

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4020

Appeal MA19-00138

Ottawa Catholic School Board

March 8, 2021

Summary: The appellant made a request under the *Municipal Freedom of Information Act* to the Ottawa Catholic School Board (the board) for records relating to the 1959 purchase of land on which a school was built. The board located and disclosed in full approximately 70 pages of records with dates ranging from 1959 to 1966. The appellant was dissatisfied with the board's access decision, claiming that additional responsive records should exist. In this order, the adjudicator upholds the board's search as reasonable, taking into account the age of the records at issue and the board's evidence about the searches that it conducted.

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

Order Considered: Order PO-3869-I.

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Catholic School Board (the board) for "all land/property records" relating to a particular school (the school). The request was later clarified to include "all records, including correspondence and agreements, related to the purchase of the land on which [the school] was built." The land was acquired for the purposes of having a school in 1959 by the Ottawa Roman Catholic School Board, a

predecessor entity to the board that no longer exists, from a particular company.¹

[2] Initially, there was a dispute between the parties about the fee and the appellant's request for a fee waiver. The board denied the appellant's request for a fee waiver and Appeal MA18-443 was opened to deal with that issue (the fee appeal). During the mediation phase of the fee appeal, the board waived all of the fees associated with processing the request and that appeal was closed.

[3] Also during the mediation of the fee appeal, the mediator facilitated an information exchange between the parties about the records requested.

[4] The fee issue having been resolved, the board then issued an access decision to the appellant granting her complete access to approximately 70 pages of records with dates ranging from 1959 to 1966. In its access decision, the board explained as follows:

Note that we do not possess any Ministry of Education documents related to the sale/purchase of the land. The Ministry may have this, you may wish to submit a request to them for information. In addition, you requested information about [the particular company]. We do not have any information on this company, specifically how they acquired the land. You may wish to contact them directly to pursue this.

[5] The above-quoted passage from the access decision responds to some of the questions asked by the appellant during the fee appeal mediation.

[6] The appellant was dissatisfied with the board's access decision, claiming that additional responsive records should exist and the present appeal was opened. At the intake stage of the present appeal, an analyst facilitated a further information exchange between the parties and transferred the appeal to mediation.

[7] During the mediation stage of the present appeal, the board stated that it conducted a number of searches during the mediation of the fee appeal. The board took the position that it located all responsive records and that no further additional records exist. The appellant maintained her position that additional records should exist.

[8] Mediation could not resolve the issue of reasonable search, the appeal transferred to the adjudication stage of the appeal process, and a written inquiry occurred. The appellant and the board made representations that were shared with each other in accordance with this Office's *Code of Procedure and Practice Direction 7*.

[9] In this order, I find that the board carried out a reasonable search and I dismiss the appeal.

¹ According to the board's representations.

DISCUSSION:

[10] The sole issue in this appeal is whether the board's search for responsive records was reasonable. 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 17.²

Representations

The board's representations

[11] The board provided context and explained the steps it took to respond to the request.

[12] The board attempted to clarify and narrow the appellant's request – initially through direct communications with the appellant and then through the mediator in the fee appeal.

[13] It explained that the board's Planning Officer spent approximately 17 hours carrying out manual searches of the board's historic records, including: maintenance and operations general school files; planning department school files; and, the construction files of predecessor entity, Ottawa Roman Catholic School Board.

[14] The board says that some aspects of the search were conducted multiple times. The board's search yielded the records that were disclosed to the appellant (approximately 70 pages). In its representations, the board explains the kinds of records contained in the above files and provides further context about the land including, for example, that there was a second purchase agreement due to an error in the legal description of the first purchase agreement.

[15] The board provided a written statement from the Planning Officer in which she confirms the searches undertaken and states that the board has no further records than those already disclosed to the appellant.

[16] The board also re-stated some of the information that it shared with the appellant at earlier stages of the appeal. It explained that it has no financial or legal records relating to the land, other than what were already provided to the appellant. It acknowledges that it is possible that other records existed; however, it was not able to locate them nor was it able to locate any information to suggest that older records were destroyed (i.e. records of destruction). The board states that the city of Ottawa (the city) may have additional records.

[17] In summary, the board submits that the disclosed records consist of all documentation pertaining to the purchase in its possession.

² Orders P-85, P-221 and PO-1954-I.

The appellant's representations

[18] First, the appellant argues that the board ought to have consulted with other parties to assist it with the search. Noting that the board states that the city may have additional records, the appellant says that it would have been reasonable for the board to have involved offices at the city in its search efforts to obtain relevant background information. The appellant also asserts that the board should have involved the Ministry of Education and a particular company, who were involved in the sale of the land on which the school sits. Further, the appellant argues that the board should have consulted with the board's Historical Committee to possibly obtain additional context and information to assist with the search.

[19] Second, the appellant argues that it stands to reason that there are more records. She submits that it is reasonable to assume that when the land was acquired for the school, the legal department for the board ought to have – or would have – requested the complete records relating to the land. Related to this argument, the appellant states that this appeal is of public importance because it deals with the obligations of school boards to ensure that reasonable recordkeeping and records retention measures are in place as required by section 4.1 of the *Act*.³

[20] Third, the appellant argues that the board has certain obligations because of section 194 of the *Education Act*.⁴ Section 194 states,

Dealings with property

Disposal of realty

194 (1) A board that is in possession of real property that was originally granted by the Crown for school purposes and that has reverted or may have reverted to the Crown may continue in possession of the real property for school purposes and when the board determines that the real property is no longer required for school purposes, the board may, with the approval of the Lieutenant Governor in Council and subject to such conditions as are prescribed by the Lieutenant Governor in Council, sell, lease or otherwise dispose of the real property. R.S.O. 1990, c. E.2, s. 194 (1).

[21] Regarding this latter point, the appellant refers to the exchange of information that occurred during the intake phase of the present appeal. At the intake stage, the

³ Section 4.1 came into force in 2014 and states:

4.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

⁴ R.S.O. 1990, c. E.2.

appellant explained that she believed that the company that transferred or sold the land to the predecessor school board had originally obtained the land from the Crown, thereby triggering the obligations in section 194. In response to this assertion, the board stated that it had no knowledge of how the company acquired the land.

[22] Fourth, the appellant submits that the board ought to have searched additional places: the Accounting Department, the Financial Department, the Purchasing and Administrative Department, and correspondence files.

[23] Lastly, the appellant submits that the board failed to provide affidavit evidence to describe its search efforts and that the board has therefore not provided sufficient evidence to show that the records she seeks are not within its custody or control, citing Order PO-3869-I.

The board's reply

[24] In reply, the board says that purchase of the land occurred several decades ago and that it does not maintain third party records in its files. The board says that responsive records were requested from all departments, including finance, accounting purchasing and administrative departments. The board says that it did not make any requests to the Ministry of Education or the city.

[25] The board provided an overview of the records that it had disclosed, including an index.

Analysis and finding

[26] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate responsive records.⁵ The Act does not require the board to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁶

[27] In my view, the board has demonstrated that it made a reasonable effort to identify and locate responsive records and I uphold its search as reasonable. I have reached this conclusion in consideration of the evidence provided by the board in this appeal and the background context of the request.

[28] The records sought are more than 60 years old and relate to a transaction involving the Ottawa Roman Catholic School Board, an entity that no longer exists. These circumstances posed some practical challenges to the board in locating the records. Nevertheless, staff at the board obtained clarification and carried out searches.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Orders P-624 and PO-2559.

[29] Considering the context and with the assistance of the information provided by the appellant, I am satisfied that the board designed logical searches to respond to the request. The board was receptive to additional information provided by the appellant and incorporated that into its searches. When it could not provide records, it provided explanations and suggestions for other external places to search.

[30] The board concedes that the records sought may have existed. Although the primary target of the search was for responsive records, the board also searched for records indicating that older records were destroyed as a part of a routine recordkeeping practices. The board was candid and forthright in its efforts to locate records or determine why records could not be found.

[31] I do not agree with the appellant that the board ought to have consulted with the city or any other third party to assist its search. In my view, the board was sufficiently aware of the role of the other parties and it used this information to assist its search. When I consider the steps that the board did take, it was not necessary for the board to also consult with other third parties to carry out a reasonable search.

[32] I considered the appellant's arguments that the board should have searched additional places. As explained above, I am satisfied that the board designed a logical search to locate the records, one that was informed by the context gained by its own research and information provided by the appellant.

[33] I considered the appellant's arguments that the evidence provided by the board in this appeal is insufficient because it did not provide affidavit evidence. When viewed together with the records that were disclosed to the appellant,⁷ the access decision itself and the other information provided by the board throughout the course of the appeal, I find the representations provided by the board are credible and they are sufficient for me to reach the conclusions that I have in this order.

[34] The appellant refers to Order PO-3869-I, in which the adjudicator concluded that the institution at issue had not provided sufficient evidence to demonstrate that a particular set of records was not within its custody or control to justify the fact that it did not conduct a search for those records.⁸ This is distinguishable from the matter before me because the board did in fact carry out a search for the records.

[35] A key component of the appellant's argument is that the board had a duty to maintain the records that she seeks pursuant to the *Act* and the *Education Act*. Although the board does not comprehensively address these arguments, I find that the board's response to the appellant's request, including its search for responsive records, demonstrates its understanding of its obligations under the *Act*. The records originated more than 60 years ago and were in the possession of a now non-existent entity, yet the board proceeded to carry out the searches that it did.

⁷ As described in the index.

⁸ At para 37.

[36] Regarding the *Education Act*, section 194 pertains to land that was originally granted by the Crown. The board denies any knowledge that the land was ever the subject of a Crown grant, while the appellant maintains this to be the case. I make no finding on this issue and in any event, it would have no bearing on my findings above. The board has not demonstrated any intent to avoid its obligations to locate and provide access to the responsive records.

[37] From the outset, the appellant has made sound and logical observations about why one might expect for the records she seeks to be located in the board's files – i.e. it is reasonable to expect that a legal file would contain complete disclosure. The board does not dispute the appellant's suggestions and it appears, in fact, that the board used this information to assist it with its search activities. At the end of the day, the board's search was reasonable but it simply did not yield the additional records sought by the appellant.

[38] In summary, after considering the evidence and arguments offered by both parties, I find that the board conducted a reasonable search and I uphold it.

ORDER:

I dismiss the appeal.

Original Signed by: _____

Valerie Jepson
Adjudicator

_____ March 8, 2021