



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER P-1585

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

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from a reporter. The request was for access to:

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.

The named employee is a Superintendent with the Ontario Provincial Police (OPP) who was on assignment in September 1995 as the Special Advisor First Nations to the Deputy Solicitor General and the Deputy Minister of Correctional Services.

The Ministry initially located one responsive record, and denied access to it pursuant to sections 13, 14 and 21 of the Act. The appellant appealed this decision. This appeal was subsequently resolved when the Ministry provided partial access to the record.

During the course of this first appeal, the Ministry advised this office that it had located one additional responsive record. The Ministry eventually issued a decision letter to the appellant with respect to this record, providing partial access to two pages, and denying access to the remainder pursuant to sections 13, 14 and 21.

The appellant appealed this second decision, claiming that more responsive records should exist. The sole issue to be decided in this appeal is whether or not the Ministry has conducted a reasonable search for the records as required by section 24 of the Act.

DISCUSSION:

REASONABLENESS OF SEARCH

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.

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 explains that in the course of conducting interviews for stories he has written on Ipperwash, he was told by a confidential source that the named individual played a key role on the Interministerial Committee and had an extensive record of documents based on his participation. The appellant provided documents obtained through other appeals to support his

position. These documents include copies of a fax transmittal cover sheet and a communications approval log which show that information relating to Ipperwash was sent to the named individual, as well as handwritten notes which make reference to this person as a participant in meetings of the Interministerial Committee. Copies of all documents provided by the appellant were forwarded to the Ministry during this inquiry.

The appellant also expresses concern regarding the time it has taken him to obtain records. He states:

My last point concerns the long length of time it has taken ministry officials to conduct their searches. I am astonished, given the time lines in the legislation, that it took nearly eight months for the two previous documents to be released. I think this indicates a lack of interest and attentiveness on the part of ministry FOI officials in the conduct of their search for records.

The Ministry states that a search was conducted by “staff who are knowledgeable and familiar with the records and locations where any responsive records would be kept were subject to the search.”

The Ministry’s representations include a general outline of the steps taken in responding to the appellant’s request. They explain that one responsive record was initially identified, and that a second record was located following consultation with another ministry. After the current appeal began:

... the ministry re-visited the request and the result was a broader interpretation of the records responsive. A further search was conducted and previously located records which were deemed not responsive were now deemed responsive.

After receiving the Notice of Inquiry:

... the ministry undertook a further search of records and some additional records were deemed responsive. The ministry is currently consulting with respect to the additional records located as a result of the search.

The Ministry explains that:

[t]he area of the ministry in which the searches took place contain a large number of records in keeping with the size and diversity of this ministry. In September 1995, the ministry maintained an office located at 175 Bloor Street East. It since has moved to its present location at 25 Grosvenor Street. The move, including the transfer of records, was a major undertaking as it involved the mass moving of records.

The Ministry states that it conducted an unsuccessful search of its backup systems in an attempt to locate responsive e-mail messages. It also states, without providing details, that “[i]t is possible that some records existed, but no longer exist.”

The Ministry's representations also include an affidavit sworn by the named individual. The essence of this affidavit is that the individual no longer holds the position of Special Advisor First Nations, and that he left behind all hard copy and electronic documents generated or received by him regarding the Ipperwash incident without retaining copies. He also denies having made any anecdotal notes of any Interministerial Committee meetings he attended.

I have carefully considered all representations, and have reached the conclusion that the Ministry has failed to satisfy me that it has discharged its obligations under section 24 of the Act to conduct a reasonable search for records responsive to the appellant's request.

The Ministry's representations are very general. Despite being asked in the Notice of Inquiry to provide specific details of all searches, the Ministry simply states that they were conducted by knowledgeable staff familiar with the locations where responsive records would be kept. There is nothing in the Ministry's representations to indicate that it took steps to identify records in the possession of other Ministry officials involved with the Interministerial Committee, who may have sent records to or received records from the named individual.

Although the affidavit from the named individual explains why he no longer has custody of any responsive records, it does not address the specific requirements outlined in the Notice of Inquiry and does not include his recollection of what records he sent and received during this period. Further, the Ministry's representations do not adequately account for custody and control of records left behind when the named individual completed his term as Special Advisor First Nations.

I am also concerned that the Ministry has now identified additional responsive records, but there is no indication that a decision letter with respect to these records has been issued to the appellant. I understand the appellant's frustration with the fact that his clearly worded and narrowly defined request was first submitted in April 1997, and he has yet to receive a comprehensive response from the Ministry.

Finally, I have difficulty understanding why the Ministry had difficulty in interpreting the scope of the request. In my view, the wording of the request clearly defines its scope. However, if the scope is unclear, the Ministry has an obligation under section 24(2) of the Act to contact the appellant, seek clarification or, at a minimum, indicate precisely what their interpretation of the scope encompasses. The fact that this was not done has caused significant delay that could otherwise have been avoided.

Based on the representations provided by the Ministry, I find that the search for responsive records was not reasonable, and I order the Ministry to conduct further searches in accordance with the order provisions that follow.

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.

4. I remain seized of this matter with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ June 19, 1998