



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

INTERIM ORDER PO-1897-I

Appeal PA-000129-1

Ministry of Tourism, Culture and Recreation



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Tourism (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to "all reports, correspondence, and/or briefing notes originating from or received by Tourism Minister Cam Jackson relating to municipal restructuring over the past two years, 1998 and 1999". The requester is a journalist with a newspaper. Subsequently, the request was clarified and the requester confirmed with the Ministry that copies of correspondence addressed to other individuals and not Minister Jackson were not to be included.

The Ministry conducted a search in response to the request. By its decision letter and attached "Index of Records", the Ministry indicated that it had located twenty-one records. It provided access to some of the records, with severances, and denied access to the rest. The appellant has appealed the Ministry's decision to deny access to some of the records in their entirety. She does not appeal the severances.

During the course of mediation, some issues were narrowed or clarified. The Ministry's position on the records it located is that they are not in its custody or control within the meaning of section 10(1) of the *Act*. The appellant disagrees, and also asserts that the Ministry has failed to conduct a reasonable search for records responsive to her request, by unduly and unilaterally restricting the scope of her request. The appellant believes that there should be more records than those identified on the issue of municipal restructuring, given that she requested records for a two-year period, and given that the Minister is the Member of Provincial Parliament (MPP) for Burlington and also a Cabinet representative for the Hamilton-Wentworth and Halton areas. The Ministry's position is that the scope of the appellant's request is limited to Minister Jackson's role as Minister of Tourism and does not relate to any additional roles he may or may not play within Cabinet.

I sent a Notice of Inquiry to the Ministry, initially, inviting its representations on the matters at issue. These were shared with the appellant, who has also provided representations. Subsequently, I sought the Ministry's reply representations on specific matters raised in the appellant's representations, as described below, and I have received those reply representations.

RECORDS:

Record 13 is an "Action Sheet" which appears to contain information about a contact from a member of the public. The form was completed on November 18, 1998.

Records 16 to 20 are memos from a named individual to Minister Jackson.

Record 21 is titled "Municipal Restructuring: Caucus Briefing".

CONCLUSION:

I have determined that the Ministry unilaterally narrowed the scope of the request, and accordingly, I order it to conduct a further search. I have deferred a decision on the question of

whether the Ministry has custody and control of the records at issue until the results of a further search are known.

DISCUSSION:

SCOPE OF REQUEST/REASONABLE SEARCH

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Further, section 25 provides, in part:

- (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
 - (a) forward the request to the other institution; and
 - (b) give written notice to the person who made the request that it has been forwarded to the other institution.

As I have set out, the appellant's request was for "all reports, correspondence, and/or briefing notes originating from or received by Tourism Ministry Cam Jackson relating to municipal restructuring over the past two years, 1998 and 1999".

The appellant believes that there should be more records than those identified, for the reasons I have outlined above. As I have also indicated, the Ministry's position is that the scope of the appellant's request is limited to Minister Jackson's role as Minister of Tourism and does not relate to any additional roles he may or may not play within Cabinet.

In her representations, the appellant states that it is unreasonable for the Ministry to suggest that the scope of her request is limited to the Minister's role as Minister of Tourism, and does not relate to any additional roles he may or may not play within Cabinet. She encloses copies of three news articles taken from the Hamilton Spectator. One article describes the Minister as the "only cabinet voice for Burlington and Hamilton". It states, among other things, that the Minister "promised to look out for Hamilton". Other articles describe the Minister's involvement in municipal restructuring relating to Burlington, Flamborough and Hamilton. It was reported that he raised issues around restructuring at meetings attended by the Minister for Municipal Affairs and Housing and the Premier, leading to certain action being taken by the Premier. The appellant states that these articles support her position that the Ministry has more documents than those which it has located.

I sent the representations of the appellant, along with the news articles, to the Ministry, and asked for its reply to her submission that they support her position that more documents exist. The Ministry states, among other things, that

- articles prepared by the appellant's employer are not evidence that additional documentation exists
- comments attributed to the Minister in the articles in respect of municipal restructuring would have been made in his capacity as an MPP on behalf of his constituents and not in his role as the Minister of Tourism. Municipal amalgamation is the responsibility of the Ministry of Municipal Affairs and Housing and not the Ministry of Tourism and accordingly there is no reason to believe that the Ministry of Tourism would have additional records.
- the newspaper articles do not in any way refer to the mandate or function of the Ministry of Tourism.

The Ministry's representations do not dispute that the Minister is a member of Cabinet, or that he is the "only Cabinet voice for Burlington and Hamilton". They do not deviate from its position that the scope of the request, and therefore its search, ought to be limited to records arising out of Minister Jackson's role as Minister of Tourism only.

In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

In Order 134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2), stating, among other things:

...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original

request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

In the appeal under consideration in Order 134, the request was somewhat vague. Hence, the institution had genuine difficulty in interpreting the scope of the request. Even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request. The facts before me are different. There is no ambiguity in the request. It clearly identifies the type of records sought. The appellant wishes to have access to records "originating from or received by Tourism Minister Cam Jackson relating to municipal restructuring" within a specified time period. The request does not state that it is limited to records originating from or received from the Minister in a specific capacity or role. Its plain meaning covers *any* records originating from or received by the Minister on the issue in question. Where the scope of the request is clear, as it is here, the Ministry cannot unilaterally determine what, in its view, the proper scope should be, and conduct a search for records based on its own views, rather than on the request. Its responsibility is to conduct a search for the records requested, or forward or transfer the request where appropriate, under section 25.

The Ministry has done neither in this case. Rather, it has in essence substituted its view of the proper scope of the request for the appellant's, in excluding from its search any records which are beyond the mandate of the Ministry of Tourism.

It may well be that the Minister fulfills a number of roles, whether as a Minister, an MPP, or as a member of Cabinet, and that records relating to actions taken in one role may be treated differently for the purposes of the *Act* than records relating to another role. But in order for these issues to be properly identified and determined, the Ministry must seek to respond to the request as framed, instead of prejudging the appropriateness of that request. As stated above in Order P-880, the proper application of the *Act*, including in my view, the proper identification of issues, requires an institution to take a liberal interpretation of the request in conducting its search for records.

In this case, the Ministry acted responsibly and reasonably in locating records which it now asserts to be constituency records and not in its custody and control. This is an issue which is accordingly before me. What is not yet known, since the Ministry has not conducted a search in accordance with the full scope of the request, is whether there are further records, such as those generated by the Minister's involvement in Cabinet, which raise other or similar issues.

I therefore conclude that because the Ministry has unilaterally and without justification narrowed the scope of the appellant's request, it has failed to search for all records which may be responsive to the request. I will therefore order the Ministry to conduct a search for records in accordance with the plain meaning of the request, which covers records of the Minister received or sent in any capacity. It should be noted that at the time of this order, Minister Jackson is no

longer the Minister of Tourism. The Ministry may, alternatively, choose to apply section 25(1) of the *Act*.

I have decided not to make any findings at this time on the other issue raised by this appeal, relating to the records the Ministry contends are constituency records. I have decided that a final determination would benefit from my having a complete factual and legal context, including the result of any further search and any positions of the parties arising out of that search.

ORDER:

1. I order the Ministry to conduct a further search for “all reports, correspondence, and/or briefing notes originating from or received by Tourism Minister Cam Jackson relating to municipal restructuring” in the years 1998 and 1999, excluding copies of correspondence addressed to other individuals and not Minister Jackson. For greater certainty, the search is to include records sent or received by the Minister in any capacity. Alternatively, the Ministry may choose to apply the provisions of section 25(1) of the *Act*, considering the date of this order as the date of the request. If the Ministry decides to forward the request to another institution it shall also forward a copy of this order.
2. If, as a result of the further search, the Ministry identifies any records responsive to the request, I order the Ministry to provide a further decision letter to the appellant regarding access to these records in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension.
3. I remain seized of the outstanding issues in this appeal, including any issues arising out of the further search and any further decision.

Original signed by: _____
Sherry Liang
Adjudicator

April 23, 2001