



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

FINAL ORDER P-1608

Appeal P_9700367

Ministry of the Solicitor General and Correctional Services



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

BACKGROUND AND NATURE OF THE APPEAL:

This is my final order in respect of Appeal P-9700367.

In Interim Order P-1585, I considered the reasonableness of the search conducted by the Ministry of the Solicitor General and Correctional Services (the Ministry) for responsive records described by the appellant as follows:

All records by [a named employee], including handwritten notes, facsimiles, computer files and e-mail communications sent and received from Sept 1/95 to Sept 15/95 relating to the Emergency Planning for Aboriginal Issues Interministerial Committee and/or Ipperwash Provincial Park.

Based on representations provided by the Ministry and the appellant, I found that the search for responsive records was not reasonable. As a result, I included the following provisions in my order:

1. I order the Ministry to provide a decision letter to the appellant with respect to access to all responsive records located during the course of this appeal, in accordance with sections 26 and 29 of the Act by **July 3, 1998**. A copy of this letter should be forwarded to my attention.
2. I order the Ministry to undertake additional searches for responsive records, and to provide me with an affidavit, sworn by the Deputy Solicitor General and Deputy Minister of Correctional Services, by **July 3, 1998**. This affidavit should include all relevant details, including a specific description of:
 - the nature and extent of searches undertaken for responsive records within the office(s) of his Special Advisor First Nations;
 - how files of the Special Advisor First Nations were managed and handled from the time period of the request (September 1 through September 15, 1995) to present;
 - the nature and extent of searches undertaken for responsive records in the possession of other Ministry officials involved in the Interministerial Committee who may have sent records to or received records from the named individual;

This affidavit should address both paper and electronic records.

If the Deputy Minister is of the view that responsive records existed but no longer exist, the affidavit should also include details of why any such records were destroyed, including information about record maintenance policies and practices such as evidence of retention schedules.

3. I order the Ministry to provide me with another affidavit, sworn by the named individual, by **July 3, 1998**. This affidavit should address all issues identified in the original Notice of Inquiry, specifically:
- his role and participation in the events, meetings, discussions and consultations relating to the occupation of Ipperwash Provincial Park during the time period specific in the request, including a description of his role with respect to the Emergency Planning for Aboriginal Issues Interministerial Committee;
 - the kinds of records sent and/or received by him during this period;
 - a description of the record keeping and file management systems in place for these records;
 - the searches carried out in response to the appellant's request, including what places were searched, what types of files were searched (both paper and electronic), and the results of these searches.

If the named individual is of the view that responsive records existed but no longer exist, the affidavit should also include details of why any such records were destroyed, including information about record maintenance policies and practices such as evidence of retention schedules.

I received affidavits from the Deputy Minister and the named individual, pursuant to Provisions 2 and 3.

I also received a copy of the decision letter sent to the appellant, pursuant to Provision 1. The decision letter informed the appellant that an additional 111 pages of responsive records had been located as a result of further searches, and that partial access was being granted. The Ministry provided me with a copy of the records identified as a result of these further searches.

DISCUSSION:

REASONABLE SEARCH

As stated in Interim Order P-1585, where a requester provides sufficient details 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 section 24 of 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.

I must now determine whether the affidavits provided by the Deputy Minister and the named individual are sufficient to discharge the Ministry's responsibility to conduct a reasonable search for responsive records.

The affidavit of the named individual

The following are direct quotations from those portions of the named individual's affidavit I find to be most relevant to the issues before me:

6. Between September 1 and September 15, 1995, I was involved in the ministry's efforts to address the Ipperwash situation. I was a member of the Emergency Planning for Aboriginal Issues Interministerial Committee and attended a number of meetings of the committee during that time. ...
7. ... Other than attending scheduled meetings of the committee, I participated in on-going consultations and discussions with different ad hoc groups.
9. The documents that were generated out of these meetings, discussions and consultations varied in their nature. The documents consisted of correspondence, draft and finalized minutes of meetings, e-mails and faxes. The documentary material that was generated during the time period in question was material that was generally available to regular attendees of committee meetings or to other senior officials in the government that were involved in the Ipperwash situation.
10. In terms of record keeping and file management, I maintain practices that are standard record keeping and file management practices and these were practices I maintained throughout the period of the request with respect to Ipperwash materials. Since Ipperwash was an active issue, the documentary material that I had was kept in my office on the fourth floor at 175 Bloor Street East.
11. I applied my normal file management practices to my Ipperwash files. This consisted of maintaining the documents in a file folder. For the Ipperwash material, there were four separate file folders, numbered 1 to 4. The file folders did not correspond to specific subject areas or issues, but were rather all the material that I had on Ipperwash. The material was arranged chronologically so that the material in folder number 1 was the oldest or earliest documentary material. I did not and still do not maintain a personal notebook or diary of the type that many people now use to take notes generally. My personal notes with respect to Ipperwash were written directly (generally in the margins) on the documents that were distributed at meetings.
12. ... When I left the position [of Special Advisor First Nations], I left the files or materials that I had in my office at that time, including the

Ipperwash file, for my successor in the position, [named employee #1] who was intimately familiar with all of my files, their locations and contents.

13. In terms of electronic files, my practice with respect to e-mails is to print them off if there [sic] were of any significance and to place them in the physical file. I typically delete unimportant ones, such as e-mails for general information purposes that would not be needed again or would not serve as a reference document. I followed this standard file management practice with respect to the Ipperwash file. My practice was not to delete any significant electronic documents such as e-mails on any of my files unless there was already a hard copy of the document.
14. Upon my departure from the office, all the material that I had on my computer was left as is. I am generally aware that the intention was to have my computer information transferred to [employee #1's] computer and that there was [sic] some technical difficulties in doing so. I have no specific knowledge of what occurred with my computer and my electronic files after my departure.
15. I am not aware of any destruction of documentary material related to Ipperwash and did not destroy or participate in any such destruction of Ipperwash material.

I find that the named individual's affidavit constitutes a satisfactory response to each of the issues listed in Provision 3 of Interim Order P-1585.

The affidavit of the Deputy Minister

a. Searches relating to the files of the named individual

The following are direct quotations from those portions of the Deputy Minister's sworn affidavit I find to be most relevant to the issues before me:

Files of Special Advisor First Nations

8. I have been advised by [employee #1], Special Advisor, First Nations in the Deputy Minister's office, and I verily believe that [the named individual] was filling the position [employee #1] currently fills through the period of the request (September 1-15, 1995 to April 19, 1996). During that period, [employee #1] was an Advisor, First Nations Policy and acted as an assistant to [the named individual]. When [the named individual] left his assignment, [employee #1] assumed the role of Special Advisor, First Nations and took over the files that [the named individual] had with respect to Ipperwash, including the responsive records.

9. From the period of the request (September 1-15, 1995) to December, 1996, I have been advised by [employee #1] and I verily believe that the records were kept in the office of the Special Advisor First Nations which formed part of the Deputy Minister's office on the 4th floor of 175 Bloor Street East, Toronto. In Mid-December, 1996, the office was relocated to the 11th floor at 25 Grosvenor Street, Toronto. At the time of the move, I am advised by [employee #1] and I verily believe that [employee #1] personally moved these files from the one office to the other.
10. I have been advised by [employee #1], and I verily believe that in September, 1997, counsel at Crown Law Office - Civil at the Ministry of the Attorney General requested the file of the Special Advisor, First Nations in order to prepare the necessary response to a legal action brought ... against the province. Those files were photocopied by support staff in the Deputy Minister's office. A copy of these files were kept by [employee #1] and the original files were delivered to Crown Law Office - Civil where they still reside.

Additional Searches

3. On Tuesday, June 23, 1998, I asked [employee #2], Deputy Co-ordinator of the ministry's Freedom of Information and Privacy Branch (FOI Branch), and [employee #1], Special Advisor, First Nations in the Deputy's office, to conduct another extensive search for all responsive records to the request. This resulted in a thorough review of all records both in hard and electronic form. Enquiries were also made by [employee #1] concerning the possible existence of electronic records.
4. I have been advised by [employee #2] and I verily believe that he and [employee #3], a Program Analyst in the FOI Branch undertook a thorough search on June 24 and 25, 1998, of the copy he had of the [named individual] Ipperwash records that he had in his office in North Bay. A search was also made with respect to copies of ministry records compiled in relation to other FOI requests for Ipperwash records. This search was conducted to look for responsive records for this request. No further responsive records were found. In addition, on June 25, 1998, [employee #2] conducted a further search at Crown Law Office - Civil, Ministry of the Attorney General, of the original records relating to this request. As a result of this search by [employee #2], a further responsive record was found. This record had been released as a result of another FOI request.
5. I have been advised by [employee #1] and I verily believe that he conducted a thorough search of all records in his possession relating to this request on June 24, 1998, and that he found one further record responsive to this request. In addition, on June 26, 1998 [employee #1] completed the

search of records located at Crown Law Office - Civil which had been started by [employee #2] on June 25, 1998, and he found 11 correspondence routing memos that had been copied to [the named individual] representing correspondence from the general public on the Ipperwash situation.

In response to my request for additional details regarding his affidavit, I received subsequent correspondence from the Deputy Minister regarding searches of the files relating to the named individual. The Deputy Minister advised me that there were a total of 147 records contained in the four files of the named individual, 34 of which were dated between September 1 and September 15. Of these 34 records, 12 were found to be responsive to the appellant's request, and were included among the 111 pages of records which were the subject of the July 3 decision letter issued to the appellant in response to Provision 1 of Interim Order P-1575.

The Deputy Minister identified the following reasons for determining that the remaining 135 records (i.e. 147 minus 12) in the files of the named individual were not responsive to the appellant's request:

- the records were outside the time frame requested; or
- the records were not sent or received by the named individual; or
- the records were not dated.

Having reviewed the affidavit of the Deputy Minister and his subsequent letter, I find that he has provided a satisfactory response to the issues raised in the first two bullet points of the first paragraph of Provision 2 of Interim Order P-1585, with the following exception. Twenty-three records located in two of the four files of the named individual are dated within the time frame of the appellant's request, yet the Ministry has determined that they fall outside the scope of the request because they were not "sent or received by the named individual."

The approach taken by the Ministry in determining whether records were "received" by the named individual was to ascertain whether the individual's name appeared on the face of the record, either on the "to" line or address line of any correspondence or e_mail messages, or the "cc", "bcc" or "fan out" lines of these records. The Ministry explained that "fan out" is a term used to describe a list of names often stamped on the top of a document, which indicates those persons subsequently provided with a copy of the document.

I find that the Ministry's approach to determining what records were "received" by the named individual is overly restrictive. In my view, it is reasonable to conclude that records found in files pertaining to the relevant subject matter which were in the custody of the named individual and dated between September 1 and 15 were "received" by the named individual within this time period, and therefore fall within the scope of the request. I will include a provision in this order requiring the Ministry to make an access decision with respect to these 23 records.

b. Searches relating to the files of other ministry officials

The following are direct quotations from those portions of the Deputy Minister's sworn affidavit I find to be most relevant to the issues before me:

Nature and Extent of Searches Undertaken for Responsive Records in the Possession of Other Ministry Officials

11. I have been advised by [employee #4], a former Special Advisor Policing in the Deputy's office and I verily believe that he undertook a number of searches and information gathering with respect to this request as follows:
- a) He searched the Public Domain Drive (P Drive) of the computer system in the Deputy Minister's office and found no files related to [the named individual].
 - b) He searched the Deputy Minister's office for files in relation to this request and located the file of [employee #5] who was his predecessor in his position.
 - c) He also obtained the file of [named employee #6], Executive Assistant to the Minister. He also inquired of the secretaries in the Minister's office whether there were e-mail records from [the named individual] and was advised that there were none on their system.
 - d) He also asked [employee #7], a former Executive Assistant to the former Deputy whether he had responsive records and was advised that he did not have any.
 - e) In addition, he reviewed the files of [employee #1] and [the named individual].

In all of these efforts he advised that he was searching for responsive records. In general, [employee #4] conducted FOI searches based upon the parameters identified in the request. Key persons who would potentially have possession of information were asked by him to provide any information they had which conformed to the request. When persons had come forward with records, the package in its entirety was shared with the FOI Branch.

If a request sought ministry correspondence, other than e mail, ministry staff were given the parameters of the request and asked to initiate and perform data and file searches through correspondence management systems. Numerous FOI searches were conducted during the tenure of [employee #4] and he advises and I verily believe that no information was ever destroyed, misplaced or diverted.

In the subsequent correspondence received from the Deputy Minister, he provided additional details regarding searches of the files of employees #1, 5 and 6. The Deputy Minister advised me that there were three responsive records located in the files of employee #6, six responsive records located in the files of employee #1, and no responsive records located in the files of employee #5. These nine records were included among the 111 pages of records which were the

subject of the July 3 decision letter issued to the appellant in response to Provision 1 of Interim Order P-1575.

The Deputy Minister identified the following reasons for determining that all remaining records in the files of employees #1, 5 and 6 were not responsive to the appellant's request:

- the records were outside the time frame requested; or
- the records were not sent or received by the named individual; or
- the records were not dated.

Having reviewed the affidavit of the Deputy Minister and his subsequent letter, I find that he has provided a satisfactory response to the issues raised in the third bullet point of the first paragraph of Provision 2 of Interim Order P-1585.

c. Searches for electronic records

The following are direct quotations from those portions of the Deputy Minister's sworn affidavit I find to be most relevant to the issues before me:

12. Record retention and disposal is governed by directives issued by Management Board Secretariat. These directives apply to all ministries in government. The directive on Management of Recorded Information applies to recorded information generally, including computerized information. The directive sets out a number of operational requirements relating to the preservation of recorded information. The directive requires that ministries must develop recorded information schedules to govern the retention and disposal of all existing recorded information.
13. This ministry has developed a comprehensive record maintenance manual in accordance with the Management Board Secretariat directives. The manual is distributed to the various branches and offices in the ministry, including the Deputy Minister's office. The manual establishes a classification scheme to organize and maintain recorded information.
14. The record maintenance manual also establishes retention schedules for recorded information. The retention schedules set out in the ministry's record maintenance manual vary depending on the nature of the recorded information.
15. I have been advised by [employee#1] and I verily believe the following information with respect to files and electronic records:
 - a) On April 19, 1996, when [the named individual] left his position in the Deputy's office, [employee #1] assumed his responsibilities as Special Advisor, First Nations.

- b) All Special Advisor files relating to the Ipperwash incident were retained by [employee #1] in his office. This office was locked nightly. The files in question consisted of four folders numbered 1-4 created and maintained by [the named individual] and one additional folder created and maintained by [employee #1].
 - c) On or about April 19, 1996, [the named individual's] computer Local Area Network (LAN) account was deleted by office staff in accordance with normal office operating procedure. The contents of [the named individual's] e-mail mailbox were, however, retrieved from a back-up tape with the assistance of the Information and Technology Division HELP Desk in North Bay. The contents of the mailbox were transferred to [employee #1's] mailbox however, the folders did not contain any records. Efforts by staff of Information and Technology Division to retrieve any records which may have been located in the folders were unsuccessful.
 - d) [The named individual's] old computer and hard drive were surplused, as the lease had terminated and the machine and hard drive were returned to the leasing company in February 1997. No e-mails records were located on the hard drive as those records are stored on the server drive of the office LAN system.
 - e) On December 13-16 1996, the Deputy Minister's office relocated from 175 Bloor Street to 25 Grosvenor Street. [employees #8 and #9] of the Information and Technology Division of the ministry had the responsibility for the move of all office computers. Instructions were issued to all staff that confidential and sensitive materials located on hard drives were to be copied to diskettes and secured during the move. The physical move of the computers was handled by [a named company].
16. I am advised by [employee #10] of the ministry's Information and Technology Division and I verily believe the following with respect to electronic records:
- a) that electronic records are backed up to LAN servers.
 - b) that the back up to LAN servers creates a record that can be retrieved even if the original electronic copy of the record is deleted or lost by other means, such as a hard drive crash.
 - c) that the electronic information maintained on LAN servers is stored at regular intervals to tapes and thus is kept for a period of time.

- d) that information maintained on the tapes is overridden or replaced by the current incoming information and that this generally occurs at approximately 30 day intervals.
- e) the fact that data is being replaced on the tapes means there is no feasible or practical means to locate e mails or other electronic documents that have be [sic] overridden on the tapes and that have not been otherwise stored (such as on a diskette) or printed as a hard copy.

As a result of the various activities described by the Deputy Minister, the Ministry has been unable to retrieve any electronic records left behind by the named employee at the time he left the position of Special Advisor First Nations. However, having reviewed the affidavit of the Deputy Minister, together with the affidavit of the named individual which explains the manner in which he managed his paper and electronic records, I find that the Ministry has provided a satisfactory response to the issues raised in the second and third paragraphs of Provision 2 and the second paragraph of Provision 3 of Interim Order P-1585.

ORDER:

1. I order the Ministry to provide a decision letter to the appellant with respect to access to the 23 records located in the two files of the named individual and dated within the time frame of the appellant's request which were not included in the Ministry's decision letter of July 3, 1998, in accordance with sections 26 and 29 of the Act, by **September 14, 1998**.
2. I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1. It is to be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

August 28, 1998