Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4145

Appeal MA19-00859

Upper Grand District School Board

January 10, 2022

Summary: A parent made an access request to the school board under the *Act*. The board initially denied the request in full and the appellant appealed to the IPC.

With the assistance of IPC mediation, the board decided to disclose all responsive records to the appellant in full. The appellant believed that additional records exist.

After an inquiry, the adjudicator concludes that the board carried out a reasonable search and dismisses the appeal.

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

OVERVIEW:

[1] A parent of children enrolled at a school within the Upper Grand District School Board (the board) made the following access request to the board under the *Municipal Freedom of Information and Protection of Privacy Act*:

1. All records that contain meeting minutes and/or notes and/or summaries, phone call minutes and/or notes and/or summaries, and any other summaries of communication, in all of which the Board staff have indicated me as a party of the communication.

2. All audio recordings of meetings and phone conversations with me that the Board staff have produced, except the audio recording that the Board already provided under the FOI Request [specified number].

[2] Following communication between the parties to clarify the request, the board wrote to the requester denying access to the records in full. The requester, now the appellant, appealed the board's decision to the Office of the Information and Privacy Commissioner (IPC).

[3] A mediator was assigned to explore resolution. During the mediation phase, the board issued a revised decision granting full access to responsive records.

[4] The mediator had further discussions with the appellant about the revised decision and the records. As a result of these discussions, the board provided fresh copies of some of the digital audio files disclosed.

[5] After review of the disclosed records and further discussions, the appellant informed the mediator that she believed that further responsive records exist and provided the mediator with the reasons why. The board informed the mediator that it was confident that no further responsive records exist.

[6] With no further resolution possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted a written inquiry in which I received representations from the board and the appellant, which were shared with each other in full.

[7] In this order, I uphold the board's search as reasonable and dismiss the appeal.

RECORDS:

[8] The records include emails, letters, typed and hand-written notes, communication logs, daily journals for the appellant's child, and records relating to individualized education plans.

DISCUSSION:

Did the board conduct a reasonable search for records?

[9] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[1]

[1] Orders P-85, P-221 and PO-1954-I.

[10] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[2] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[3]

[11] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[4] that is, records that are "reasonably related" to the request.[5]

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such additional records exist.[6]

Representations

[13] Both parties made representations about the length of time that elapsed between the time that the appellant received the records during the mediation and the decision to transfer the appeal to the adjudication stage. They also made representations about the costs associated with the search already undertaken, as well as other access requests made by the appellant. I have not summarized these representations because these considerations are not relevant to the issues in dispute.

The board

[14] The board submits that it conducted a reasonable search. In support, it provides affidavit evidence given by its FOI Coordinator and Executive Assistant to the Director of Education (the FOI Coordinator).

[15] The board explains that after the request was made, the FOI Coordinator initially attempted to obtain clarification from the appellant, which the board says was not provided.

[16] After initially denying access to the records, the board then revised its decision during the mediation phase of the appeal and disclosed all responsive records to the appellant, which consisted of 3,915 pages and audio recordings.

[17] The board rejects the appellant's assertion that there are additional records. The board understands that the appellant's skepticism about the search arises from her recollections of interactions with board staff for which there are not corresponding

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[2] Orders M-909, PO-2469 and PO-2592.
[3] Order MO-2185.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Order MO-2246.

records. The board submits that not all interactions with board staff result in the creation of a record or that corresponding records were no longer retained at the time the request was made.

[18] The board explains that during the period of time that one of the appellant's children attended the school, the appellant was an active and assertive advocate for that child. As a result of the "intensity" of the appellant's interactions, a particular superintendent (the superintendent) was designated as the supervisory officer responsible for overseeing and coordinating staff's responses to the appellant. This means, says the board, that the superintendent was aware of the board staff who had contact with the appellant.

[19] The superintendent asked the following people for records: all of the board's superintendents; and, managers and supervisors who had contact with the appellant or her child (or whose staff had contact with the appellant or her child). As a result of these requests, the superintendent compiled records from the school principal, the vice-principal, classroom teachers, a resource teacher, the superintendent herself, the board's chief psychologist, the board's attendance counsellor, a speech and language pathologist, an ABA facilitator, the assistant superintendent of special education and the board's head of information technology (IT). The FOI Coordinator, other staff and a contract FOI specialist assisted to compile the records.

[20] The board says that it understands that the IPC expects it to interpret the request liberally and that it has done so. It submits that this approach is evidenced by its decision to consider the following types of records as reasonably related: notes, minutes, summaries of conversations and audio recordings.

[21] The board also explains its retention policy. It begins by stating that the request was made 11 months after the appellant's child ceased to be a student at the school. The board says that its records retention policy states that staff should not retain records relating to students beyond the school year in which the records are generated.

[22] Further, it explains that the board's policy is to remove emails from the board's servers 30 days after the account holder has deleted them. The FOI Coordinator therefore states that she did not ask the IT department to undertake an electronic search for emails stored on the board's server for two reasons. First, she understands and believes that the board does not retain copies of deleted emails beyond 30 days from the date of deletion; second, because the superintendent (who oversaw the response to the request) had thorough knowledge of the board employees with whom the appellant had contact.

[23] The board submits that when one considers the efforts taken by the board, the search undertaken was reasonable. It states that the IPC has consistently held that a reasonable search is one in which an experienced employee expending a reasonable amount of effort conducts a search to identify any records that are reasonably related

to the request.

[24] The board states that the concerns raised by the appellant during the mediation are mere conjecture.

The appellant

[25] The appellant submits that the board's search was not reasonable and she continues to believe additional records exist.

[26] She begins by stating that the affidavit evidence filed by the board contains factual errors – that is, the date of the revised access decision and the dates on which the FOI Coordinator states that she worked to respond to the access request.

[27] Regarding the number of pages disclosed, the appellant clarifies that there were only 68 records disclosed, consisting of approximately 450 separate emails or student records. She says that the large page number cited by the board is due to multiple duplications of emails that she says are not related to the access request.

[28] The appellant disputes the suggestion that she did not provide clarification when requested. She provided me with a copy of her email in which she responded to the request for clarification:

> Thank you for your email. I understand you require clarification in regards to [the access request]. Specifically, you asked me to identify meeting notes/recordings/summaries by date.
>
> Please be informed this is not possible as it seems the board administrators have been very secretive about what records they were producing about myself and my [child]. Also, in some instances, they would indicate wrong date in their records (e.g. I spoke to them on August 30 and they would record their notes as dated August 29).
>
> Therefore, please provide the information per my original FOI request:
>
> [duplicate of request]
>
> If you think I did not address your question or if you have any further questions, please do not hesitate to contact me […]. I prefer to clarify any outstanding issues via phone to avoid further delays.

[29] The appellant says that her child did not cease to be a student at the school when stated by the board; she says it was not until several months later. Further, she says that her other child continues to be a student at the school.

[30] Regarding the relevance of the retention schedule, the appellant states that her

request does not pertain to student records but rather "overall unethical conduct" by board staff. She says that, therefore, the retention schedule for student records would not apply to all of the records within the scope of her request.

[31] The appellant says that the records maintained by the school's speech and language pathologist are required to be maintained for 10 years pursuant to Ontario Regulation 164/15 made under the *Audiology and Speech-Language Pathology Act, 1991* and, as I understand the argument, that this requirement would prevail over any records retention schedule.

[32] The appellant points out that the board does not explain the total number of records provided by staff to the superintendent, but only the total number of records that the superintendent deemed to be responsive.

[33] The appellant disputes that the superintendent had the ability to know and remember all of the board staff that she was in contact with. The appellant says that the supplied index (organized by contact) "only includes a small portion of staff" she had meetings with.

[34] The appellant says that it is not reasonable to rely on the superintendent's memory. The superintendent, says the appellant, is responsible for 19 schools, totalling over 7,000 children, as well as other responsibilities. The appellant says that in her own experience, the superintendent demonstrated forgetfulness. The appellant refers to academic research in the field of psychology to support her contention that confidence in memories does not imply correctness of the memories and that, therefore, documentation is "instrumental."

[35] Also regarding the role of the superintendent, the appellant says that the superintendent is biased and it was not appropriate that she be designated as the "gate-keeper" for records to be identified or disclosed to the appellant. The appellant explains that she has alleged that the superintendent has engaged in unethical conduct.

[36] Regarding the record retention policies, the appellant observes that many of the records that were disclosed to her evidence that board staff do not follow the policy because they were retained when, in fact, the policy suggests those records ought to have been destroyed.

[37] The appellant says that the board has not clarified why it is not possible to do a more "objective electronic search at least based on last name."

[38] The appellant listed a number of other employees who she believes should have been contacted to identify responsive records, including the Director of Education, the Executive Officer of Human Resources, the Associate Chief Information Officer, an employee in the IT department, another superintendent, a speech language pathologist, a vice principal, a special education consultant, the FOI Coordinator, a board trustee and teachers at the school.

[39] The appellant concludes by stating she hopes that the board will conduct additional searches of the staff she has identified.

[40] The appellant explains the reasons why she is making this request and her interest in addressing what she believes is misconduct on the part of the board.

The board's reply

[41] The board disputes that there are factual errors in the affidavit evidence. It states, however, that the erroneous dates pointed out by the appellant are typographical errors.

[42] The board states that the appellant's child did in fact stop attending the school on the date that it cited and that all records related to the appellant's interaction with the board "with respect to her [child]" were released. The board says that whether the appellant's other child remained a student of the board is not relevant to the appellant's appeal.

[43] The board states generally that the appellant has "provided no evidence that specific clinical records must exist and were not disclosed."

[44] The board reiterates that it was the role of the superintendent to supervise board communications with the appellant.

[45] The board reiterates that the record retention policy informs the practice of records retention at the board and that if records were not located, it is reasonable to conclude that they were destroyed in accordance with the retention process. The board reiterates that not every contact elicits the creation of a record.

[46] The board says that it made the decision to "release all records in the Board's custody and control relating to the appellant and her [child] to forestall an argument about judgements regarding responsive records."

Discussion

Observations about disclosed records

[47] I reviewed the disclosed records and make the following observations.

[48] The records contain a high amount of duplicate information, as asserted by the appellant and as acknowledged by the board (in the Index itself). This duplication arises primarily because communications often took place using email and lengthy prior email exchanges were duplicated when new communications occurred.

[49] Despite the duplicates, the disclosed records contain a high number of unique communications or records. They cover a wide variety of interactions, involving several

staff members of the board. The records consist primarily of direct communications between the appellant and board staff, but there are also some records that include communications internal to the board about those communications, as well as notes made by board staff about meetings or interactions.

[50] Regarding the individuals that the appellant has identified who are not listed in the board's *Index*, I observe that several disclosed records include communications involving most of the individuals. In other words, although they were not listed on the Index, some of these individuals' communications appear within the records.

[51] Based on my review, records involving all but two of the people listed by the appellant are contained within the records, despite them not having been asked for records or appearing in the Index. I could not find records involving the trustee or a particular IT employee (although there are records of other IT employees).

[52] Lastly, I observe that it is apparent that the superintendent was coordinating and overseeing communications between the appellant and the board. I form this conclusion because the records themselves evidence instances where board staff were keeping the superintendent in the loop or aware of communications.

Analysis and finding

[53] Considering the wording of the request, the board's evidence and the records themselves, I find that the superintendent had sufficient and relevant knowledge about the request and the board's interactions with the appellant to enable the superintendent to effectively oversee the search for records. Taking into account the superintendent's role and the variety of contacts, I find that the method used by the superintendent and the FOI Coordinator to search for records was reasonable.

[54] The appellant has raised a number of concerns that could suggest that further searches would yield other records. In the discussion that follows, I explain why I have concluded that these concerns do not give rise to a reasonable basis that further records exist and why, therefore, I do not order the board to carry out further searches.

[55] I considered the appellant's concerns about the veracity of the affidavit, arising due to the errors later acknowledged by the board. In my view, these errors are typographical in nature and do not detract from the substance of the evidence. In any event, I find that when viewed together with the records that were disclosed, the evidence about the search in the affidavit is credible.

[56] I considered the appellant's concerns about the superintendent's ability to accurately recall communications. I find that the superintendent and the FOI Coordinator, together, undertook a sensible and systematic approach to respond to a broad request. As I observed above, the superintendent had a role to supervise communications between the board and the appellant and there is no suggestion that she carried out this supervision on the basis of her memory alone. Based on her

knowledge, she sought records from a variety of different sources within the organization.

[57] I considered the appellant's concerns that the superintendent is biased and should not have been responsible for coordinating the search. The appellant has briefly explained that she has this concern because she has made allegations in the past that the superintendent was engaged in unethical conduct. In these circumstances, I understand why the appellant would be skeptical of the superintendent's neutrality. However, I have no reasonable basis to conclude that the superintendent was biased or that this bias impacted the board's ability to respond to the request in accordance with the *Act*. I am satisfied that the board, acting through the superintendent and the FOI Coordinator, fulfilled the board's obligations under the *Act* in response to the request.

[58] I considered the appellant's submissions about whether the board ought to have conducted an electronic search. The board has explained that it did not conduct an electronic search because (when distilled down) it does not believe that such a search will yield any further records. When I consider the breadth of the records that were disclosed, together with the board's reasons, I accept this explanation.

[59] While I acknowledge that the appellant would have preferred for there to be an electronic search, there is no reasonable basis for me to conclude that such a search would yield further records.

[60] I considered the appellant's submissions that other individuals should have been asked to search for records. The main thrust of the appellant's argument is that there is an incongruence between people she spoke to and the board's *Index*. The appellant does not specifically identify any gaps in the records themselves.

[61] According to the board's evidence, which I accept, the following people provided records: the school principal, the vice-principal, classroom teachers, a resource teacher, the superintendent herself, the board's chief psychologist, the board's attendance counsellor, a speech and language pathologist, an ABA facilitator, the assistant superintendent of special education and the board's head of information technology. I note that the board indicates that it did not ask every employee who had contact with the appellant but, rather, only those employees' managers and supervisors. Having reviewed the records, I find that this was a reasonable approach to take.

[62] As indicated above, the records contain communications involving most of the individuals identified by the appellant as people who should have been asked for records. On this basis, I am satisfied that further searches would not yield any further records because the searches that occurred captured these communications.

[63] Regarding the IT employee and the trustee – the two individuals who do not appear to be referenced in the records – I begin by accepting the appellant's evidence that she interacted with them. However, I have no reasonable basis to conclude that

there ought to be additional records relating to these interactions. In the case of the trustee, I have no information about the nature of the interaction and why there would be a corresponding record and I am therefore unable to conclude that further searches would yield additional records. In the case of the IT employee, I accept the board's general explanation that there were no corresponding records at the time that the request was made.

[64] I considered the appellant's submissions about the speech and language pathologist. The appellant contends that retention of records involving the speech and language pathologist are not governed by the board's records retention schedule and so there is no reason to conclude that these records would be deleted, obviating the need for an electronic search as suggested by the board. Because the records disclosed do include communications involving the speech and language pathologist, I am unable to conclude that there is a gap and I am therefore not persuaded that further searches would yield additional records.

[65] The board is not required to prove with absolute certainty that further responsive records do not exist. Rather, the board is required to demonstrate that it has made a reasonable effort to locate records. I find that it has.

ORDER:

I find that the board's search was reasonable and I dismiss the appeal.

Original Signed by: January 10, 2022

Valerie Jepson
Adjudicator