did. Although I can understand why the appellant might expect that a draft affidavit would have been retained by the principal, I find that the explanation offered by the Board and the principal for not doing so is reasonable in the circumstances. The principal's role in providing the affidavit appears to have been to give factual evidence relevant to the family dispute involving the appellant and his former partner. It does not relate to his professional responsibilities with the Board, which is presumably why he decided it was not necessary to retain a copy of the draft. The appellant has a copy of the final signed and sworn version of the principal's affidavit, and in contacting the principal and confirming that he did not retain a copy of the draft version of this document, I find that the Board has taken reasonable steps in determining that it no longer exists.

Parts 2 and 3

The Board makes the following submissions regarding its searches for written statements or correspondence made by the principal and the teacher in the context of the December 7, 1988 "incident" identified by the appellant:

> [The principal] only became involved after the appellant arrived in his office on December 7, 1998, complaining that he was denied an observation period with his daughter's teacher, [the teacher]. [The principal] agreed to question [the teacher] about the "incident". It is during his discussion with [the teacher] that [the principal] acquired the information set out in his affidavit, which the Commission has a copy of.
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> …
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> In an effort to identify and locate the requested records, [a named Board official (the official)], directed [his named assistant], to conduct a search of the personnel files of both individuals named in the appellant's request [the principal and the teacher]. Any written statements and/or correspondence created by an individual

> would be kept in the personnel file. The search failed to turn up any written statements, incident reports and/or correspondence related to the request.
>
> [The official] then contacted [the principal and the teacher] in writing on April 16, 2002 with respect to the appellant's request. Both individuals responded to [the official's] request, in writing, advising that they did not have any copies of any written statements and/or correspondence with respect to the "incident" on December 7, 1998. Both individuals also advised [the official] that they did not, at any time to the best of their knowledge, create any written statements and/or correspondence with respect to the December 7, 1998 incident. [The principal] also advised [the official] by telephone conversation that he did not have a copy of the draft affidavit sought by the appellant.
>
> In a letter dated April 26, 2002, …, the Board advised the appellant that both individuals had been contacted and that neither had any responsive records in their possession. The Board also stated that both individuals had denied ever having had any written statements or correspondence related to the incident.

The Board provided copies of these various letters with its representations, and they were shared with the appellant during the course of this inquiry.

The Board summarizes its position as follows:

> The Board submits that it has conducted a reasonable search for the records requested. [The official] conducted a search of internal personnel records for both individuals named in the appellant's request. [The official] also contacted both individuals identified in the appellant's request in order to ascertain if records did, in fact, exist, and, if so, whether they objected to the records being disclosed to the appellant. Both individuals advised that no such records existed.

The appellant disagrees with the Board's position. The appellant identifies his legal dispute with the Board and the Board's role in the family dispute with his former partner as indicators that the requested correspondence should exist. He also points to the Board's policy for documenting serious incidents, and questions why an incident report was not created in the context of the December 7, 1998 "incident" involving himself and the teacher. The appellant also submits that if the official had taken a different approach in questioning the principal and the teacher, the Board would have received more useful information. In this regard, the appellant submits:

> I believe if [the official] made a request to [the principal and the teacher] keeping more in line with what I requested e.g. Did you make any written statements and/or correspondence with respect to the incident on Dec 7, 1998? we could at least verify whether or not the documents in issue existed. If [the principal and the teacher] answered simply "no" to making any written statements or correspondence with regard to Dec 7, 1998 there would [be] no need to pursue this matter with the Board or your office.

> If [the principal and/or the teacher] answered that yes they did make statements and or correspondence with regard to the Dec 7, 1998 incident at the school, [the official] could ask [the principal and/or the teacher] who they gave the statements/correspondence to and conduct their search from there. It is unfortunate that [the official] did not ask these simple, helpful questions in his search for documents but I hope your office considers these questions and causes the Board to do a reasonable search for the documents I requested.

I do not accept the appellant's position. The appellant's request letter clearly defines the records that would be responsive to Parts 2 and 3 of his request, and there is no ambiguity in the way this request was conveyed by the Board's representative to the principal and the teacher in asking for their input. The principal and teacher both stated that, to the best of their recollection, no records were created. The Board did not stop there. It also reviewed the Board files where records of this nature would be stored, and confirmed that no written statements, correspondence or incident reports dealing with the December 7, 1998 "incident" were located. Although not specifically addressed by the Board, and not required in order to establish whether searches for these records were reasonable, in my view, the most likely explanation for why no such records exist is that the principal and the teacher concluded at the time, rightly or wrongly, that the "incident" referred to by the appellant was not the type of activity that required the creation of an incident report.

In summary, I find that the various searches undertaken by the Board for records responsive to all three parts of the appellant's request, including consultations with the two individuals named in the request, was reasonable in the circumstances.

ORDER:

I uphold the Board's decision and accordingly dismiss the appeal.

Original signed by: November 28, 2002
Tom Mitchinson
Assistant Commissioner