



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1744

Appeal PA-990131-1

Ministry of Municipal Affairs and Housing



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NATURE OF THE APPEAL:

On March 11, 1999 the Ontario Rental Housing Tribunal (the Tribunal) was added as an institution under the Freedom of Information and Protection Act (the Act) pursuant to O. Reg.104/99.

On November 27, 1998, the Ministry of Municipal Affairs and Housing (the Ministry) received a request under the Act for access to records relating to applications made by the requester to the Tribunal in respect of his property, and complaints filed with the Ministry and with the Investigations Unit of the Ministry, for the period between August 18, 1998 and December 4, 1998. The Ministry identified 556 pages of records from the office of the Minister, the Tribunal and the Investigations Unit and granted access to the responsive records.

The requester, now the appellant, appealed the Ministry's decision on the basis that additional records exist. The appellant stated that the records disclosed by the Ministry did not include "a single memorandum, office correspondence, interdepartmental correspondence, electronic correspondence (e-mail), minutes of meetings, notes taken from telephone conversations and entries into log books that are kept by the officials of the Ministry." In his appeal, the appellant also included a list of names of people as authors or recipients of such records.

During mediation, the Ministry advised our office that since the request had been received prior to the Tribunal being named as an institution under the Act, the Ministry had responded to the request on behalf of both itself and the Tribunal. The Ministry indicated that it would continue to act for both itself and the Tribunal for the purposes of this appeal. Therefore, any reference hereafter to the Ministry will be deemed to include reference to the Tribunal as well.

As a result of mediation, the Ministry conducted a second search for additional records in the Tribunal offices, the Investigation Unit and the Minister's office. This search resulted in the location of five additional records which were disclosed to the appellant. The appellant continued to insist that additional records must exist.

I sent a Notice of Inquiry to the appellant and the Ministry, informing them that an oral inquiry will be held to determine whether the Ministry had conducted a reasonable search for records which are responsive to the request. A mutually convenient date for the oral inquiry was set. Prior to the date agreed to for the hearing, the appellant advised the Mediator that he would not be able to attend on that date and requested that another date be set. This was repeated on two more occasions when hearing dates were set and the appellant indicated that he would not be available.

Finally, the oral hearing was set for September 8, 1999. A Confirmation of Hearing was sent to both parties. The Mediator advised the appellant that if he chose not to be available for the hearing, I would proceed in his absence. The inquiry was conducted via teleconference. The Ministry was represented by its legal counsel. Also present were the Tribunal's Freedom of Information and Privacy Co-ordinator and Senior Counsel. The Executive Assistant (Corporate Resources), Manager of the Investigations Unit and

the Manager of Shared Technology were also present. The Ministry provided oral representations. The appellant did not make himself available for the oral hearing.

DISCUSSION:

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, an appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

During the oral hearing, the Ministry stated that it was making submissions of behalf of both itself and the Tribunal. The Ministry indicated that it was relying on its letter dated June 18, 1999 addressed to the appellant and this office. The letter of June 18, 1999 was accompanied by a binder which contains copies of records located as a result of the second search and which have been disclosed to the appellant. In this letter, the Ministry describes the particular areas searched, by whom and the results of the searches. As a result of the request, staff of both institutions conducted an initial search and located 556 records which were disclosed, in their entirety, to the appellant. Upon appeal and during mediation, the Ministry conducted a second search and all of the additional records found were disclosed to the appellant in the binder accompanying the Ministry's letter of June 18th, 1999.

The Ministry made the following submissions on its searches for records responsive to the request within the Tribunal and the Ministry:

The Tribunal:

The FOI Co-ordinator contacted tribunal members and staff and discussed with them the nature of the request and the records being sought. The Vice-chair of the Tribunal supervised the search for records in the Tribunal's Eastern District office. This search included the two application files, and any letters, memoranda, e-mail, minutes of meetings and records of telephone conversations. No records apart from those in the application files were found. The contents of the application files were disclosed to the appellant.

The three tribunal members who presided over the application hearings were also contacted as part of the search. Each of them confirmed that they did not have any records responsive to the request. The administrative files in the office were also searched for responsive records and none were found.

The Ministry stated that in response to the appeal, a second search was conducted in all the above areas in an attempt to locate additional records. The search resulted in locating three entries in the Vice-Chair's daily business dairy which were disclosed to the appellant. In response to my question, the Ministry explained that the three entries had been identified in the earlier search but were determined not to be responsive to the request. However, at the time of the second search, the Ministry decided to disclose the dairy entries even though it was still of the opinion that the information was not fully responsive to the request.

The Ministry stated that requests had been made for a review of the orders issued by the Tribunal in respect of the appellant's two applications. As part of the review process, duplicates of the application files had been made by the review analyst, in charge of the administration of the review files. In response to the request, the review analyst conducted a thorough search of the review files and verified that they were duplicates of the application files and did not contain any additional records. The review analyst also searched her office for any additional records which may be responsive to the request. The Ministry stated that internal correspondence, e-mail and memoranda would not normally be generated in the review process and if such a record was created, it would have been located in the search. The Ministry stated that "records of transactions" to record telephone enquiries on the status of the review are not kept. Subsequent to the appeal, another search of the review files was conducted and no additional records were located.

A search for responsive records was also conducted in the Tribunal Chair's office. Correspondence sent to the Chair by the appellant, the response, correspondence routing slips and two telephone messages were disclosed to the appellant. As a result of the second search, two correspondence log entries were located and disclosed to the appellant.

Searches were also conducted in the Tribunal's Program Development Section and no records responsive to the request were located.

The Ministry

Within the Ministry, searches were conducted in the Investigation Unit, the Minister's office and the Correspondence Control unit.

In response to the request, the entire investigation file was made available to the appellant for his review and was disclosed with the exception of routing slips which were considered not to add any value. At the time of the second search, the routing slips were also disclosed. The Unit Manager, Team Leader and Investigator also reviewed their files. As a result of the second search, the Investigator located a note of a telephone conversation with the appellant and disclosed this record. No additional records were located.

The Minister's office was also searched. The Ministry stated that the involvement of the Minister's office was limited. Any e-mail messages and correspondence sent by the appellant was forwarded by the Minister's Executive Assistant to the Executive Assistant of the Deputy Minister so that the Correspondence

Control Unit could prepare a response. The Ministry stated that the Ministry's Executive Assistant indicated that he had received an e-mail from the Deputy Minister's office some time ago, asking for a response to be prepared, and that he had deleted this e-mail. The Ministry stated that no records related to the request were produced in the Minister's office. Therefore, no records were located in the Minister's office as a result of the two searches.

As part of the second search, the Correspondence Control Unit, being a part of the Ministry's Communications Branch and the office responsible for managing the Minister's correspondence, reviewed all of the correspondence related to this matter. Copies of incoming correspondence, draft replies and correspondence routing instructions were located and were disclosed to the appellant. The Ministry points out that these additional records include correspondence sent by the appellant, and copies of replies he has already received but which have been disclosed again in the interests of completeness.

The Ministry submitted that thorough searches were conducted in both the Tribunal and the Ministry and all responsive records have been disclosed.

I have carefully reviewed the representations made by the Ministry. As I have indicated previously, the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M -909). In my view, the Ministry has clearly met this requirement. It conducted thorough searches in areas where the records are most likely to be located and searches were conducted by staff who were experienced and knowledgeable about the type of records requested. The Ministry also provided detailed evidence on the results of those searches together with reasonable and logical explanations as to why some types of records requested do not exist.

As I have also indicated previously, while the appellant will rarely be in a position to indicate 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. Throughout the course of this appeal, the appellant has continued to assert that additional records, such as internal memoranda, internal office correspondence, inter-departmental correspondence and minutes of meetings must exist. The appellant has not, however, provided a reasonable basis for his assertions. While he was provided with an opportunity, on more than three different occasions to make his submissions on the basis for his conclusions, he has chosen not to do so. Consequently, I dismiss his appeal.

ORDER:

I dismiss this appeal.

Original signed by: _____
Jiwan
acting-Adjudicator

January 21, 2000 _____ Mumtaz