



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

# ORDER P-1328

Appeal P\_9600326

Ministry of Finance



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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The requester is a corporation which is audited by the Ministry of Finance (the Ministry). The requester made a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to the calculation and application of retail sales tax assessed against telecommunication services used by it. The requester also sought access to records of meetings, consultations and communications in connection with the application of the tax.

The Ministry identified seven pages responsive to the request and disclosed them to the requester. The Ministry indicated that as the audit was ongoing, records related to the audit were "not yet available". The requester sought clarification and was advised by the Ministry that "not yet available" actually meant that no records exist. The requester appealed the Ministry's decision that no further records exist.

This office provided a Notice of Inquiry to the requester, now the appellant, and the Ministry inviting the parties to comment on the reasonableness of the Ministry's search for responsive records. Representations were received from both parties. In its representations, the appellant asked to be provided with a copy of the affidavit which forms part of the Ministry's representations. I will address this issue as a preliminary matter.

## **PRELIMINARY MATTER:**

The Ministry has included an affidavit as part of its representations to this office.

In its representations, the appellant asks that the Ministry provide affidavit evidence and that the appellant be allowed access to it.

Section 52 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes the power to make a binding order, the ability to require production of any record in the custody or under the control of an institution, the right to enter the premises of an institution and the right to conduct an inquiry in private.

Section 52(13) of the Act reads as follows:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order 164, former Commissioner Sidney B. Linden discussed the application of section 52 and in particular, section 52(13), and he commented:

...the words [in section 52(13)] “no person is entitled” to see and comment upon another person’s representation mean that no person has the right to do so. In my view, the word “entitled”, while not providing a right to access representations of another party, does not prohibit me from ordering such an exchange in a proper case... Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer’s Report [now referred to as the Notice of Inquiry] allow the parties a considerable degree of disclosure.

I agree with former Commissioner Linden that the Commissioner or his delegate has the power to order the exchange of representations in the appropriate case. I also agree that the procedures established by this office, such as the Notice of Inquiry, do allow the parties “a considerable degree of disclosure”.

It is also the practice of the Commissioner or his delegate during the course of an inquiry to review the representations of the parties to any appeal and to consider whether the appellant should be given access to all or part of the representations, whether there is a need for clarification or whether a party should be given an opportunity to respond to the representations.

In my view, after having reviewed the representations of the parties, including the affidavit provided by the Ministry, I find that this is not the appropriate case to require the exchange of representations. I find also that there is no need for clarification and the parties, including the appellant have been given an adequate degree of disclosure to know and address the issues. Therefore, I conclude that the appellant has no right of access to the representations of the Ministry in the circumstances of this appeal.

## **DISCUSSION:**

### **REASONABLENESS OF SEARCH**

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution’s response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant submits that since the Ministry conducted an audit in connection with the application of retail sales tax, and since an interim tax amount was assessed, it must, therefore, already have determined the method or basis for calculation of the tax, if payable. On this basis, the appellant submits that additional records related to the calculation of the retail sales tax must exist.

As I have indicated previously, the Ministry has provided an affidavit sworn by an audit manager in the retail sales branch of the Ministry (the audit manager). In the affidavit, the audit manager states that no records exist for the following reasons:

- (1) the audit has not been completed and therefore, no decisions have been made or recorded, and
- (2) an interim or preliminary assessment which was not based on any specific formula was made and this amount has since been reversed, and
- (3) the appellant has not yet provided the Ministry with costs relating to telecommunication services and therefore, no assessment has been made.

As I have indicated previously, the Ministry does not have to prove with absolute certainty that additional records do not exist but it does have to provide me with sufficient evidence to show that it has made a reasonable effort to locate the records requested.

Having considered the representations of the parties, the affidavit of the audit manager and the circumstances in this appeal, I find that the explanation provided by the Ministry is reasonable and sufficient evidence. Accordingly, this appeal is dismissed.

**ORDER:**

I find that the search for records was reasonable and I dismiss the appeal.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_  
January 9, 1997