

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3392

Appeal MA14-338

Toronto District School Board

December 21, 2016

Summary: The Toronto District School Board (the board) received a request under the *Act* for access to information pertaining to two documents referenced in a series of newspaper articles. The board identified two emails for two specific dates with twitter trends for the respective weeks as being responsive to the request and granted partial access to them. The board withheld information that it considered to be non-responsive to the request. The appellant appealed the decision claiming that the withheld information was responsive to the request and challenging the reasonableness of the board's search for responsive records. In this order the adjudicator finds that the board conducted a reasonable search for responsive records and that the withheld portions of the records at issue are not responsive to the request.

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

OVERVIEW:

[1] The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information. The request read, in part:

... there have been a series of articles in the [identified newspaper] that contained two documents in reference to my role as an employee at [the board] ...

Therefore, I would request ... all email and BBM¹ communications between [two named Trustees] and either of [named individual] and/or [named individual]. And in addition, I would make the same request for all email and BBM for [two named Trustees] and [named individual].

And I would ask for any phone records that indicate text or phone communication between any of the above persons regarding the documents or commentary on the documents.

[2] The request was subsequently clarified to be for:

...all email and BBM communications between [two named Trustees] and any of [named individual], [named individual] and/or [named individual] during the time period of March 1 to the present. And in addition, I would make the same request for all email and BBM for [two named Trustees] and [named individual].

And I would ask for any phone records that indicate text or phone communication between any of the above persons regarding the documents or commentary on the documents.

[3] In a subsequent telephone communication with the board, the requester further clarified that the request included:

... disparaging remarks re [the requester], information about expenses, [named organization], documents re investigation of [the requester], trips, etc.

[4] The board identified two emails for two specific dates with twitter trends for the respective weeks as being responsive to the request and granted partial access to them. With respect to the withheld portions, the board's letter stated:

In every instance, the severances contain personal information or are not responsive to the request and have been made in accordance with s. 14 of the *Act*, a copy of which is attached for your reference.

[5] The requester (now the appellant) appealed the board's decision.

[6] During the course of mediation, the appellant advised the mediator that he was pursuing access to the withheld portions of the records identified as responsive to the request and was of the view that additional responsive records should exist. Specifically,

¹ Blackberry Messages.

the appellant explained that the board did not produce any BBMs, phone records and information related to two named Trustees and three named individuals. The board took the position that no additional responsive records exist.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] During the inquiry into this appeal, I sought, and received, representations from the board and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. As it appeared to me that the records at issue might contain the personal information of the appellant, I added section 38(b) (personal privacy) as an issue in the appeal. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[9] In this order, I find that the board conducted a reasonable search for responsive records and that the withheld portions of the records at issue are not responsive to the request.

RECORDS:

[10] The records at issue in this appeal are two emails for two specific dates with twitter trends for the respective weeks.

ISSUES:

- A. Is the withheld information responsive to the request?
- B. Did the board conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Is the withheld information responsive to the request?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²

[13] To be considered responsive to the request, records must "reasonably relate" to the request.³

[14] The board submits that it provided six pages of responsive records to the requester. It submits that:

... It redacted records non-responsive to the request and also, in the alternative, took the position that the author's email address for the non-responsive emails was the author's personal information. [The board] is not certain which of these BBM addresses constitute business addresses and which constitute a personal address.

The only responsive BBMs are located on pages 1 and 4 of the record which were provided in full. The balance of the BBMs are clearly non-responsive on the face of the text and the description of the author.

[15] The appellant asserted that the withheld information is his personal information and should be disclosed to him.

Analysis and finding

[16] I have carefully reviewed the information that was not disclosed to the appellant and agree with the board that they are not responsive to the request. The subject matter of the withheld information does not refer to the appellant or the documents that are the subject matter of his request. In that regard, I find that they do not in any way reasonably relate to the request.

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

[17] Accordingly, I do not have to also consider whether the withheld information also qualifies as the sender's, or the appellant's, personal information so as to engage the application of the personal privacy exemptions at sections 14(1) and/or 38(b) of the *Act*.

Issue B: Did the board conduct a reasonable search for responsive records?

[18] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[19] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[20] 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.⁷

[21] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁸

[22] 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.⁹

Representations of the board

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

⁹ Order MO-2246.

[23] The board provided me with an affidavit sworn by its Chief Technology Officer setting out the nature and extent of the search which he conducted for emails and BBMs that were sent or received by trustees who had been issued a Blackberry cellphone by the board¹⁰. In his affidavit this individual states that the search terms used were "confidential", "Document", "[individual named in the request]", "Employee File" and ["the individual named in the request"]. The individual confirms that there were 62,196 "hits" in the email boxes and 7 "hits" in the BBM group. He explained that each "hit" represented an individual email or BBM.

[24] The product of that search was then forwarded to the Policy Officer for the board, who provided me with an affidavit setting out her involvement in the processing of the request. This individual, along with the acting Freedom of Information Coordinator, reviewed the records produced by the original search to determine if any contained information that was responsive to the request. The board submits that:

The records produced by the search were then reviewed by [board] staff to determine which, if any, fell within the scope of the request. The review determined that there were no responsive emails within the filtered group. BBMs were redacted to remove non-responsive BBMs ...

Representations of the appellant

[25] The appellant asserts that the search filters used by the board would not capture all the responsive records. He submits:

The most serious flaw in the [board's] search is that it has failed to specify search terms that would generate hits responsive to my request. My request was made with respect to records including emails and BBM communications between and among all the listed individuals relating to the leak of documents relating to me and disparagement relating to me. In this context, it is noteworthy that the [board] search criteria did not even include my name, let alone words relating to the content of the leaked documents (e.g. "allegation", "investigation", "review", "sealed", "fraud", "corruption", "charity", etc.), the name of the newspaper ([the identified newspaper]), the name of [named] Schools, or other relevant keywords.

[26] He further submits that the board also failed to include the email accounts of key individuals in its search. He submits:

¹⁰ He stated in his affidavit that certain individuals named in the request had not been issued a Blackberry cellphone.

In my request for records, I sought disclosure of emails and BBMs of the following [board] Trustees and employees: [named individuals].

From the affidavit of [the board's Chief Technology Officer], it is unclear exactly which email accounts were searched by the [board]. He appears to suggest at paragraph 4, that only the email accounts of individuals who were issued Blackberry phones by the [board] were actually searched, which would exclude [certain named individuals]. From the affidavit of [the board's Chief Technology Officer], it appears that [the board] email accounts of individuals who use computers, including [board] issued laptops and desktop computers, were excluded from the search.

[27] The appellant also asserts that the board did not attempt to locate phone records. He submits that:

In my request under *MFIPPA* for disclosure of records, I specifically requested the disclosure of telephone records of calls between the enumerated individuals. The [board] refers nowhere in its materials to any attempts made by it to locate or determine the responsiveness of these records. As a result of my duties [in a specified position], I am aware that these records are in the possession and control of the [board]. I personally reviewed such records while I was [in the specified position].

The board's reply representations

[28] In reply, the board took issue with the appellant's assertions. With respect to the search filters it used, it submits that:

..., the request involves communications between enumerated Trustees and Staff of the board (Group "A") and one of three individuals, [named individuals] (Group "B"). As per the original [affidavit of the board's Chief Technology Officer] and the affidavit of [the board's Administrative Freedom of Information Liaison], the search terms "[named individual]" and "[named individual]" were used in conducting the search. In each case the email addresses known to be used by these individuals contained their first and/or last names. The search term "[named individual]" was not employed. The board notes that [named individual] was not employed by the Board during the operative period of the request.¹¹

[29] The Board submits that its use of the names in Group B (other than the named

¹¹ In support of its position the board relies on the original affidavit of its Chief Technology Officer and the affidavit of its Administrative Freedom of Information Liaison provided with its reply representations.

individual for the reasons cited above) would capture all responsive documents and does not agree that the appellant's proposed additional search would capture any additional documents not captured by the search filters it used.

[30] With respect to the appellant's position regarding the board's failure to adequately search email accounts, the board submits that:

Contrary to the allegations of the [appellant], the board searched both BBMs and emails. The details of the search are set out in the original affidavit of [its Chief Technology Officer] submitted with the original representations and are elaborated upon in the Supplementary Affidavit of [its Chief Technology Officer] appended to these submissions. The search was conducted through the board's servers which would capture both BBMs and email, regardless of the device used (eg board issued Blackberry, laptop computer, desktop computer). [Its Chief Technology Officer's] supplementary affidavit clarifies the group whose email and Blackberry accounts were searched (note that the Blackberry searches were limited to that group of persons who had Board issued Blackberries - the email searches applied to the entire group of enumerated Trustees and Board Staff.)

[31] With respect to the appellant's position regarding phone records and text messages the board submits:

Two points may be made in response to this matter. First, with respect to BBM messages sent by Blackberry phone these were captured as indicated in the description of the search set out above. Text messages, unlike BBMs, do not pass through the board's servers and are not recoverable.

Second, with respect to phone records, there are no phone records which "indicate ... phone communications between any of the ... persons ... regarding the documents or commentary on the documents" The board notes that it receives monthly phone records. However, these records do not provide any information which would permit the board to determine the subject matter of a phone call and whether such a phone call was "regarding the documents or commentary on the documents"

[32] The board's representations were accompanied by an affidavit of its Administrative Freedom of Information Liaison. She states in her affidavit that:

By way of background, I understood that the request involved - in part - all emails and BBM messages between the enumerated Trustees and staff and one of three individuals, [specified individuals]. As noted in the initial affidavit of Peter Singh, the search terms "[named individual]" and

"[named individual]" were used in conducting the search. I have knowledge that the published email address for [named individual], contains her last name. Moreover, the published email address for [named individual] contains her last name.

I understand that [named individual] had ceased to be employed by the Board well before the operative period of the request.

[33] In addition, the board provided a supplementary affidavit of its Chief Technology Officer. He states in his supplementary affidavit that:

I understand the appellant has raised questions as to whether laptops and/or desk computers were searched. As noted in paragraph 3 of my prior affidavit both emails and BBMs were searched.

To elaborate, the search was conducted on the Institution's servers. All emails and texts (BBMs), whether generated by laptop, Blackberry phone, desktop computer, would flow through this server. I am therefore of the opinion that the search was reasonable and complete and captured the devices identified by the appellant. In each case the search was conducted on the emails and Blackberries (for those of the group who had a board issued Blackberry) of each of the enumerated individuals having accounts with the board.

For the sake of clarity, the following individual's email and board issued Blackberry accounts (where a Blackberry was issued) were searched: Trustee [named trustee], Trustee [named trustee], [named individual], Trustee [named trustee], [named individual] and [named individual]. I have identified those individuals from this group who did not have a board issued Blackberry in paragraph 2 of my prior affidavit.

For the sake of clarity, I note that [named individual] is not an employee of the board and does not have a board issued email account or Blackberry.

[34] With respect to phone records and text messages, he states:

I understand that the requester asked for "any phone records that indicate that text or phone communications between any of the above persons regarding the documents or commentary on the documents". I can confirm that the [board] receives monthly statements of activity for board issued cell phone records. However, these records do not contain information which would permit the [board] to ascertain if there were

communications between the referenced parties "regarding the documents or commentary on the documents".

Furthermore, I can confirm that no text messages are stored by the board's servers.

Appellant's sur-reply representations

[35] In his sur-reply representations, the appellant acknowledges the clarification provided by the board regarding the BBM messages and states that he is "now satisfied with respect to this issue".

[36] Regarding the board's position that it was reasonable to exclude one of the names from its search filter because the individual was not an employee of the board, the appellant asserts that the board is obliged to disclose records of communications with third parties, unless an exemption from disclosure is applicable and that two other named individuals are also not employees of the institution but were included in the search filter.

[37] With respect to the search filters used, the appellant submits that the board failed to search for terms that "that are intimately connected with the leak of my personal information to the [identified newspaper]".

[38] With respect to the board's position regarding its email search, the appellant submits that:

... [the board] indicates that it interprets the search as covering only emails exchanged between one set of individuals on the one hand ("Group A") and another set of individuals on the other ("Group B"). This is an overly narrow interpretation of the request. Properly interpreted, the request would include communications exchanged among the members of Group A.

[39] With respect to the phone records, the appellant acknowledges that the phone records do not disclose on their face the content of the conversation, "[h]owever, it is clear from the context that any phone conversations between [the identified newspaper] reporters and trustees or staff of the Institution over the relevant time period would prima facie be relevant to issues concerning me and these records are therefore responsive to my request".

Analysis and findings

[40] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a

reasonable effort to identify and locate responsive records within its custody and control. In my opinion, the board properly interpreted the scope of the request and its searches were extensive and wide-ranging. I find that, based on the searches it conducted, the board has made a reasonable effort to locate records responsive to the request. In that regard, I accept the board's evidence that one of the named individuals had left the boards employ well before the operative period of the request and that there would therefore be no responsive records relating to her. I also accept the board's evidence that the phone records do not contain information which would permit the board to ascertain if there were communications between the referenced parties "regarding the documents or commentary on the documents", so as to enable the board to determine if they are responsive to the request. Finally, I am not satisfied that using the other search terms or strategies suggested by the appellant would result in the location of additional responsive records.

[41] Accordingly, I find that the board has conducted a reasonable search that is in accordance with the requirements of the *Act*.

ORDER:

1. I uphold the reasonableness of the board's search for responsive records.
2. I uphold the board's decision and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

December 21, 2016 _____