CITATION: Teper v. Information and Privacy Commissioner of Ontario, 2025 ONSC 1717
DIVISIONAL COURT FILE NO.: DC-23-00000596-00JR
DATE: 20250320

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Newton RSJ, Myers, and Shore JJ.

BETWEEN:	)	
	)	
Robert Michael Teper	)	Self-represented Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
Information and Privacy Commissioner of Ontario and Toronto District School Board	)	*Frank Cesario and Victoria McCorkindale*, for the Respondent Toronto District School Board
	)	
Respondents	)	
	)	*James Schneider* for the Respondent Information and Privacy Commissioner of Ontario
	)	
	)	
	)	**HEARD:** October 8, 2024

REASONS FOR DECISION

[1] This is a case about obtaining information under the *Municipal Freedom of Information and Protection Privacy Act*, RSO 1990, c.M.56 ("MFIPPA" or the "Act").

[2] A complaint was filed with the Toronto District School Board ("TDSB" or "Board") with respect to one if its Trustees allegedly violating the TDSB's Code of Conduct (the "Code"). The complaint was sent to the Office of the Integrity Commissioner to investigate. The Integrity Commissioner (the "IC") retained an independent investigator to assist.

[3] Robert Teper (the "Applicant"), an independent individual, filed a request under MFIPPA for records and correspondence regarding the IC's retention of the independent investigator.

[4] The Applicant's request was denied. On January 3, 2022, the Board released their decision stating that any records requested, if they exist, would be in the custody or control of the IC, not the Board.

[5] The Applicant appealed the Board's decision to the Information and Privacy Commissioner of Ontario (the "IPC"). The IPC dismissed the appeal in a decision dated October 2, 2023 (the "Appeal Decision" or "Order No. MO-4777"). The IPC found that the records requested were not in the TDSB's care or control and that the TDSB conducted a reasonable search for any responsive records.

[6] The Applicant seeks judicial review of the Appeal Decision.

[7] For the reasons below, I find the decision to be reasonable. The application is dismissed, with costs.

Factual Background:

[8] In June 2021, the IC commenced an inquiry into two complaints received about a TDSB Trustee, alleging the Trustee had violated the Code. One of the complaints included an allegation of discrimination and harassment.

[9] Pursuant to s. 6.4 of the *Workplace Harassment Prevention and Human Rights Policy* ("PR 515"), if there is a complaint of harassment or discrimination against a Trustee (as opposed to a similar complaint against an employee), the complaint is not investigated by the Human Rights Office (the "HRO"), an office within the TDSB, but is referred to the Office of the Integrity Commissioner and addressed under the Code's policies and procedures.

[10] Section 6.10(b) of PR 515 provides that the IC is to consult with the HRO and then determine the appropriate next step, "including referral of the complaint to an independent investigator".

[11] While the IC looked into the other complaint regarding the alleged Code violation, the IC retained an investigator, an alleged expert in human rights, harassment and discrimination, to conduct a threshold assessment in order to determine if, on the facts of the complaint, the allegations met the definition of harassment or discrimination. When the investigator concluded that there was a *prima facie* case that the allegations met the definition of harassment or discrimination, the IC retained the same investigator to conduct an investigation.

[12] On completion of the investigation, the investigator provided the IC with a written summary. The IC relied on the investigator's report and analysis, along with the IC's own notes from the broader investigation, to determine whether the Trustee's actions amounted to discriminatory and/or harassment.

[13] The IC specifically stated in her report that she relied on the investigator's conclusions. The report contains several quotes and summaries of the investigator's report.

[14] Once the IC's report was made public, members of the public and public interest groups raised concerns that the investigator had a conflict of interest or was biased because of comments that the investigator had previously made on social media. The Applicant is one of the concerned members of the public.

[15] On December 13, 2021, the Applicant sought disclosure under the MFIPPA of:

(a) the investigator's report;

(b) the retainer agreement engaging the investigator;

(c) all social media statements of the investigator in the possession of the TDSB at the time the investigator was retained; and

(d) all correspondence and records of the TDSB regarding the appropriateness of selecting the investigator, particularly in view of various social media statements made by the investigator.

[16] Section 4(1) of the MFIPPA creates a presumptive right of access to records provided they are "in the custody or control" of an institution. There is no dispute that the TDSB is considered an institution under the MFIPPA.

[17] However, the Board denied the request. In a decision letter dated January 3, 2022, the TDSB denied that any of the requested records were in their custody or under their control. The Applicant appealed this decision to the IPC. The IPC subsequently dismissed the appeal.

[18] In addition to the January 3, 2022, decision appeal, the Applicant had a second appeal proceeding through the IPC. He requested that the appeals be merged and heard together. The IPC denied the request.

[19] The Applicant is seeking judicial review of the Appeal Decision as well as the decision denying his request to merge the two appeals.

Issues raised in the review:

[20] The Applicant raises the following issues in the application for judicial review:

(a) Did the IPC err in their interpretation and application of s. 4(1) of MFIPPA, whether records were under the "custody or control of" the TDSB, and did the IPC err in finding that the TDSB did not have custody or control of the records requested?

(b) Did the IPC err in finding that the Board conducted a reasonable search for the records, as required under s. 17 of the Act?

(c) Was the Applicant denied procedural fairness when the IPC declined to merge the two appeals?

Standard of Review:

[21] The parties disagree on the applicable standard of review.

[22] The Applicant submits that the correctness standard should apply in the interpretation of the "custody or control" provisions under the MFIPPA. The Applicant submits that this case addresses a general question of law of central importance to the legal system and therefore, the correctness standard should apply.

[23] The IPC submits that the standard of review is reasonableness. The interpretation of s. 4(1) of the MFIPPA does not engage an exception to the presumption of deference to the IPC's interpretation of its home statutes.

[24] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Supreme Court of Canada confirmed that the presumptive standard of review on the merits of an administrative or tribunal decision is reasonableness.

[25] The issue of the interpretation and application of whether records are "in the custody or under the control of" an institution is a question of statutory interpretation. The court is to evaluate matters of statutory interpretation on a reasonableness standard: *Vavilov*, at para. 115.

[26] For an exception of the presumptive reasonableness standard of review to apply, the issue must be a general question of law of central importance to the legal system as a whole. Questions of law of "central importance" usually involve determination of issues necessary for the proper functioning of the justice system, and therefore, there is a need for uniform and consistent answers. These issues have included solicitor-client privilege, *res judicata*, abuse of process, and parliamentary privilege: *Vavilov*, at paras. 59-60.

[27] The question raised in this case may be an important legal issue, but the mere fact that there is a question on an important legal issue or of wider public concern is insufficient for a question to be a question of law of central importance. The Applicant has not demonstrated how the decision in this case would impact the administration of justice as a whole. The question in this case is about the right to access information found in the MFIPPA, in a specific, fact-driven context: see *YUDC v. Information and Privacy Commissioner*, 2022 ONSC 1755.

[28] In his factum, the Applicant relies heavily on the case of *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, 141 O.R. (3d) 481, leave to appeal refused [2019] S.C.C.A. No. 38285, which held that the correctness standard applied to review a decision regarding the interpretation of the term "custody or control" in freedom of information legislation, in the context of information held in the files of the Children's Lawyer. In that case, the father requested all notes and information from the Children's Lawyer, by making a request to the Ministry of the Attorney General ("MAG"). The adjudicator and this Court found that the documents were in MAG's custody and control. The Court of Appeal ultimately found that, given the context in which the

records were created, and the purpose they serve, the records were not in MAG's care and control and ought not be produced.

[29] The issue in *Ontario (Children's Lawyer)* was specifically about solicitor-client privilege and the role of the Children's Lawyer. The Court of Appeal found that the unique role of the Children's Lawyer and the issue of solicitor-client privilege are fundamental to the proper functioning of the legal system, and thus, reviewable on a standard of correctness.

[30] Those unique facts do not exist in the case before this Court. Further, *Ontario (Children's Lawyer)* was decided before the Supreme Court of Canada released *Vavilov*, which clarified the standard of review.

[31] I find that there is no basis for departing from the presumptive standard of review of reasonableness in this case.

[32] A reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision-makers. A reasonable decision is one that is based on internally coherent reasoning and is justified considering the legal and factual constraints that bear on the decision: *Vavilov*, at paras. 102 and 105. There can be a range of reasonable outcomes, and the court must accept any decision that falls within that range.

[33] There is no standard of review for procedural fairness, a court must decide whether the requisite level of procedural fairness has been met by applying the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Was the interpretation and application of s. 4(1) of the Act reasonable?

[34] The Applicant submits that the IPC was wrong in its interpretation and application of the law to the facts in this case. The Board submits that the IPC did not err, and that the records, if they exist, are in the custody or control of the IC, not the Board.

The Law:

[35] The parties agree that the IPC correctly identified the relevant tests in its decision:

> *[10] Section 4(1) establishes the right of access under the Act. That section reads, 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... [emphasis added].*
>
> *[11] This section makes it clear that the Act applies only to records that are in the custody or under the control of an institution. A record will be subject to the Act if it is in the custody or under the control of an institution; it need not be both.*

> *[12] A finding that a record is in an institution's custody or control does not necessarily mean that a requester will be provided access to it. Such a record may be excluded from the application of the Act under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption at sections 6-15.*
>
> *[13] The courts and the IPC have applied a broad and liberal approach to the custody or control question. The IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.*

[36] There is no dispute between the parties that the TDSB is an institution under the Act. The question is whether the documents are in the TDSB's custody or control.

[37] The Supreme Court of Canada set out a two-part test for determining whether records are under the control of an institution: *Canada (Information Commissioner) v. Canada (Minister of Nation Defence),* 2011 SCC 25, [2011] S.C.R. 306, at paras. 49-60:

(a) Do the contents of the documents relate to a department matter; and

(b) Could the institution reasonably expect to obtain a copy of the documents on request.

[38] There was no dispute between the parties that the documents relate to a department matter, but the question is whether the Board could reasonably be expected to obtain a copy of the documents on request.

[39] In *Ontario (Children's Lawyer)*, the Court of Appeal set out various factors to consider when determining whether an institution has "control" of the records and could reasonably be expected to obtain a copy of the records on request.

[40] In considering the second part of the test, on whether the Board could reasonably expect to obtain a copy of the records, the IPC weighed the various factors relevant to the "control" and "custody" issues including those set out in *Ontario (Children's Lawyer)*. The IPC concluded that it was not satisfied that the Board had control over or could expect to obtain the records sought by the Applicant.

[41] The IPC correctly set out the test it had to meet, and proceeded to consider the requisite factors to arrive at its decision that the documents were not in the care and control of the TDSB. The IPC provided detailed and thoughtful consideration of the evidence, the submissions, and the law. The award is entitled to deference.

[42] Under the *Education Act*, R.S.O. 1990, c. E.2, the Board is responsible for investigating an allegation that a trustee has behaved in a way contrary to the Code. The Applicant submits that the IPC erred because the TDSB cannot abdicate their responsibility to investigate the allegation of trustee misconduct and therefore, cannot transfer custody and control of the related records. The Applicant relies on *Ontario Criminal Code Review Board v. Hale* (1999), 47 O.R. (3d) 201 (C.A.), in which the Court of Appeal held that the Board could

not avoid disclosure of back up tapes, by entering into arrangements with third parties to hold the records. There, the Board replaced their own reporters with independent court reporters to do the very same function previously done by their own reporters, and then suggested the contractors could not be compelled to provide the records. The Court found that the Board would have a right to possession of the tapes. The case before this Court is very different and the IPC addressed this issue.

[43] The Applicant also submits that had the Board requested a copy of the investigator's report, they could have reasonably expected a copy of the report, given that the IC quoted and relied on the report.

[44] The IPC agreed with the Applicant that the Board is responsible for investigating an allegation that a trustee has behaved in a way contrary to the Code. In their reasons, the IPC discussed that the Board set up a process for a complaint of this nature to go through the IC's office. The process ensures that the IC conducts their investigations in an impartial and independent manner, to avoid the IC being subjected to "undue influence" in its investigations. A finding that the IC is merely an officer of the board (or an employee, as in *Hale*) would erode the important values of the IC's independence and impartiality from the Board in the context of the IC's investigatory and reporting functions.

[45] The IPC addressed this issue as follows:

> [93] The content of the records relates generally to the board's mandate and functions. However, in my view, the content of the records is more accurately described as relating to the mandate and functions of the IC specifically. While it is true that the board itself has the statutory duty to ensure compliance with the *Education Act*, it has set up the IC and an independent body to carry out the function of the investigating and reporting on allegations of misconduct. Ultimately, the board carried out its own statutory duties by receiving the IC's reports and recommendations and taking whatever actions the board deems appropriate.
>
> [94] As a result, this factor can be considered to weigh in favour of a finding that the board controls the records. However, because of the distinction between the board's and the IC's roles, I find that it carries a low weight.

[46] From reviewing the reasons, the IPC was alive to the various issues in determining whether the Board had custody or control of the requested records and addressed each of the issues and factors in its decision. The IPC's interpretation of the MFIPPA was reasonable and justified in light of the facts before it. Absent exceptional circumstances, a reviewing court will not interfere with factual findings.

[47] Based on reviewing the IPC's reasons, and the record before the court, I find the decisions to be reasonable. The IPC correctly set out the law under the MFIPPA and applied the law to the facts. The IPC also assessed the relevant factors to arrive at their decisions.

Reasonable Search:

[48] The IPC considered whether the Board conducted a reasonable search for the last two records requested by the Applicant: the investigator's social media statements in the TDSB's possession and all correspondence and records of the TDSB regarding the appropriateness of selecting the investigator.

[49] The IPC was satisfied that the Board conducted a reasonable search for any records that might be in their care or control and that they did not have any. The IPC correctly set out the law in this area, considered the evidence before them and reached a reasonable conclusion.

[50] I find the decision to be reasonable.

Procedural Fairness:

[51] The Applicant had two appeals proceeding before the IPC, one was MA22-00021, resulting in Order MO-4447, and the other appeal was MA22-00279. MA22-00279 dealt with a separate request for disclosure from the TDSB under MFIPPA. The Applicant requested that the IPC merge both appeals. An adjudicator considered the request and declined to merge the two appeals, noting that the records were different and an affected third party also filed an appeal of the Board's second decision, making joining the two appeals impractical. Initially, both appeals were assigned to the same adjudicator. However, a different adjudicator ultimately determined appeal no. MA22-00021.

[52] The Applicant submits that the IPC's June 3, 2022, decision not to merge his two appeals denied him procedural fairness. He submits that there were issues of credibility raised in appeal no. MA22-00279 that were relevant to appeal no. MA22-00021.

[53] The Applicant submits that he was not advised of the reassignment of the appeal or given another opportunity to request that the appeals be heard together. The Applicant alleges this resulted in the adjudicator in Order MO-4447 failing to consider representations in the other appeal on the issue of agency and evidence relating to the Board's assignment of email accounts to the IC.

[54] Under s. 18 of the IPC's *Code of Procedure*, orders can be reconsidered in limited circumstances. The Applicant sought reconsideration of the order. The IPC held that the Applicant failed to establish a denial of procedural fairness and denied the reconsideration request.

[55] The Applicant did not raise the issue of procedural fairness in the relief requested in the Application for Judicial Review, although the grounds were pled.

[56] In any event, there was nothing procedurally unfair in the IPC's decision not to join the two access for information appeals. Tribunals are afforded considerable latitude to choose their own procedures: *Baker*, at para 27. The legislature empowered the IPC to determine the

course and conduct of its own proceedings, including the discretion on whether to merge appeals.

[57] For the reasons above, I do not find that the process was procedurally unfair.

Costs:

[58] The Applicant and the IPC are not seeking costs and request that no costs be awarded against them.

[59] The TDSB is seeking costs of $9,062.39.

[60] Costs in the sum of $7,500 are reasonable in the circumstances.

Order:

[61] The application is dismissed, with costs of $7,500 inclusive, payable by the Applicant to the Respondent TDSB.

_____
Shore J.

I agree _____
Myers J.

I agree _____
Newton RSJ.

Released: March 20, 2025

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REASONS FOR DECISION

Released: March 20, 2025