

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-4177-F

Appeal MA18-151-2

Toronto Catholic District School Board

March 25, 2022

**Summary:** This final order determines whether the Toronto Catholic District School Board conducted a reasonable search for responsive records in response to two previous interim orders regarding the appellants' request under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to alleged bullying incidents at an elementary school. In Interim Order MO-4002-I, the adjudicator upheld the board's decision to withhold portions of the responsive records under section 38(b) (personal privacy), but ordered the board to conduct a further search for responsive records. In Interim Order MO-4106-I, the adjudicator determined again that the board had not conducted a reasonable search and ordered a further search. In this final order, the adjudicator finds that the board has now conducted a reasonable search for responsive records, and she dismisses the appeal.

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

**Orders Considered:** Interim Orders MO-4002-I and MO-4106-I.

### OVERVIEW:

[1] This final order addresses the reasonableness of the Toronto Catholic District School Board's (the board) search for responsive records related to alleged bullying incidents at an elementary school after having been ordered to conduct a further search in two previous interim orders.

[2] By way of background, the board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any and all records

related to the appellants' son and specified incidents involving several other named elementary school students for the time period of May 23, 2017 to the date of the request (January 27, 2018). The board issued a decision granting partial access to the responsive records, while withholding portions of them under the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] The appellants appealed the board's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution. During mediation, the appellants took issue with the board's decision to withhold information under section 38(b) of the *Act* and the adequacy of the board's search, claiming that further records responsive to their request exist.

[4] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, and I conducted an inquiry. In Interim Order MO-4002-I, I upheld the board's decision to withhold portions of the records under section 38(b), but found that the board had not conducted a reasonable search. I ordered the board to conduct a further search for both electronic and physical records, because I found that the board's affidavit failed to specify who carried out the search, where they searched, and what they searched. In Interim Order MO-4106-I, I found once again that the board did not conduct a reasonable search because the board did not include a specified teacher as part of its search, and the board did not direct the individuals conducting the search to search for electronic records stored locally on their computers. I ordered the board to conduct a further search for responsive records, to issue a decision to the appellants with respect to any new records located, and to provide me with an affidavit outlining its new search.

[5] The board conducted a further search, which did not locate further records, and provided an affidavit outlining its search efforts. After receiving the board's affidavit, I shared it with the appellants and invited their representations. I shared the appellants' representations with the board, inviting its reply, which I received. I then shared the board's reply with the appellants, and invited and received their sur-reply.

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

## **DISCUSSION:**

### **Did the board conduct a reasonable search for responsive records in response to Interim Order MO-4106-I?**

[7] The appellants claim that further records responsive to their request exist. Where a requester claims 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.<sup>1</sup> If I am satisfied the search carried out was

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[8] 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 (responsive) to the request.<sup>2</sup>

### ***Representations of the board***

[9] The board submits that it conducted a reasonable search for responsive records. In support of its position, the board submitted the affidavit of its Senior Manager of Archives, Records Management, and Freedom of Information (FOI manager). The relevant portions of the FOI Manager's affidavit are as follows:

- The FOI Manager's role is to coordinate board responses to requests for information under the *Act*. He facilitated a further search, which he and other relevant individuals within the board conducted, as ordered by Interim Order MO-4106-I.
- In response to order provisions 2 and 3 of Interim Order MO-4106-I,<sup>3</sup> the individuals selected to conduct a further search were individuals named by the appellants as potentially holding records responsive to their request. These individuals are as follows:
  - A Superintendent;
  - Former principal of the school;
  - Former vice-principal #1 of the school;
  - Former vice-principal #2 of the school;
  - M.K., a teacher at the school;
  - M.S., a teacher at the school;
  - M.C., a teacher at the school;
  - D.D., a former teacher at the school;

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<sup>2</sup> Orders M-909, PO-2469 and PO-2592.

<sup>3</sup> These order provisions stated: 2. I order the board to include Mrs. M, teacher, in its further search for both electronic and paper records. The individuals that have already conducted further searches following Interim Order MO-4002-I are not required to repeat their previous searches for paper records.

3. I order the board to search its record holdings for electronic records, including emails, which may be stored locally on the computers of the individuals the board selected to conduct further searches (as listed in its affidavit) following Interim Order MO-4002-I and Mrs. M, the teacher listed in order provision 2.

- M.O. (formerly M.M.), a former teacher at the school; and
- A ward trustee.
- These individuals were instructed to search for electronic records containing the last names of the appellants, or their son's first name, from May 23, 2017 – January 27, 2018. These individuals searched all files located within their local computer drive ("C:" drive).
- M.O., who did not participate in the prior search, undertook a search of both her local computer drive and all network drives, as was undertaken by the other individuals in the prior searches.
- The FOI Manager noted that as the electronic records search was keyword-based, all electronically searchable file types containing the identified keywords were captured by the search criteria used.
- These individuals were instructed not to limit their search to only direct correspondence between themselves and the appellants, or between themselves and other board employees, but to also to determine whether any correspondence or other records may exist between them and a third party (such as other parents or any parties external to the board) containing matters related to the alleged incidents.
- The two former Directors of Education and W.N., a former teacher at the school, who conducted prior searches, have since retired from working at the board. As such, it was no longer possible to search their local computer drives because their computers have been decommissioned.
- M.O. also searched for any paper records, dated from May 23, 2017 – January 27, 2018, related to investigations into the alleged bullying of [the appellants' son], including handwritten notes, meeting notes, written correspondence, assessments relating to the alleged incidents, evaluations, investigative reports, printed material, or any other paper file related to the alleged incidents. She searched for paper records in locations based on the individual school and board business records practices.
- The FOI Manager noted that all individuals who conducted a further search are aware of their obligations under the *Education Act*, the board's records management policies with regard to the retention of active files relevant to principals' investigations, as well as their legal obligations with regard to retention of the board's business records in general.
- The FOI Manager noted that:

"While I am satisfied that records of this nature were not destroyed, I cannot confirm with certainty that transitory paper records and draft notes have not

been destroyed as a matter of general file maintenance based on individual record-holders' determination of ongoing relevance to [board] business. With regard to email correspondence records containing the appellants' personal information specifically, I cannot confirm with certainty that all records relating to the forgoing further search have been retained, as more than one year has passed since the date of the original date range of the search. It is possible that transitory emails and/or email records that each individual record holder determined to be no longer relevant to [board] business were disposed of as a matter of general file maintenance."

### ***Representations of the appellants***

[10] The appellants submit that the board has not yet conducted a reasonable search and further records responsive to their request must exist.

[11] The appellants submit that the criteria specified by the board did not require all local storage devices on the specified individuals' computers to be searched and the board's affidavit does not identify the specific file types that were electronically searchable, so the scope of the search is unknown. The appellants submit that it is not clear whether the individuals conducting the electronic search were directed to wait until the computer had successfully completed the search. The appellants further submit that it is not clear whether the board archives the files from the local drives of personnel who leave the organization, prior to wiping those drives clean. The appellants submit that if such files are archived, it is not clear that the archived files for the two former Directors of Education and W.N., a former teacher at the school, were included in the board's search.

[12] The appellants submit that the board's request that the specified individuals conduct a search of their own local drives is a suboptimal search approach. The appellants submit that a centralized search is the preferred approach as it provides consistency because it can be conducted by one individual, instead of multiple individuals each with their own interpretation of the search instructions. The appellants concede that the keywords used by the board ought to capture the majority of the responsive records.

[13] The appellants submit that the board's directive to search the "C:" drive, means that any additional drives beyond the "C:" drive, such as partitions of the computer's primary hard drive, additional internal hard drives, or removable drives, would have been excluded from the search. The appellants submit that the board's failure to extend the search location to local storage devices beyond the "C:" drive represents a gap in the search location, which ought to be addressed by a further search.

[14] The appellants submit that the specified individuals initiated a keyword search on unspecified file types on their personal computers' "C:" drive using an unnamed software application and it is unclear if these individuals waited for the computer to complete the search. The appellants submit that this does not represent a "reasonable" search, as the search instructions did not specify that all local storage locations be

searched, nor did they specify which file types were to be targeted for the specified keywords.

[15] The appellants submit that in order to qualitatively evaluate the search activity, they would need to know, on a user specific basis, which search application was used for the search, which file types were selected for the text-based keyword search, and whether or not the individuals conducting the scans let the scans run to successful completion. The appellants submit that since none of this information is provided in the board's affidavit, they have no basis on which to qualitatively evaluate the search activity.

[16] The appellants submit that it is unclear whether the further searches located no records at all, or if the searches located records that are duplicates of ones previously located. The appellants submit that the distinction is important, as a complete absence of any information could signify a deficiency in the execution of the search. The appellants submit, therefore, identifying and quantifying the documents that were detected by the incremental search has some relevance to making a qualitative assessment of the search.

[17] The appellants submit that M.O. was a Safe School's representative, so she would be familiar with the board's documentation practices related to bullying incidents. The appellants submit that she took their son's statement regarding a December 21, 2017 incident, but so far, these notes have not been located. The appellants submit that they have concerns with the latency period of the board records being significantly lower than the time for the IPC's dispute resolution process, and that this time difference has a material and adverse impact on the search result, especially M.O.'s ability to locate their son's statement.

[18] The appellants submit that the board and Interim Order MO-4106-I did not address two items they identified in their representations from that order: the missing incident report to the Ministry of Education (the ministry), and confirmation about an email enclosure. The appellants submit that an incident report (incident report) to the ministry, pertaining to the December 21, 2017 incident involving a specified child, may exist, and if it does, it would be a responsive record, which they have not yet received. The appellants further submit that the board has not confirmed whether a specified PDF attachment (PDF attachment) to an email is the same document as a PDF they received with the same name and the word "Redacted" added to the filename.

[19] With respect to the missing incident report, the appellants request that the board search the records in the Ministry of Education's Safe Schools incident reporting system for records that meet a specified list of criteria. With respect to the PDF, the appellants request that a redacted version of the PDF attachment be provided to them for review since the board has not provided a response to their question.

***The board's reply***

[20] The board submits that the "C:" drive is the designated name for the local

storage drive for all individuals who conducted the further search and it is the only local storage drive on such computers. The board also submits that it does not archive files from the local drives of personnel who leave.

### ***The appellants' sur-reply***

[21] The appellants submit that it is surprising and unusual, given that records would have been stored over 3 years ago, that none of the individuals who conducted the further search used any kind of external storage device connected to their computers at that time. The appellants submit that it would certainly not have been in the board's best interests to have such storage devices connected to their computers at the time they conducted the search. The appellants further submit that they have no basis on which to dispute the board's statement, as they have no knowledge of or way of seeing the specified individuals' computers.

[22] With respect to the board's submission that it does not archive files from the local drives of personnel who leave, the appellants submit that as implausible as that statement appears to them, they have no basis on which to dispute it.

[23] The appellants' further sur-reply representations reiterate their outstanding issues and concerns from previous representations, which I will not repeat here.

### ***Analysis and findings***

[24] The review of the issue of whether the institution has conducted a reasonable search for records as required by section 17 arises where a requester claims additional records exist beyond those identified by the institution.<sup>4</sup>

[25] In Interim Order MO-4106-I, I ordered the board to conduct a further search for records, because I found that the board did not include M.O.<sup>5</sup> as part of its search, and that the board did not direct the individuals who conducted the search to search for electronic records stored locally on their computers. I also ordered the board to provide me with an affidavit outlining the following:

- a. the names and positions of the individuals who conducted the searches;
- b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
- c. the results of the search; and
- d. details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

[26] The board has provided the affidavit of its Senior Manager of Archives, Records

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<sup>4</sup> Orders P-85, P-221 and PO-1954-I.

<sup>5</sup> Formerly M.M. and referred to in Interim Order MO-4106-I as "Mrs. M".

Management, and Freedom of Information, which outlines the board's search efforts in response to the appellants' request and Interim Order MO-4106-I. The board asked M.O. to conduct a search for both physical and electronic records. The board also asked the individuals who conducted the previous search to conduct a further search for electronic records responsive to the appellants' request on the local drive of their computers. In Interim Order MO-4106-I, outside of M.O., the individuals I ordered to conduct a further electronic search of the local drive on their computers were the same individuals the board selected to conduct the prior search. These individuals are as follows:

- Former Director of Education #1;
- Former Director of Education #2;
- A Superintendent;
- A ward trustee;
- Former principal of the school;
- Former vice-principal #1 of the school;
- Former vice-principal #2 of the school;
- M.K., a teacher at the school;
- M.S., a teacher at the school;
- M.C., a teacher at the school;
- D.D., a former teacher at the school; and
- W.N., a former teacher at the school.

[27] As noted above, the two former Directors of Education, and W.N., a former teacher, did not participate in the further electronic search, because they had retired from their positions with the board.

[28] The board maintains that it has now conducted a reasonable search for responsive records, while the appellants argue that it has not.

[29] The appellants argue that the board should confirm whether the specified PDF attachment to an email is the same document as a PDF they received with the same name and the word "Redacted" added to the filename. Although it would have been helpful for the board to answer this question for the appellants, this lack of clarification is not a sufficient basis upon which to find that the board did not conduct a reasonable search for responsive records. The appellants also argue that the board should search the Ministry of Education's Safe Schools incident reporting system for records that meet



a specified list of criteria in order to locate the missing incident report. As the appellants acknowledge, these records would be found in the ministry's system, not the board's record holdings. In this appeal under the *Act*, the appellants' right of access is to records or parts of records that are in the custody or under the control of the board.<sup>6</sup> Therefore, the board would not be expected, or be in a position, to search for records that may be held by the ministry.

[30] The appellants argue that the board did not conduct a reasonable search, because the board did not specify which program the specified individuals used and what file types they searched for; and the electronic search was conducted individually instead of centrally. It is clear that the appellants have strong opinions about how the search should have been conducted and what the board should have specified in its affidavit. However, the *Act* does not stipulate how a search should be undertaken, or what information should be included in an affidavit. The *Act* also does not stipulate that the search be perfect. I must only be satisfied that sufficient evidence has been provided to establish that a reasonable search has been conducted.

[31] 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.<sup>7</sup> As I set out above, in support of its position that it conducted a reasonable search for responsive records, the board has provided an affidavit from its Senior Manager of Archives, Records Management, and Freedom of Information, which outlines the board's search efforts in response to the appellants' request and my most recent interim order in this appeal, Interim Order MO-4106-I. The board has listed the individuals involved in the search, provided a sufficient explanation of where and how they searched, and the result of the search. The board's affidavit outlines all the details that I directed it to provide in Interim Order MO-4106-I. Therefore, I am satisfied that experienced employees knowledgeable in the subject matter of the request conducted the search.

[32] 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 such records exist.<sup>8</sup> The appellants claim that additional responsive records should exist, such as M.O.'s handwritten statement from their son and the incident report. Based on my review of the representations of the parties, I find that there is insufficient evidence before me to establish a reasonable basis to conclude that these further records responsive to the appellants' request exist in the board's record holdings, but have not yet been located by the board through its many searches. Given that the board has now conducted three searches for records responsive to the appellants' request, with their guidance and my direction, I am not persuaded, based on the evidence before me, that ordering the board to conduct another search will locate these records that the appellants claim should exist. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However,

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<sup>6</sup> See section 4(1) of the *Act*.

<sup>7</sup> Orders M-909, PO-2469 and PO-2592.

<sup>8</sup> Order MO-2246.

the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records,<sup>9</sup> which I find that the board has done.

[33] For the reasons above, I find that the board has conducted a reasonable search for responsive records.

**ORDER:**

I uphold the board's search as reasonable and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Anna Truong  
Adjudicator

\_\_\_\_\_ March 25, 2022

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<sup>9</sup> Orders P-624 and PO-2559.