Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-500

Appeal M_9400672

Toronto Board of Education

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Toronto Board of Education (the Board) received a request for all records relating to the appellant held by a named law firm which acts for the Board (the Board's solicitors).

For ease of reference and to better understand the nature of the issues which arise in this appeal, it may be helpful to include some background information.

On September 7, 1994, the Board received the request referred to above. On September 29, 1994, the Board responded with a letter extending the time for issuing its decision letter to January 7, 1994. The requester appealed the decision of the Board to extend the statutory 30_day time limit. The Commissioner's office opened Appeal M_9400568 to deal with the time extension appeal.

During the mediation stage of Appeal M-9400568, the appellant agreed to narrow the scope of his request to include only specific records held by the Board's solicitors. In return, the Board agreed to issue a final decision on access in that matter on or before November 1, 1994. On that basis, the file was closed.

On November 1, 1994, the Board issued its decision to the appellant granting access to a number of records. The appellant appealed the Board's decision on the basis that more records should exist. Thus, the Commissioner's office opened Appeal M-9400672, which is the present appeal and the subject of this order.

On January 13, 1995, a Notice of Inquiry was provided to the appellant and the Board. The sole issue raised in this notice was whether the Board had conducted a reasonable search for the records as required by section 17 of the Act.

By letter dated January 23, 1995, the Board notified the Commissioner's office that it does, in fact, have additional records responsive to the appellant's request. The Board indicated that these records have either previously been disclosed to the appellant or are identified in one of the indices created for other appeals and for which exemptions have been claimed. The Board has taken the position that the appellant is not entitled to know which records identified in those appeals are responsive to the request in this appeal.

Accordingly, on February 1, 1995 a Supplementary Notice of Inquiry was forwarded to the appellant and the Board. In this notice, representations were sought on the additional issue of whether the Board's decision letter complies with the requirements of section 22 of the Act.

Representations were received from both the appellant and the Board.

DISCUSSION:

REASONABLENESS OF SEARCH

I will first determine whether the Board has conducted a reasonable search for the records as required by section 17 of the Act.

In addressing this issue, the Board's representations raise a number of additional issues. I would note that these same issues were previously raised by the Board in an earlier appeal involving the same appellant and addressed in Order M-315.

The Board submits that these issues were not properly interpreted in Order M-315.

ISSUE: PROPER STANDARD TO APPLY IN DETERMINING WHETHER OR NOT ADDITIONAL RECORDS EXIST

The Board submits that the only permissible determination concerning additional records is whether they exist. The Board takes the position that the statute does not allow a determination of whether the Board's search for additional records was reasonable.

In Order M-315, Inquiry Officer John Higgins found that the proper standard to apply in determining whether or not additional records exist is whether sufficient evidence has been provided by the institution to show that it has made a **reasonable** effort to identify and locate records responsive to the request. The Act does not require an institution to prove with absolute certainty that the requested records do not exist.

ISSUE: BURDEN OF PROOF

The Board submits that where the Board has provided evidence of the search, the burden of proof shifts to the appellant who then bears the onus of establishing that the search was unreasonable.

In Order M-315, Inquiry Officer Higgins commented that the general law is that a person who asserts a position must prove it. Therefore, if an institution asserts that no further records exist, it bears the burden of proving its position.

In addition, in my view, sections 36(1) and 37 of the Act place some obligation on the requester to provide as much direction to the Board as possible as to where the records that he is requesting may be located and/or to describe the records sought. In my view, the appellant has met this obligation through identifying the location of the records requested and by narrowing his request to certain records.

ISSUE: POWER TO ORDER ADDITIONAL SEARCHES OR PRODUCTION OF FURTHER AFFIDAVIT EVIDENCE

The Board submits that the Commissioner does not have jurisdiction to order an institution to conduct a further search or to produce further affidavit evidence.

The Commissioner's general order-making powers derive from section 43 of the Act. In Order M-315, Inquiry Officer Higgins concluded that where there is a possibility that additional records exist, the wording of section 43 is sufficiently broad to permit the Commissioner's office to order an institution to conduct additional searches and/or to provide additional affidavit evidence.

As previously noted, the Board has indicated that it does not agree with certain analyses and interpretations in Order M-315. If the Board does not agree with a decision of the Commissioner, appropriate legal mechanisms exist to challenge such a determination.

I have considered the above issues and carefully reviewed the Board's representations on the above issues. I agree with Inquiry Officer Higgins' reasoning on these issues in Order M-315 and adopt it for the purposes of this appeal. I find that the conclusions reached in Order M-315 apply equally to the circumstances of this appeal.

REASONABLENESS OF SEARCH

The appellant claims that additional responsive records exist.

As part of its representations, the Board has provided affidavits sworn by its Freedom of Information and Privacy Co-ordinator (the Co-ordinator) and the solicitor named in the request (the solicitor). The Co-ordinator confirms that she informed the solicitor of the nature of the request and asked him to co-ordinate a search for responsive records.

In his affidavit, the solicitor states that as a partner, he is experienced and knowledgeable about the law firm's system of file maintenance. He states that he personally supervised the search for records and reviewed all the files which might contain information responsive to the request, i.e. that were in the control of the Board and contained the personal information of the appellant. The solicitor sets out the criteria that he used to determine which records were within the control of the Board.

The solicitor states that some of the responsive records were forwarded to the Co-ordinator and were subsequently disclosed to the appellant. The solicitor states also that the remaining records are included in the 65-page index of records appended to his affidavit as "Exhibit B". I note that this index lists the records responsive for Appeal M-9200452 which was the subject of Order M-315. The solicitor, however, has not identified, on this index, the specific records which he found to be responsive to this request during the course of his search.
Therefore, based on the evidence before me, I am satisfied that a reasonable search for records responsive to the request was conducted by the Board.

However, I am not satisfied that the results of the search i.e. the identification of records found to be responsive to the request as a result of this search, was adequately communicated to the appellant and the Commissioner's office. I will address this issue more fully below.

ADEQUACY OF THE BOARD'S DECISION LETTER

The request was for certain records held by the Board's solicitors. The Board identified the responsive records and granted full access to some of the records. With respect to the remaining records, the Board's decision letter stated: "Apart from the records referred to in this and all previous decision letters, there exist no additional records that contain your personal information in the custody or control of the Board."

It is clear from the chronology of events described above, that this appeal results from a request separate and apart from any earlier requests submitted by the appellant to the Board. This is evidenced by the fact that when the Board received the appellant's request in September 1994, it responded by issuing a time extension. The Board later issued a decision letter in which it indicated that the appellant may ask the Commissioner's office to review that decision.

The Board submits that the records are identified in one index which it has maintained since the first request received from the appellant in November 1992, similar, in my view, to a running log. The Board's position is that it should not have to provide the appellant with another index of records for the purpose of identifying only those records that are responsive to his request in this appeal.

The Board did provide the Commissioner's office with a copy of the index (Exhibit "B" to the solicitor's affidavit) which purportedly includes the records responsive to this request. However, the Board failed to specify which records within this index are responsive to the appellant's request, despite being asked to do so in the Notice of Inquiry. No description of the responsive records has been provided to me.

There is no evidence before me that the Board has provided this particular index to the appellant. Further, I fail to see the value of this index to the appellant as the records responsive to his request have not been identified.

In effect, the Board is denying the appellant access to the remaining records which are responsive to his request in this appeal.

When an institution denies access to a record, section 22(1) of the Act prescribes that the institution must issue a notice of refusal to the requester. The contents of this notice (which are conveyed in a decision letter) are more fully described in section 22(1)(b) which reads as follows:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

A number of previous orders issued by the Commissioner's office have commented on the degree of particularity which should be contained in a decision letter. Although the orders indicate that there are several ways in which an institution can comply with its obligations under section 22(1)(b) of the Act, the key requirement is that the requester must be put in a position to make a reasonably informed decision on whether to seek a review of the head's decision.

In this case, the Board failed to provide any description whatsoever of the records which are responsive to the appellant's request. The result is that the requester has effectively been precluded from making a reasonably informed decision on whether to seek a review of the Board's decision.

The Board argues that identifying records located at the Board's solicitors would reveal to the appellant the fact that a law firm has been retained by the Board to provide advice or perform other work relating to the records. The Board submits that this would be a breach of solicitor-client privilege. The Board refers to a case of the Supreme Court of Ontario, Madge v. Thunder Bay, wherein it was held that the fact of the delivery of documents from client to solicitor represented confidential communication and was privileged.

I do not agree that this case is pertinent to the facts of the appeal before me. The mere possession of documents by a law firm does not automatically make them subject to solicitor-client privilege. Moreover, the Board has not claimed this exemption in its decision letter and the records for which the Board is now claiming solicitor-client privilege in this appeal have not been identified.

As I have noted above, the purpose of an index is to provide a requester with enough information to determine whether to seek a review of the Board's decision, without disclosing information for which an exemption has been claimed. This the Board is unwilling to do in this appeal.

Based on the content of its representations, the Board appears to be asserting a right (which would be analogous to that contained in sections 8(3) and 14(5) of the Act) to refuse to confirm or deny the existence of the records in question.

I do not accept the Board's argument. First, in its decision letter, the Board did not refuse to confirm or deny the existence of records responsive to the request. Rather, it simply chose not to identify which records were responsive to the appellant's request. Secondly, section 22(2), which refers to the power to refuse to confirm or deny the existence of records, is only available to an institution in certain defined circumstances where either section 14(3) or 21(5) of the Act is

used as the basis for withholding a record (Order P-553). Neither of these exemptions have been claimed in the present appeal.

For the reasons provided above, I am unable to accept the argument which the Board has advanced.

Following a review of the representations and the Board's decision letter, my conclusion is that the Board has failed to comply with the requirements of section 22(1)(b) of the Act with respect to the appellant's request. Accordingly, I will order the Board to issue to the appellant a decision letter in the form contemplated by sections 19, 22 and 23 of the Act.

In June 1992, the Commissioner's office published an issue of "IPC Practices" which outlines the requirements for a proper decision letter denying access to records, including a detailed index of records. This document was intended to assist government organizations to prepare decision letters which comply with the requirements of the Act. I would encourage the Board to refer to this document for future decisions made under the Act. The Board may choose to use the same index referred to above and identify on it those specific records which are responsive to this request.

ORDER:

1. I uphold the Board's decision with respect to the reasonableness of its search.

2. I order the Board to provide a decision letter to the appellant regarding the records requested in his September 2, 1994 letter, in the form contemplated by sections 19, 22 and 23 of the Act, within fifteen (15) days after the date of this order, without recourse to a time extension. This decision letter should contain a general description of the records responsive to the request and not previously disclosed to him in this appeal and which satisfies the minimum disclosure requirements contemplated under section 22(1)(b) of the Act.

3. I order that a copy of the decision letter and index referred to in Provision 2 should be forwarded, within twenty (20) days of the date of this order, to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: March 27, 1995
Mumtaz Jiwan
Inquiry Officer