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

Reconsideration Order MO-2543-R

Appeal MA07-427

Order MO-2413

Ottawa-Carleton Catholic School Board

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BACKGROUND:

The Ottawa-Carleton Catholic School Board (the Board) received a request on November 12, 2007 under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following records:

1. Any and all documents, in any form, contained in [the requester's named child's] OSR [Ontario Student Record]

2. Any and all digital materials contained in any database or software system or stored on any server with regards to, or mention of [the named child] or any member of her family

3. Any and all records, notes, communication, letters, emails, minutes, sent or received, or documentation in any form with regards to [the named child] maintained by any employee of the [Board] or contracted to work with the [Board]

4. Any and all records, documents, minutes, emails or information in any form contained in any file (paper or electronic) maintained by [13 named individuals] making mention of [the named child] or her family, or not making specific mention of but clearly in reference to [the named child] or her family

5. Any and all records with respect to special education resources (financial, human, material) allocated to [the named child]

6. Information with respect to the resources and allocation of special education services at [named school] (# children receiving services, # children identified and the categories of identification, # children receiving withdrawal services, # children receiving EA [Educational Assistant] support and the hours, EA schedule, special education budget allocated and expenses and purchases)

7. Information with respect to the special education requirements in the grade [#] classes, including # of grade [#] children identified and the categories of identification, # children in each grade [#] class and # of identified children in each grade [#] class

8. Any and all information with respect to the criteria used at [named] school to allocate, distribute, rationalize special education services, programs, resources

The Board located responsive records and issued a decision dated December 11, 2007, in which it withheld certain portions of the responsive records. The requester, now the appellant, appealed this decision.

After the appellant filed her appeal, the Board issued a new decision dated January 31, 2008, disclosing six additional emails to her.

During mediation, the appellant provided the mediator with an example of specific records which she believed she had not received. In a letter dated April 14, 2008, the Board responded to the

appellant's concerns and provided access to the responsive records, as well as providing her with an additional copy of her child's OSR. The Board also provided an explanation for why the deleted emails were not accessible. The appellant accepted this explanation and deleted emails were no longer at issue in this appeal.

In response, the appellant advised that the Board had not provided a decision on the final three points of her request. The Board agreed, and subsequently issued a final decision dated May 8, 2008, addressing these points. In this decision, the Board denied access to the responsive records under section 14 (personal privacy) of the *Act*, and indicated that no records exist concerning the special education budget as the school does not have a school-based budget.

The appellant asked that the file be moved to adjudication on the basis of reasonable search and the exemptions claimed. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the Board initially. I received representations from the Board and then sent a copy of the Board's initial and supplemental representations to the appellant, along with a Notice of Inquiry and sought her representations. I received representations from the appellant. I then sought reply representations from the Board. I received reply representations from the Board and then sought and received sur-reply representations from the appellant. I sent a portion of the appellant's representations to the Board and sought further representations, which I received. I then issued Order MO-2413 on April 30, 2009, wherein I upheld the Board's search for responsive records and ordered the disclosure from the records of a portion of the information that had been withheld by the Board.

Subsequently, on April 20, 2010, the appellant called this office and advised that she had been involved in a human rights proceeding with the Board. Apparently, during these proceedings, the Board produced some records that had not been produced to her during the Board's response to the request noted above. The appellant advised this office that the Board's counsel at this hearing had told the judge that the Board had had these records all along and did not want to give them to her. The appellant asked that this office sanction the Board for this non-disclosure.

As a result of the appellant's phone call, I asked a staff member from this office to call the appellant and ask the appellant to forward to this office a copy of all records that she claims had not been previously produced by the Board in response to her request. On May 10, 2010, the appellant wrote this office and provided 13 emails and one handwritten note that she claims she had never seen before. In the appellant's letter she advised that these emails and note are all from the last weeks of September 2007 and were printed by a named principal at one of the schools attended by the appellant's daughter (as shown at the top of the emails) in September 2007. The appellant stated:

> When asked by the tribunal chair where these emails came from, the [principal] avoided answering the question.

I then sent a copy of the appellant's correspondence to the Board, along with a letter stating:

> I have received a letter from the appellant enclosing certain emails that she recently received that she claims are responsive to the request in the above-noted

appeal file. She appears to be seeking a reconsideration of provision 1 of Order MO-2413, wherein I upheld the Board's search for responsive records and dismissed that part of the appellant's appeal.

You will note in Order MO-2413, concerning emails, it was stated that:

> During mediation, the appellant provided the mediator with an example of specific records which she believed she has not received. The Board …provided an explanation for why the deleted emails are not accessible. The appellant accepted this explanation and deleted emails are no longer at issue in this appeal…
>
> The Board submits that all the records that were in the custody or control of these staff members were located and disclosed to the appellant, subject to any claimed exemptions. The Board advised that certain emails no longer exist based on the Board's record retention policy. The Board states that:
>
> > …it is the Board's understanding that the appellant agreed with the Board's policy on the retention of emails and withdrew this request. Any available and/or responsive emails have been disclosed…

The IPC's *Code of Procedure* (the *Code*), which applies to appeals under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), contains provisions governing the process and grounds for reconsideration of decisions. Section 18.01(a) of the *Code* states:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;

It appears that the appellant is claiming that a fundamental defect in the adjudication process occurred when the issue of responsive emails was not adjudicated upon as a result of the removal of the issue as set out above.

Enclosed is a copy of the appellant's letter and accompanying emails (and one handwritten note). Please provide your position as to whether you consider these documents responsive to the appellant's request, as well as providing an explanation as to why they were not disclosed to the appellant during the request or the appeal stage.

On May 27, 2010, the Board responded and stated that:

> … In a letter from the Ottawa Catholic School Board to the appellant, dated January 31, 2008, nine of the 14 pages can be found. Attached is a copy of the letter and documents. As for the remaining five pages [G-6.1, G-6.2, G-13.1 and G-15], the Board can continue searching if you feel necessary, however, these pages were provided to the appellant during a Human Rights Appeal and may not be part of the FOI [freedom of information] records. The appellant had been informed previously that documents for this purpose would not be provided...

As I was unclear as to what the Board meant by "…documents for this purpose would not be provided," I asked the Board for clarification. I then received a letter from the Board's solicitors dated June 21, 2010 stating that:

> As has been stated in our client's correspondence, all responsive documents within the custody and control of the [Board] were disclosed at the time of the request.
>
> Clearly, the documents now in [the appellant's] possession and for which she complains were disclosed to her either through the *MFIPPA* process, the process before the Ontario Special Education Tribunal (OSET), or within a Human Rights complaint by [her] against the [the Board] and the personal respondent [the named principal]. Unfortunately, [the appellant's] letter of May 10, 2010 leaves the impression that the [Board] has withheld documents. This is clearly not the case. Several of the documents and emails in question were also disclosed through various access to information requests including the [Board's] response in 2008. Furthermore, the context has not been fully developed in [the appellant's] letter even though she is fully aware of the facts which are as follows:
>
> > 1. The emails she complains of are emails printed contemporaneously by [the principal] and placed in a personal file belonging to [her].
> >
> > 2. Toward the end of September 2007, [the principal] took a leave without pay from her position as Principal of [named school]. She has not returned to work for the [Board] since that time.
>
> In [the principal's] defence to [the appellant's] complaint against her through the Human Rights process, [she] was directed by the Alternate Chair of the Ontario Human Rights Tribunal to prepare a will say statement being the sum and substance of her evidence before the Tribunal. On her own, she complied with this direction and produced a 29 page document including two volumes of materials which she advised the HRTO [Human Rights Tribunal of Ontario] was collated from documents produced by [the appellant] in previous proceedings

> before the Human Rights Commission and the Ontario Special Education Tribunal as well [the principal's] own personal file.
>
> 3. At no time was the [Board] made aware of a file kept by [the principal] which only came to the [Board's] attention as part of [her] will say statement dated March 4, 2010. The [Board] is advised that all pertinent documents in [the principal's] file have been disclosed.
>
> 4. In any event, [the appellant] has not suffered any prejudice as a result of this situation as she now has the responsive records in her possession which were sought for the sole purpose of the proceedings before the Ontario Human Rights Tribunal and a complaint against the [Board] and against [the principal].
>
> 5. [The principal] has been consulted with respect to this additional recent complaint by [the appellant] as set out in Adjudicator Smith's letter dated May 12, 2010, [she] has provided the [Board] with the following information as to how she obtained the documents appended to her will say statement and which demonstrate in some cases that [the appellant] has had these documents in her possession for some time…

Concerning the documents not previously provided to the appellant, the Board submits that:

> (iii) The documents marked as G-6.1 were submitted only by [the principal] in her will say. The file containing these emails/notes was kept by her when she left [named] School and was not left at the school upon leaving.
>
> (iv) The document[s] marked as G-6.2, [G-10, G-11.1 and G-13.1 were] submitted to the HRTO as part of [the principal's] will say in the same manner as set out in item (iii) above…
>
> (x) The document marked as G-15 was submitted by the [Board] … as part of its disclosure obligations pursuant to the HRTO proceedings.

> As a result, the [Board] maintains its position that it has complied with its obligations under the [*Act*] and directions from the IPC…
>
> Based on the foregoing, any further searches for documents would be pointless as the [Board] has already exhausted such efforts when responding to the complaint. We urge you to consider the facts and context of the matter in concluding that the [Board] has fulfilled its obligations under the *Act* and that no further action is required...

In reply, the appellant submits that the Board failed to provide 12 distinct records. She states that:

> In some instances, the records that the [Board] disclosed had [the] same date, but they were different records.

The appellant included a chart to indicate the records that she believes the Board failed to provide. She also believes that additional records exist, namely, correspondence within the board offices between the Superintendent for a named school, the Superintendent, Special Education and Student Services and the Deputy Director of Education.

Concerning any additional responsive records from the named principal, the appellant points out that:

> The [Board] responded [to] the IPC request on December 11, 2007. At that time they stated,
>
> > [The principal] confirmed that the only remaining documents were contained in the Ontario Student Record. [The principal] confirmed that her file had been shredded. She also confirmed that all other involved staff members did not keep relevant files. As [the principal] confirmed the only remaining documents were those contained in the OSR…
>
> In their correspondence the [Board] is clear that the [Board] consulted with [the principal], that she searched for records and responded to the [Board].
>
> At no time on December 11, 2007 or at any time during the period of the request or mediation, did the [Board] indicate that [the principal] could not be reached due to her suspension, that she could not search or that she could not provide records that responded to the search.
>
> At no time did the [Board] indicate that [the principal's] suspension from the Board was an obstacle to providing the records requested.
>
> In fact, [the principal], although suspended, remains an employee of the board and responded to the [Board's] request to provided records…
>
> [The principal] deliberately failed to provide records that were responsive to the request...
>
> It is clear that the [Board] and [the principal] had/have records in their possession that they deliberately failed to provide...

Analysis/Findings

I will first determine whether Order MO-2413 should be reconsidered on the basis that a fundamental defect has occurred in the adjudication process concerning the reasonable search issue adjudicated upon in that order. If I decide that a fundamental defect has occurred in the adjudication process I will then decide whether the Board should conduct another search for responsive records.

Section 18 of the IPC's Code of Procedure (the Code) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the Code state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Based upon my review of the appellant's representations, it appears that she is claiming that section 18.01(a) applies in that a fundamental defect in the adjudication process occurred, in particular when emails were determined to be not an issue to be adjudicated upon based upon the Board's representations. It appears now from a review of the documents identified as G-6.1, G-10, G-11.1, G-13.1 and G-15 that responsive emails did exist at the time I issued Order MO-2413, which are responsive to parts 3 and 4 of the appellant's request. The remaining documents, identified by the appellant as G-4, G-6, G-7, and G-13, appear to me to be identical to the records already disclosed to the appellant by the Board in its decision letter of January 31, 2008.

The emails identified as G-6.1, G-10, G-11.1, G-13.1 and G-15 were all sent by the named principal to various recipients. Document G-6.2 is a handwritten note prepared by this same principal. These documents were kept by the principal in a separate file and produced by her at the HRTO hearing. The Board's explanation as to why these documents were not produced prior to the issuance of Order MO-2413 is that they were kept in a separate file retained by the principal who had taken an extended leave of absence prior to the date of the appellant's request of November 2007.

The appellant refers above to the details of the Board's decision letter to her of December 11, 2007. However, she fails to quote the entire statement of the Board concerning the principal in her representations. In the December 11, 2007 decision letter, the Board states that:

> As you are aware in an email correspondence to you dated June 22, 2007, [the principal] confirmed that the only remaining documents were contained in the Ontario Student Record. [The principal] confirmed that her file had been shredded. She also confirmed that all other involved staff members did not keep relevant files. As [the principal] confirmed the only remaining documents were those contained in the OSR and, as you know very well, parents are entitled to access these documents at the school [emphasis added].

The principal was one of the parties named by the appellant in part 4 of her request. Based upon my review of the parties' most recent representations and the emails and note identified above, it appears that the principal was not asked after the Board's receipt of the appellant's request as to the existence of any responsive records in her custody or control. Although on a leave of absence, the principal was still a Board employee. The Board has not stated that it was unable to contact this principal on or after the request date of November 12, 2007, seeking responsive records.

As the Board did not seek responsive records from the principal after receipt of the request, the existence of responsive records created after June 22, 2007 in the custody or control of this principal was not adjudicated upon. I find that this is a fundamental defect in the adjudication process. Therefore, in accordance with section 18.01(a) of the Code, I will reconsider my decision in Order MO-2413 that the Board's search for responsive records was reasonable.

In this reconsideration order, I will consider both whether I should order a new search concerning records in the custody or control of the principal, who was the sender of the emails and the writer of the note referred to above, and also whether I should order the Board to conduct a new search for records in the custody or control of the recipients of the emails (G-6.1, G-10, G-11.1, G-13.1 and G-15) all of which were not produced prior to the issuance of Order MO-2413.

I will order a further search if I find that the Board did not provide sufficient evidence to demonstrate that it had made a reasonable effort to identify and locate all of these responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

The *Act* does not require the Board to prove with absolute certainty that further records do not exist. However, the Board must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Concerning the principal who was the author of the emails and note not previously disclosed to the appellant, I find that the Board should have specifically asked this principal at the time of the

appellant's request in November 2007, as to the existence of any responsive records. Based on the Board's representations of June 21, 2010, as set out above, I find that the appellant has received copies of all responsive records that this individual has in her custody or control. The appellant has not provided a reasonable basis for me to conclude that this principal has custody or control of any additional responsive records that the appellant has not received copies of already. Therefore, I will not order the Board to conduct another search for records within the custody or control of this principal.

Emails G-6.1, G-10, G-11.1, G-13.1 and G-15 are responsive records to the appellant's request and were not disclosed by the Board to the appellant prior to the issuance of Order MO-2413. I will now review the searches undertaken by the Board for each of the recipients of these emails in order to determine whether these searches undertaken by the Board for responsive records in the custody or control of the recipients of the emails were reasonable.

The two emails that comprise G-6.1 were sent to a named classroom teacher. On October 30, 2008, I wrote to the Board specifically seeking information about the search undertaken for responsive records maintained by this teacher.

In response the Board stated that

> As stated in previous correspondence, requests for information from personnel at [named school] were undertaken by contacting the principal of [this school] and asking for all material that staff may have in their possession. Also, [the] Director of Education had been asked for any information that he might have in his files. Material provided to me in my capacity as Freedom of Information Officer has been forwarded to the appellant in previous correspondence.
>
> After receiving your October 30, 2008 letter, another search was undertaken. Below are the responses received from the individuals listed in the correspondence:
>
> A. [Named classroom teacher]: "I do not have material in my possession in regards to the student and/or the parent(s)."

Based on the searches undertaken by the Board for responsive records, I find that the Board conducted a reasonable search for records in the custody or control of the named classroom teacher who was the recipient of the emails in document G-6.1.

The emails G-10 and G-11.1 were sent to a named resource teacher. She was also one of the recipients of email G-15. G-15 was also sent to a named former principal, the Special Education Consultant, the Superintendent, Special Education and Student Services, the Superintendent at a named school, a principal at a named school, a school psychologist and another individual who is identified on the Board's website in 2007 as being the Vice-Principal of Special Education and Student Services.

In the Board's initial representations, it submitted that:

> The FOI Officer contacted [the Superintendent of Special Education and Student Services] with the request for records as the requests involved staff in her area of expertise [the Resource Teacher, the Special Education Consultant, and other Special Education Department staff]. [The Superintendent of Special Education and Student Services] provided to the FOI Officer records contained in staff files pertaining to [the appellant's child]. [The Superintendent of Special Education and Student Services] also provided additional information pertaining to Board policy and procedures regarding special education, which was forwarded to the Appellant.

The Board also provided notes taken by the FOI Officer in March 2008 concerning searches undertaken for responsive records regarding additional files that the appellant said were in the possession of the Resource Teacher, and the Special Education Consultant.

Concerning the principal at a named school, the Board submits that:

> …the FOI Officer spoke with [a principal at a named school]. At that time, [he] informed [the FOI officer] that records pertaining to [the appellant's child] were in the child's OSR file…
>
> In March 2008, the appellant was provided with copies of the contents of [her child's] OSR file.

Concerning the former principal and the Superintendent at a named school, the Board submits that:

> In March 2008, the FOI officer contacted the former principal and the Superintendent at a named school by email and by phone. She was informed by these individuals that there were not any more responsive records in their custody or control that had not already been disclosed to the appellant.

Therefore, concerning all of the recipients of emails G-6.1, G-10, G-11.1, G-13.1 and G-15, the Board directly contacted all but two of the recipients concerning whether they had responsive records. These two recipients were recipients of email G-15. In Order MO-2413, I determined that the Board had conducted a reasonable search for responsive records concerning these individuals who had been directly contacted by the Board. 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 [Orders M-909, PO-2469 and PO-2592].

Based on the searches undertaken by the Board for responsive records, I still find that the Board conducted a reasonable search concerning records in the custody or control of these individuals, namely, the Resource Teacher, the former principal, the Special Education Consultant, the Superintendent, Special Education and Student Services, the Superintendent at a named school

and the principal at a named school. Although email G-15 was not produced by these individuals, the Board's evidence has been that the retaining of emails is the responsibility of the individual who sends or receives emails. If the emails are not printed or stored in a separate area, they are removed from the Board's FirstClass email system after 21 days. Therefore, it is possible that email G-15, which is dated September 26, 2007, as well as emails G-6.1, G-10, G-11.1 and G-13.1, also dated September 2007, would have been removed from the email system by the time of the Board's receipt of the appellant's request in November 2007.

The third listed recipient of email G-15 is identified on the Board's website as a psychologist. Although there are handwritten notes concerning this individual in the Board's Book of Documents that accompanied its initial representations, it is unclear as to what searches were undertaken for responsive records in this individual's custody or control.

The fifth listed recipient is identified on the Board's website as the Vice-Principal of Special Education and Student Service. I have no evidence that the Board contacted the Vice-Principal of Special Education and Student Services to determine whether this individual had responsive records. Based on the wording of the appellant's request and the fact that this individual was sent email G-15, which is a responsive record not previously disclosed to the appellant, this individual should have been contacted by the Board to see if she had any responsive records. As she was not contacted previously, I will now order the Board to contact her and ascertain whether she has responsive records in her custody or control.

In conclusion, I find that a fundamental error has occurred in the adjudication process when I determined that the Board had provided sufficient evidence to show that it had made a reasonable effort to identify and locate responsive records by conducting a reasonable search for records as required by section 17 of the *Act* [Orders P-624 and PO-2559].

Accordingly, I find that the search carried out by the Board was not reasonable in the circumstances concerning the existence of records in the custody or control of the third and fifth recipient of email G-15 and I will order the Board to conduct further searches for responsive records in the custody or control of these recipients of email G-15.

ORDER:

1. I order the Board to conduct a further search for responsive records in the custody or control of the third and fifth recipient of email G-15. If, as a result of these further searches, the Board identifies any additional records that are responsive to the request, I order the Board to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

2. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of any decision letter provided to the appellant.

Original Signed by: July 28, 2010
Diane Smith
Adjudicator