

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4432

Appeal MA21-00663

Toronto District School Board

August 29, 2023

**Summary:** The sole issue in this appeal is whether the Toronto District School Board (the TDSB) conducted a reasonable search for records responsive to the appellant's request under the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the TDSB conducted 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, as amended, section 17.

**Orders Considered:** Order PO-4435

### OVERVIEW:

[1] The Toronto District School Board (TDSB) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

I would like to receive documentation/records that demonstrate how the TDSB discovered the following piece of information:

1. The Ministry of Education executed the document Addendum No. 1 to Google Apps for Education Agreement (the Addendum) on August 26, 2013.

2. The Ministry of Education executed document Addendum No. 1 to Google Apps for Education Agreement is applicable to the TDSB and is retroactive to August 26, 2013.

For this FOI, I would also like to obtain documentation that supports the TDSB public claim "that the Addendum came into force on August 26, 2013, the day the Ministry of Education executed the document"

[2] The TDSB issued a decision indicating that a search for records responsive to the request was completed and none were located. It also provided the requester the following explanations as to why no responsive records were located:

Part 1 of your request:

The Ontario Ministry of Education (the "Ministry") executed the document entitled Addendum No. 1 to the Google Apps for Education Agreement (the "Addendum") on August 26, 2013. The Ministry notified TDSB of the Ministry's signing of the Addendum via email. TDSB staff conducted multiples and extensive searches; however, no responsive records for this part of your request were located.

For part 2 of your request:

The Addendum that the Ministry executed on August 26, 2013 as set out above is applicable to TDSB. The Addendum came into force on August 26, 2013, the day the Addendum was executed by the Ministry.

The Addendum stipulates that it is incorporated by reference to the Google Apps for Education Agreement (the "Agreement"). TDSB has been advised by the Google legal team that section 7 of the Addendum states that the Security Standards in Attachment A to the Addendum are retroactive to the Effective Date of the Agreement.

[3] The requester (now the appellant) appealed the TDSB's decision to the Information and Privacy Commissioner of Ontario ("the IPC").

[4] During mediation, the appellant indicated that he believes the TDSB received an email from the Ministry of Education (the ministry) notifying it that Addendum No. 1 to Google Apps for Education Agreement (the addendum) was executed on August 26, 2013. The appellant also indicated he believes the TDSB must have documented evidence that the ministry has an executed document based on Privacy Complaint Report MC17-52, which the TDSB was a party to.

[5] Since no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process.

[6] The adjudicator originally assigned to this appeal conducted an inquiry in which she sought and received representations from the parties. The TDSB submitted representations, which were shared in accordance with the IPC's *Practice Direction 7*. The adjudicator then invited representations from the appellant, as well as the ministry as an affected party. The appellant and ministry submitted representations in response.

[7] The file was assigned to me to continue the adjudication of the appeal. I have reviewed the file, including all the parties' representations and supporting documents, and concluded that I do not need further representations from them before rendering a decision.

[8] In this order, I find that the TDSB conducted a reasonable search and dismiss the appeal.

## **DISCUSSION:**

[9] The sole issue to be determined is whether the TDSB conducted a reasonable search for responsive records.

[10] 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*.<sup>1</sup> If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[11] 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 records exist.<sup>2</sup>

[12] 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;<sup>3</sup> that is, records that are "reasonably related" to the request.<sup>4</sup>

[13] 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.<sup>5</sup> 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

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

<sup>2</sup> Order MO-2246.

<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

identify and locate all of the responsive records within its custody or control.<sup>6</sup>

[14] If the requester failed to respond to the institution's attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.<sup>7</sup>

### **Representations, analysis and findings**

[15] The TDSB submits that it conducted a reasonable search for records responsive to the appellant's request and that no responsive records exist. In addition, the TDSB submits that it is possible responsive records were destroyed, or that it never generated any.

[16] The TDSB explains that its search was conducted by the executive officer for Information Technology and Information Management Services ("the executive officer") and the Senior Manager of Client Relations in the Information Technology Services Department ("the senior manager"), serving in their positions for nine and six years respectively. It submits affidavits describing these individuals' searches.

[17] I have reviewed the TDSB's representations and affidavits, and find that it conducted a reasonable search for records responsive to the appellant's request.

[18] The TDSB submits that the executive officer and senior manager are qualified to conduct the search given their expertise in information management, and most knowledgeable with respect to the relevant records. I am satisfied that the individuals who conducted the searches are experienced employees knowledgeable in the subject matter of the request.

[19] In their affidavits, the executive officer and senior manager detail the searches of their own email inboxes and remote drives, as well as TDSB-hosted personal and shared network drives used by the relevant personnel in 2013. They also provide the keywords they used in their searches. Both affirm that no records responsive to the request were found. The TDSB submits that it contacted the ministry and Google in the course of its search, and did not receive responses. It further submits that given the subject of the request, the ministry and Google are more appropriate parties to canvass as they are the parties to the agreement at issue, and not the TDSB.

[20] The TDSB raises the possibility that responsive records were destroyed as eight years elapsed between 2013 and the request. It also submits that electronic records related to the request may not have been generated in the first place. It refers to a consultation with the ministry regarding the addendum that was conducted by "click-through acceptance" form. It submits that email correspondence relating to this was likely lost as a result of employee migration and that the "click-through acceptance"

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<sup>6</sup> Order MO-2185.

<sup>7</sup> Order MO-2213.

would only generate a record with the ministry.

[21] Based on my review of the TDSB's representations and search affidavits, I find that it provided relevant details about how it conducted its searches and the result of its searches, as well as possible explanations as to why no records were found. Accordingly, I am satisfied that reasonable efforts were made to locate records responsive to the request.

[22] As noted above, the adjudicator originally assigned to this appeal invited the ministry to submit representations. The appellant made a related request to the ministry, which resulted in Appeal PA21-00516 and Order PO-4435. In its representations, the ministry takes the position that it did not execute the addendum in question with Google, as it does in Appeal PA21-00516. It submits that it is unaware of any communication notifying the TDSB that it signed the addendum. The ministry notes that while the TDSB states that the ministry notified it of the ministry's signing the addendum via email, the TDSB has not provided a copy of this email, noting it was likely lost due to employee migration.

[23] The ministry relies on portions of their representations and the affidavit of a senior policy advisor (the advisor), filed in Appeal PA21-00516. In his affidavit, the advisor explains that the ministry and Google, along with other stakeholders, formed a working group to develop a sample addendum for school boards to consider incorporating into their own agreements with Google, to address requirements they needed to meet under the *Act*. The advisor notes that this sample addendum is the addendum referred to in the request, and was dated August 26, 2013. He explains that the ministry shared the addendum with the school boards through a memo. The ministry submitted both documents in support of their representations, and shared them with the appellant in the context of Appeal PA21-00516.

[24] The advisor affirms that he confirmed with an individual from the ministry's Legal Services Branch, who was a member of the working group, that the ministry was never the intended signatory of the addendum. He explains that school boards are legal entities separate from the ministry, and that the ministry was not a party to the agreements between Google and any of the school boards.

[25] For his part, the appellant relies on Privacy Complaint Report MC17-52 ("the privacy report"), issued by the IPC. This report was based on a privacy complaint from the parent of a student, objecting to the TDSB's use of Google's G Suite for Education services and alleging that this use contravened the *Act*. The appellant cites paragraph 7 of the report which reads:

[7] By way of background, the board has an agreement with Google to provide online educational services that are used by its students and teachers. This service is called G Suite for Education Services (G Suite). The board entered into a Google Apps for Education Agreement (the

Agreement) in August 2011. The Ministry of Education and Google later executed Addendum No. 1 to Google Apps for Education Agreement (the Addendum). The Addendum stipulates that it is incorporated by reference to the Agreement. The board states that the Addendum came into force on August 26, 2013, the day the Ministry of Education executed the document.

[26] The appellant's position, as I understand it, is that the excerpt from the privacy report forms a reasonable basis for concluding that records responsive to his request exist. Based on the privacy report and a draft circulated earlier, the appellant concludes that the TDSB provided the investigator who authored the privacy report with records responsive to his request – that is, evidence confirming that the ministry executed the addendum.

[27] Among his other arguments, the appellant raises the TDSB's reference in its representations to its consultation with the ministry via "click-through acceptance" as evidence that it has records relating to the addendum. He also notes the mention in the TDSB's decision letter that "[t]he ministry notified [the] TDSB of the ministry's signing of the addendum via email."

[28] The request in this appeal was for records demonstrating how the TDSB came to know about an addendum signed by the ministry and Google on August 26, 2013. In Appeal PA21-00516, the request was for the addendum itself and other related records. Though the requests are for somewhat different records, both are based on the existence of an addendum executed by the ministry and Google on a given date.

[29] As noted above, the ministry's position is that the addendum was a template provided to school boards for their own contracting purposes with Google, and was not meant for the ministry itself. The memo and addendum both support this position. The memo states:

"the Ministry of Education has created contract addendums to address these privacy obligations [under *MFIPPA*, which are] to be used along with the standard agreements that each board signs with...Google..."

[30] Meanwhile, the addendum sets out that it is incorporated by reference into the Google Apps for Education Agreement, which is entered into by and between Google and the customer identified in the order form. In the addendum, it is also explained that a "customer" is an "educational institution":

Customer represents that it is an Educational Institution. "Educational Institution" means any *publicly funded elementary or secondary school or school board or educational program operated by school boards* throughout the Province of Ontario, and further includes First Nation and native schools in Ontario, operating under the Ontario educational

curriculum as such curriculum may exist from time to time, publicly funded Faculties of Education and Ontario teacher training institutes...

[my emphasis]

[31] I can understand why the appellant believes records responsive to his request may exist. However, based on the ministry's representations, the addendum and the memo, the TDSB's search, and the ministry's search in Appeal PA21-00516, I am not persuaded that another search would yield the records sought by the appellant.

[32] The appellant relies on paragraph 7 of Privacy Complaint Report MC17-52 (reproduced above) to support his position that the TDSB is in possession of records confirming the existence of an addendum between the ministry and Google. I have reviewed this report and note that the parties were a parent of a TDSB student, the complainant, and the TDSB, the respondent. The ministry was not involved, nor was it asked to make representations, about the addendum in question or otherwise. Given the context provided in ministry's representations, the addendum and the memo, I am not persuaded that the excerpt from the report or the appellant's other arguments demonstrate a reasonable basis for concluding that responsive records exist.

[33] In addition, the appellant makes arguments with regard to the meaning and interpretation of the word "execute." However, these do not relate to the issue before me, which is whether the TDSB conducted a reasonable search.

[34] In light of my findings above, I conclude that the TDSB has met its search obligations, as required under section 17 of the *Act* and am not persuaded that further searches would yield responsive records.

**ORDER:**

Original Signed By: \_\_\_\_\_  
Hannah Wizman-Cartier  
Adjudicator

August 29, 2023 \_\_\_\_\_