

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4364

Appeal MA21-00629

York Region District School Board

April 17, 2023

Summary: This appeal involves a lengthy request for various types of records relating school board trustee's communications with parents, community groups and others. The requester directed his request under *Municipal Freedom of Information and Protection of Privacy Act (the Act)* both to York Region District School Board (the board) and to certain school trustees. The board responded that any responsive records would be outside of the board's custody or control. The requester appealed, objecting both to the trustees' non-response to his request and to the school board's claim that responsive records would not be in its custody or control. He also raised the issue of the reasonableness of the board's search for records.

In this order, the adjudicator finds that the designated head of the board was the appropriate party to process the request under section 19 of the *Act*, and that if records responsive to the request exist, they would not be in the custody or the control of the board under section 4(1) of the *Act*. As a result, she dismisses the appeal.

Statutes Considered: *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, section 224; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "institution"), 4(1), and 19.

Orders Considered: Orders M-813, MO-2821, MO-3031, MO-3281, MO-3618-I, and MO-4229.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 24, [2011] 2 SCR 306.

OVERVIEW:

[1] This appeal involves a lengthy request for various types of records relating to school board trustees' communications with parents, community groups and others.¹ The requester directed his request under *Municipal Freedom of Information and Protection of Privacy Act (the Act)* both to the York Region District School Board (the board) and to certain school trustees. The board responded that any responsive records would not be in its custody or control, and denied the request. The requester, now the appellant, objects to how his request was processed, and to the board's position that any responsive records that exist would not be in the board's custody or control. During mediation, he also raised the issue of the reasonableness of the board's search for records.²

[2] I started my inquiry by seeking and receiving written representations from the appellant regarding the issues on appeal. I determined that it was not necessary to seek representations from the board or school board trustees named in the request.

[3] Due to the nature of the information requested and the jurisprudence regarding records of elected officials, I find that any responsive records would not be in the custody or control of the board; there is no need, therefore, to consider the issue of reasonable search. I also find that the board appropriately processed the request, and that the trustees had no legal authorization to do so, and I dismiss the appeal.

ISSUES:

Preliminary issue: What is the scope of this appeal?

- A. Did the board's designated head under the *Act* respond to the request? Were the school trustees authorized under the *Act* to respond to the request?
- B. If records responsive to the request exist, would they be in the custody or the control of the board?

DISCUSSION:

Preliminary issue: What is the scope of this appeal?

[4] The appellant seeks to reword his request to reflect the fact that a municipal election has passed since he submitted his request, and as a result, some of the trustees named in his request are not longer in office, and others are. He considers his

¹ The request for records related to school trustee communications is lengthy and detailed, so I have attached it as an appendix to this order.

² The IPC appointed a mediator to explore resolution, but the parties could not reach a resolution.

request to be "stale dated" and seeks to have me consider a revised request.

[5] However, an appeal to the IPC is an appeal from a decision that an institution has already made.³ As a result, I decline to consider any alternative wording to the request apart from the wording that was set out in the Mediator's Report.⁴ In any event, the result would be the same, given my findings that follow.

Issue A: Did the board's designated head under the *Act* respond to the request? Were the school trustees authorized under the *Act* to respond to the request?

[6] For the following reasons, I find that the board properly processed the appellant's request.

[7] The *Act* applies to institutions that are defined as such in the *Act*, a matter that I elaborate on below. The appellant raised the processing of his request as an issue to be adjudicated because he believes that each of the school trustees, rather than the board itself, should have responded to his request. He describes the trustees as "mini institutions" under the *Act*. His position is that elected school board trustees ought to be transparent and accountable, and should "self-authorize themselves to be their own individual 'head'" for the purposes of responding to requests under the *Act*.

What is an "institution" under the Act?

[8] The *Act* provides for a general right of access *only* to records that are in the custody or under the control of *an institution governed by the Act*.⁵

[9] While one of the purposes of the *Act* includes the principle that information should be available to the public, this does not mean that because elected school board trustees are elected and paid by taxpayers, they are "institutions" governed by the *Act*.

[10] The term "institution" is defined at section 2(1) of the *Act*, as follows:

"institution" means,

(a) a municipality,

³ If an appellant no longer seeks access to records previously sought, the scope of the appeal can be narrowed; in some cases, this may eliminate the need for the appeal altogether.

⁴ While I appreciate that the appellant also attempted to *narrow* or clarify the scope his request through his representations, he is still seeking records related to school trustee communications. Given my findings under Issue B (that records responsive to a request for such records, if they exist, are not in the custody or control of the board), it is not necessary to set out or consider the details of this narrowed request.

⁵ Section 4(1) of the *Act* says, in part: "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . ."

(b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,

(c) any agency, board, commission, corporation or other body designated as an institution in the regulations; (“institution”)

[11] Given the above definition, none of the school board trustees named in the request qualify as an “institution.” For the benefit of the appellant, the list of institutions that are subject to the *Act* is available in a public directory at: [Directory of Institutions | Ontario.ca](http://DirectoryofInstitutions.Ontario.ca).

Which employee at an institution is responsible for processing a request under the Act?

[12] The appellant objects to the involvement of a certain board employee in responding to his access request, because the request was not “addressed to” that individual. He also submits that the school board trustees should have “self-authorized themselves” to be a “designated head” under the *Act*, to respond to the request.

[13] However, under the *Act*, the “designated head” is the person legally responsible at an institution for responding to a request under the *Act*,⁶ whether or not the request relates to, or is addressed to, that individual or not. An individual cannot “self-authorize themselves” to be a “designated head” under the *Act*. The evidence before me is that that individual is the “designated head” of the board under the *Act*. Accordingly, he or his staff were legally authorized to respond to the appellant’s request.

[14] Additionally, and as I explain in more detail at issue B, individual elected trustees are not “part of” the board in any legal sense.

[15] For these reasons, I find that the request was processed in accordance with the *Act*, and this ground of the appeal cannot succeed.

Issue B: If records responsive to the request exist, would they be in the custody or the control of the board?

[16] For the reasons that follow, I find that if there are responsive records, they would not be in the board’s custody or control, so the appellant would have no right of access to any such records under the *Act*. As a result, there is no need to consider the issue of the reasonableness of the search for responsive records.

⁶ See section 19 of the *Act*.

[17] Past court decisions and/or IPC orders have found that records of municipal councillors or school board trustees are not within the custody or control of the municipality or school board, except where the councillor or trustee is acting as an officer of the municipality or board, or where a finding of custody or control is made based on the application of established principles, which I discuss below.⁷

[18] The reason for this is explained by the Ontario Superior Court in *St. Elizabeth Home Society v. Hamilton (City)*:⁸

It is an equally long-standing principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office ... Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties ... [para.264]

[19] Given this jurisprudence – and the fact that the appellant is seeking records of school board trustees – I sought the representations of the appellant initially. In addition to the Notice of Inquiry, I provided him with a copy of two IPC orders that explained the reasoning of the IPC regarding such records.

[20] The appellant provided representations in response, but they contain his views about many matters outside the scope of the *Act*, and submissions based on what he believes *should* be the case (for example, that school board trustees are “mini-institutions” and that many other laws other than the *Municipal Freedom of Information and Protection of Privacy Act* should be considered here). However, I must consider the issues before me in light of the existing statute and jurisprudence relevant to the circumstances.

[21] One of the orders I sent with the Notice of Inquiry was Order MO-3031. In Order MO-3031, the IPC found that the approach taken in considering whether municipal councillor’s records are in the custody or control of a municipality (and therefore subject to the *Act*) can be taken with school board trustee records too, given that both councillors and trustees are elected officials and that their respective relationships with the municipality or board are similar. I agree with that analysis, and adopt it here.

[22] The appellant does not dispute that he seeks records of school board trustees, in their capacities as school board trustees. In commenting on Order MO-3031, the appellant highlighted certain paragraphs from that order, including paragraphs 64 and

⁷ See, for example, Orders MO-2821 and MO-3031.

⁸ (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

65:

[64] On a final note, with respect to the appellant's general concerns about accountability and transparency, similar concerns were addressed in a number of orders, including Order MO-2821. That order considered the impact of a finding that political or elected or constituent representative records fell outside the scope of the *Act*, and determined that such a finding is consistent with the scheme and purposes of the *Act*. As Senior Adjudicator Liang stated [in Order MO-2821]:

... A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the [Act](#). A finding that the city, as an institution covered by the *Act*, is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[65] I agree with the approach taken by Senior Adjudicator Liang. My finding that the records at issue in this appeal fall outside the scope of the *Act* because they are not in the custody or control of the board is consistent with the overall framework of the [Act](#). In addition, as referenced in Order MO-2821, this finding does not affect other ways in which the activities of board trustees are regulated.

[23] The appellant asks what "other ways" school board trustees may be held accountable. One obvious answer is that they are elected officials and accountability is found at the ballot box. However, my jurisdiction is over institutions that are subject to the [Act](#), so I will not further address any accountability mechanisms outside of the [Act](#) regarding individuals or officials that are not.

[24] The appellant's representations do not establish any reason to depart from the analysis in Order MO-3031.⁹

[25] In the circumstances, I find that there is no reasonable basis for departing from the court decisions and IPC orders stating that school board trustee¹⁰ records are not accessible under the *Act*, except in two situations (where the trustee is acting as an

⁹ The appellant offers his view about email as a business tool, and a need for policies and procedures to safeguard them, but this does not go to whether the analysis in Order MO-3031 is relevant and should be followed here.

¹⁰ Many of these orders relate to municipalities, not school boards, but as I noted above, the principles are the same.

officer of the municipality or board, or where a finding of custody or control is made based on the application of established principles).¹¹

[26] The evidence before me does not establish that either of these situations is relevant here.

[27] Regarding the first situation, the request is clearly for records belonging to school board trustees, in their respective capacities *as school board trustees*, not as "officers" of the school board; the appellant's representations are also consistent with this assessment.

[28] Regarding the second situation, I assessed the factors that the IPC usually considers to determine whether a school board has custody or control over a school trustee's records, and the appellant's representations about these factors. Such factors include, for example, considerations of who has physical possession of the records, who owns the records, how has the responsibility for the protection of the records, who has the authority to destroy them, and the customary practice of the individual who created the record in relation to possession or control of records of this nature.¹²

[29] The appellant's representations rely on his characterization of school board trustees as "mini-institutions," an argument I rejected above. On this basis, his representations heavily skew towards discussion of custody or control belonging to the trustees and not the school board.

[30] Based on my review of the request and the appellant's representations, I find that the relevant factors that are usually considered in such appeals weigh heavily in favour of finding that any responsive records that exist would *not* be in the custody or under the control of the school board.

[31] I have also considered the two-part test set out by the Supreme Court of Canada on the question of whether an institution (the board, in this appeal) has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?¹³

¹¹ See, for example, Orders M-813, MO-1403, MO-1967, MO-2773, MO-2807, MO-2821, MO-2824, MO-2878.

¹² Examples of other factors considers include: whether the record was created by an officer or employee of the institution; what use the creator intended to make of the record; whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record, and whether the activity in question a "core," "central" or "basic" function of the institution.

¹³ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

[32] I find that there is insufficient evidence to accept that either part of this two-part test is met, but it is sufficient to discuss part two here.

[33] One of the IPC orders I sent to the appellant was Order MO-4229, in which I discussed Interim Order MO-3618-I (which had to do with town councillors' records about expanding a project in the town not being in the town's custody or control). Following the relevant reasoning in Interim MO-3618-I, in Order MO-4229, I found that although the emails being pursued in the appeal before me (between certain builders and town councilors) could be said to relate to the town's business broadly speaking, the emails would constitute the councillor's constituency or political records and the town could not reasonably be expected to obtain a copy of them upon request. As a result, I found that the second part of the test in *National Defence* was not met.

[34] In my view, that reasoning is applicable here, and I adopt it. Given the wording of the request, the records sought may be considered to relate to the board's business in a general sense, but I am not satisfied that the board could reasonably be expected to obtain a copy of such constituency or political records on request to the school board trustees. Since these are records relating to the trustees' constituency or political business, and trustees are not "part" of the city in any legal sense, I find that the board could not be expected to obtain a copy of these types of records, taking into account these factors:

- the city does not have physical possession of the records,
- the trustee, and not the city, owns the records,
- the trustee, and not the city, has the responsibility for the protection of the records,
- the city does not have the authority to destroy the records, and
- it is not customary for a trustee to provide these types of records to a board.

[35] As a result, the second part of the test in *National Defence* is not met. Since both parts of the test must be met for a finding of institutional control, I am satisfied that the board would not have control of responsive records, if they exist.

[36] Having considered the wording of the request, the appellant's representations, and the relevant jurisprudence, I find that if responsive records exist, they would not be in the custody or control of the board. Given my findings, there is no basis for me to consider the reasonableness of any search that the board may have conducted in response to the request, and I dismiss the appeal.

ORDER:

I uphold the board's decision and dismiss the appeal.

Original Signed By: _____

Marian Sami
Adjudicator

_____ April 17, 2023

APPENDIX

The requester submitted 13 identical requests to 13 board trustees under the *Act* for the following information:

1.1 The number of email addresses and/or phone/ text numbers (NOT actuals, ONLY metadata) that you have under your control for:

1.1.1 YRDSB parents and guardians that live in your wards or whose children attend a school there.

1.1.2 Community Groups and media, with names and contact info that operate exclusively or partially in your ward.

1.1.3 Individual "concerned citizens", and other stakeholders who may not be citizens, who may or may not live in your wards but may have an interest in public education in York Region and have not asked for their email address to be removed from your lists.

1.2.1 Copies, including dates of distribution, of each of the "newsletters and other materials" that you have emailed to the above in the current 2020 to 2021 school year.

1.2.2 Ditto in the previous school year, 2019 to 2020.

1.2.3 A target, estimate or plan for the numbers, types and frequencies of "newsletters and other materials" that you plan to send out to the above in the new school year, 2021 to 2022.

2.1 The alternate contact information, for example, Canada Post addresses, phone/text and fax numbers, Twitter addresses, Facebook ID's and any other social media way of connecting (email connections are covered above) that you hold for - again, metadata only:

2.1.1 YRDSB parents as per above.

2.1.2 Community Groups and media as per above.

2.1.3 Individual "concerned citizens", and other stakeholders who may not be citizens

2.2.1 Copies, including dates of distribution, of each of the "newsletters and other materials" that you have sent out as per above in the current school year.

2.2.2 Ditto in the previous school year, 2019 to 2020.

2.2.3 Any target, estimate or plan for your target for the 2021 to 2022 school year.

3. The schedule of each of your "...organized and informal meetings" (maybe known as Ward Town Halls, Forums or Council Meetings, or simply "meet for coffee") with your ward publics including note of the subject matter, agenda, location, date, time and approximate duration, login info and number of public attendees of each meeting during these time frames;

3.1 The current school year.

3.2 The previous school year, 2019 to 2020.

3.3 An outline of your plans for "organized and informal meetings" for 2021 to 2022.

4. An indication of your constituent inquiry subject matters with available numbers relating to "...numerous inquiries and are available and accessible to address concerns from the community with respect to Board policies and procedures" that you have fielded during these time frames;

4.1 The current school year.

4.2 The previous school year, 2019 to 2020.

5. The name and direct @YRDSB.CA email address of staff who assisted in the assembly and/or formatting of the above requested data.