



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

ORDER MO-1216

Appeal MA-990053-1

Toronto Hydro-Electric Commission



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NATURE OF THE APPEAL:

The Toronto Hydro-Electric Commission (Toronto Hydro) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information collected from the requester's Postgraduate University by Toronto Hydro in its investigation of the requester's MBA program studies. The requester also sought access to all similar information collected by Toronto Hydro from other academic institutions. The information relates to reimbursement of the requester's tuition costs by Toronto Hydro.

Toronto Hydro extended the time for responding to the request an extra 30 days beyond the 30 day time period prescribed by the Act. The requester appealed Toronto Hydro's time extension and Appeal File MA-990020-1 was opened. Toronto Hydro issued an access decision before the expiry date of the time extension and the appeal was resolved.

In its access decision, Toronto Hydro informed the appellant that records responsive to his request have been identified and that it has "...authorized the disclosure of all of the information specified in your request". The appellant was then provided with access to his personnel file.

The appellant subsequently wrote to this office to advise that he has not been given access to all of the information which responds to his request. In particular, he believes that information relating to Toronto Hydro's investigation of his MBA Program studies exists, but was not identified and made available to him.

Appeal File MA-990053-1, the current appeal file, was opened to address the appellant's concerns.

During mediation, the appellant informed this office that the portion of his request relating to access to all similar information collected by Toronto Hydro from other academic institutions has been resolved. Accordingly, this part of the request is no longer at issue. Remaining at issue in this appeal is whether Toronto Hydro conducted a reasonable search for all information collected from the appellant's Postgraduate University during its investigation of the requester's MBA program studies.

I sent the appellant and Toronto Hydro a Notice of Inquiry informing them that an oral inquiry will be held to determine whether Toronto Hydro conducted a reasonable search for records which respond to the request. A mutually convenient date for the oral inquiry was set. The inquiry was conducted via teleconference. Both the appellant and Toronto Hydro provided oral representations. Toronto Hydro was represented by the Freedom of Information Co-ordinator. The Co-ordinator's Assistant and a Human Resources Representative from Toronto Hydro's Human Resources Department also provided evidence on behalf of Toronto Hydro.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify all responsive records. The Act does not require the institution to prove with absolute

certainty that records do not exist. However, in my view, in order to properly discharge its statutory obligations, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

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.

During the oral hearing, the appellant explained that after he was granted access, he viewed his personnel file on two occasions. On the first occasion, his file contained a note reflecting a discussion between a Toronto Hydro Human Resources Consultant and Revenue Canada. The note related to reimbursement of his tuition costs. Although he could not provide the date of the note, the appellant did provide other details such as the name of the author, the note's location in the file, the approximate number of lines and the fact that it was typed, not handwritten. The appellant further explained that he showed the note to a named Toronto Hydro Human Resources staff member who was present during the appellant's viewing of his file.

According to the appellant, when he returned approximately two and one half months later to view his file and to photocopy the note, the note was no longer in the file. On this occasion, two files, including the original file, and a number of loose documents were made available to him. The appellant asked the Toronto Hydro staff member present during this viewing for a copy of the note. A copy could not be made because the note was not in the file and could not be located. Neither the appellant nor Toronto Hydro are able to shed light on the note's whereabouts.

The appellant also stated that there was at least one other document, a funded leave application, on file when he first viewed his file, but was not in the file on his second viewing. Toronto Hydro did not address this matter during the inquiry.

The appellant submitted a letter addressed to him, dated February 8, 1999, from Toronto Hydro's Manager, Organizational Development. He believes that a sentence contained therein, which discusses payment for courses and tax implications, is a direct result of the contents of the note discussed above and of Toronto Hydro's Human Resources Consultant's discussion with Revenue Canada.

The appellant submitted another letter, addressed to him, dated March 9, 1999, from Toronto Hydro's Senior Vice-President, Corporate Services and Chief Financial Officer. This letter clarifies the February 8, 1999 letter mentioned above and discusses tuition reimbursement, tax implications and makes reference to Toronto Hydro's request for additional information regarding the university where the appellant attended the MBA program.

The appellant stated that although he has not received direct confirmation that an investigation into his MBA program is being conducted, he was told by Toronto Hydro that an investigation would take place. He adds

that in correspondence with Toronto Hydro, he has made reference to an investigation and he has never been told that an investigation is not taking place.

The appellant submitted a letter he wrote on July 24, 1998 to a named member of Toronto Hydro's Human Resources Department. In his letter, he refers to a telephone conversation they had the previous day and, as requested, provides the named individual with information about his MBA program, the course cost, the university phone number and the name of the university Registrar.

Toronto Hydro described the process it follows when receiving a request similar to the appellant's request. Toronto Hydro explained that the request is sent to the department which, it is believed, has custody of the information sought. That department provides the relevant file to the Freedom of Information Co-ordinator who then reviews the file to determine whether it contains any third party personal information or solicitor-client privileged information. The file is then returned to the department with instructions that photocopies can be made of the information to which access is granted.

In this case, once notice of this appeal was received, and after the appellant had viewed his file for the first time, the Co-ordinator's office asked the relevant department, the Human Resources Department, to return the appellant's file and to check whether other responsive records exist. The file was returned and included additional information that was generated after the access request was submitted. The appellant then viewed his file a second time in the presence of a named Toronto Hydro Human Resources Consultant.

Toronto Hydro explained that it has a considerable volume of material relating to the appellant. These files, some of which are active and are still used by the Human Resources Department from time to time, include matters relating to grievances, the Ontario Labour Relations Board and the Ontario Human Rights Commission. In its search for responsive records, Toronto Hydro identified two areas which it felt could reasonably contain the information requested: areas containing training files and personnel files. The searches were conducted by staff in these two areas. Toronto Hydro did not search other areas or files such as Ontario Labour Relations files or others relating to the appellant as mentioned above. Toronto Hydro concedes that because of the volume of material relating to the appellant, it is possible that documents could be misfiled. Toronto Hydro submits, however, that it conducted a reasonable search of the areas where responsive records could reasonably be expected to be located and disclosed all records it identified as responsive to the request.

Having considered the evidence submitted and the representations of both parties, I am not satisfied that Toronto Hydro has taken all reasonable steps to locate all records which respond to the request.

According to the appellant, a note reflecting a discussion between a Toronto Hydro Human Resources Consultant and Revenue Canada and a funded leave application were contained in the information which was initially disclosed to him when he viewed his file the first time. He provided a detailed description of the note. These documents were not in the file on his second viewing. At inquiry, Toronto Hydro did not dispute that these documents existed and cannot now be located.

The absence of these documents on the second viewing demonstrates that documents can be misplaced, and in this case, appear to have been misplaced.

Toronto Hydro searched two areas for records which respond to the request. Toronto Hydro did not search through the other files relating to the appellant. Although on the second viewing, the appellant pointed out to a Toronto Hydro staff member that at least one document was missing from his file, there is no evidence to indicate that a further search was conducted in the appellant's files, either those from the two areas originally searched or his other files, for these and other documents which may be responsive to the request.

Accordingly, I will order Toronto Hydro to undertake a further search for all records that respond to the request.

ORDER:

1. I order Toronto Hydro to conduct a further search for all records which respond to the request, including a search through **all** files relating to the appellant in Toronto Hydro's custody or control, and to notify the appellant in writing as to the results of that search, by **July 2, 1999**.
2. In the event that responsive records are located, I order Toronto Hydro to render a decision on access to the records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the Act.
3. I order Toronto Hydro to provide me with a copy of the correspondence referred to in Provisions 1 and 2 (if applicable) by **July 7, 1999**. This should 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: _____

June 1, 1999

Alex Kulynych
Acting Adjudicator