



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1981

Appeal PA-010255-2

Ontario Human Rights Commission



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BACKGROUND AND NATURE OF THE APPEAL:

Prior to 1991, the Ontario Human Rights Commission (the OHRC) had a policy whereby an organization could apply to the OHRC to have a particular program declared a “special program” for the purposes of section 14 of the *Human Rights Code*, R.S.O. 1990, c.H-19 (the *Code*). The OHRC subsequently amended this policy, eliminating the application process as a means to obtain a “special program” designation. The issue of whether a particular program meets the criteria of a “special program” is now determined by the OHRC’s Board of Inquiry in the course of a complaint.

The OHRC received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to “special programs” as provided for under section 14 of the *Code*. The appellant subsequently filed a new request, expanding the scope of what she was seeking. In particular, she requested access to:

all reports, correspondence, memoranda, and other documents regarding “special programs” (as provided in section 14 of the *Human Rights Code*), including any policy paper regarding special programs and any other opinion and/or approval by the Human Rights Commission in respect of whether a program satisfies or fails to satisfy the requirements of a special program.

After filing her revised request, the OHRC responded to the appellant’s original request, advising her that, aside from its *Guidelines on Special Programs*, the information which she was requesting was not “tracked” by the OHRC. A copy of the *Guidelines* was provided to the appellant. The appellant appealed to this office claiming that she did not receive a proper decision letter as required under the *Act*. That appeal (PA-010255-1) was resolved upon the issuance of a decision letter by the OHRC.

In its decision letter dated August 17, 2001, the OHRC stated that, aside from the *Guidelines on Special Programs*, which were previously provided to the appellant, it has no other records regarding the requirements of a “special program”. The OHRC cited in its decision the wording of the appellant’s original request, as opposed to the wording of her revised expanded request.

The appellant is appealing the decision of the OHRC as she believes that additional records responsive to her amended request exist.

A Notice of Inquiry was provided to the appellant and the OHRC outlining the facts and issues in this appeal. The parties were advised that the sole issue to be determined in this appeal is whether the OHRC conducted a reasonable search for records responsive to the appellant’s request. Based on the procedures established by this office, the OHRC was advised that all individuals who conducted searches in this case should be available for the oral inquiry. Present at the Inquiry were the appellant and the Registrar of the OHRC.

DISCUSSION:

REASONABLENESS OF SEARCH:

Where a requester provides sufficient detail about the records which she is seeking and the OHRC indicates that further records do not exist, it is my responsibility to ensure that the OHRC has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the OHRC to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the OHRC 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 the OHRC's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant submits that, in view of the OHRC's previous policy, documents such as correspondence, opinions, and/or orders relating to specific applications for "special program" designations must exist. Further, the appellant maintains that documentation must exist in relation to the OHRC's decision to change its policy with respect to "special programs". The appellant also referred to the fact that the OHRC's *Guidelines on Special Programs* was revised in 1997. She maintains that documents should exist relating to that revision.

At the Inquiry, I provided the parties with a copy of Order PO-1968. That order relates to an application to the OHRC by the Ontario College of Art (the OCA) for approval to implement a "special program" in accordance with section 14 (then section 13) of the *Code*. In that case, the OCA made a request under the *Act* for information relating to its application. The OHRC issued a decision advising the OCA that records responsive to its request did not exist. During the course of mediation in that appeal, the OHRC conducted further searches and located two reports and one order relating to the OCA's request for "special program" status. After considering the submissions provided by the OHRC at the Inquiry in that case, this office ordered the OHRC to conduct further searches for additional records.

Upon reviewing Order PO-1968, the appellant asserted that the records located in that appeal would, by their very nature, be responsive to her request. While the nature of the request in Order PO-1968 is more limited in scope than the request in this appeal, I am in agreement with the appellant that the documents located in that order would be responsive to her request. Further, it would follow that any documents located in the search conducted pursuant to Order PO-1968 would likewise be responsive to the request at hand.

As I noted above, the Registrar was the only representative of the OHRC available to present submissions on its behalf. In outlining the details of the steps taken by the OHRC in response to the appellant's request, the Registrar provided the following information:

- The Director of Mediation and Investigation (formerly the Director of Regional Services and Systemic Investigation Branch) was contacted. He advised the Registrar that he had

checked his cabinet and that he does not have any information relating to the appellant's request.

- The former Director of the Systemic Investigation Branch who was employed with the OHRC when the previous policy with respect to "special programs" was in place was also contacted. She advised the Registrar that, aside from the request by the OCA, she was not aware of any records relating to "special programs".
- The Registrar attempted to contact two other former employees but was not able to do so as of the date of the Inquiry. These employees were identified in a letter of the OHRC dated October 29, 2001. That letter was brought to my attention with the consent of the parties prior to the Inquiry.
- Records Centre/Corporate Services was contacted and they advised the Registrar that they have no records dated prior to 1992. The Registrar indicated that complaint files and the minutes of the Commissioners' meetings are the only types of records which would go to Records Centre/Corporate Services. She further advised that records dating prior to 1992 would be located in Archives of Ontario.
- Archives of Ontario was contacted and they advised the Registrar that they have no responsive records in their possession.
- The Registrar indicated that she personally searched the cabinets of the Policy and Public Education Branch and no responsive records were located.
- The Registrar stated that the Intake Department would not have responsive records.
- With respect to electronic records, the Registrar advised that the OHRC was not computerized until 1993. She further advised that the OHRC did not input information prior to that date. She explained that the OHRC generally only keeps files relating to specific complaints.

At the Inquiry, the parties confirmed that during the mediation of this appeal, the OHRC had agreed to search the minutes of the Commissioners' meetings for the period of 1987-1991. In addition, the Registrar had agreed to make further inquiries within the Legal Department. As of the date of the Inquiry, these searches had not been conducted. However the OHRC has confirmed that they intend to do so.

As set out above, the Notice of Inquiry asks the OHRC to provide details of the searches conducted. More specifically, submissions should establish; who conducted the searches, the specific places searched, the individuals contacted in the course of the search, and the types of files searched.

In addition, the Notice of Inquiry specifically establishes that the OHRC should have all individuals who conducted searches available for the oral inquiry. In response to my questioning at the Inquiry, the Registrar advised that, while no one else was available to present evidence at

the Inquiry, she was the person who had contacted each individual. She acknowledged that while various individuals may have heard about the OCA case, and while there is an assumption that records did exist at one time, the time period at issue spans back over ten years. As a result, the Registrar indicated that neither she nor the individuals contacted appear to have any responsive records. She stressed that in order to conduct a search, the records at issue must exist.

The obligations of an institution with respect to its record keeping practices was addressed in Order PO-1943. In that order, Adjudicator Laurel Cropley found that the *Act* contemplates that records will be maintained in accordance with a regularized and managed system so that a reasonably informed or knowledgeable staff member will be able to, upon reasonable effort, locate records responsive to the request. I agree with Adjudicator Cropley's findings and adopt them for the purposes of this appeal.

Assistant Commissioner Tom Mitchinson recently considered the type of evidence necessary to establish that reasonable efforts have been made to locate a record in Order PO-1954-I:

In conducting a reasonable search inquiry, the *Act* gives me the power as well as the obligation to satisfy myself that all reasonable steps have been taken to locate and identify records responsive to a request. I have the ability as well as the responsibility to determine what questions are objectively relevant in this regard, and to require that these questions be answered. In the context of these four inquiries, I determined that the most basic of questions associated with any reasonable search appeal of this nature were relevant and needed to be answered, and it is not acceptable for the government to refuse to answer direct questions of this nature, and to require me to accept indirect answers derived from the evidence it chooses to submit.

...

Although the search activities undertaken by the four institutions in these appeals were unquestionably extensive, given the approach adopted by the institutions, and the resulting error in defining the proper search parameters, I am unable to satisfy myself that all reasonable efforts have been made. The reason for these deficiencies, in my view, stems from the apparent decision on the part of the government to rely on indirect evidence when direct evidence would have been more appropriate. I am unclear as to why this approach was adopted, but at the end of the day I must make my decisions based on the evidence and arguments presented by the institutions and legal counsel. At many stages of the inquiry process, beginning with the Notice of Inquiry, and throughout the two days of oral inquiries, I made it clear what type of evidence I required in order to satisfy myself that all reasonable steps have been taken to identify records responsive to the appellant's request. That type of evidence was not forthcoming.

Where a considerable time period has elapsed, I do not find it to be unreasonable that former employees may not be able to identify the existence and/or locations of specific records. However, I believe that these individuals may be called upon to assist present employees in their search for records created prior to their assuming their positions. Further, in my view,

individuals assuming the positions of former employees assume the obligations of their predecessors in relation to record keeping practices.

In this appeal, the OHRC has failed to provide me with the specific details of the searches conducted for the responsive records. Further, the OHRC has failed to tender evidence from the individuals who would best be able to address the questions posed in this regard. This evidence is necessary for me to make a determination as to whether its search for records was reasonable. Under these circumstances, I find that the OHRC has not provided me with sufficient evidence to conclude that its search for records responsive to the appellant's request was reasonable.

ORDER:

1. I find that the records at issue in Order PO-1968 would be responsive to the appellant's request in this appeal and I order the OHRC to render a decision on access to these records in accordance with section 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request and without recourse to a time extension.
2. I order the OHRC to provide details in relation to its contacts with all three former employees identified in the OHRC's letter dated October 29, 2001.
3. I order the OHRC to conduct further searches based on the appellant's revised request as referred to in this order. Specifically I order the OHRC to conduct further searches within the Records Centre/Corporate Services, Archives of Ontario, Policy and Public Education Branch, Intake Department, and Legal Department. I also order a further search of their electronic databases. In addition, I Order the OHRC to conduct a search of the minutes of the Commissioners' meetings for the time period of 1987 up to and including 1991. Specifically I order the OHRC to provide;
 - (a) Information establishing that the searches were conducted by reasonably informed employees who are knowledgeable of the particular record keeping practices,
 - (b) details outlining how files are stored ,
 - (c) details of the areas searched,
 - (d) details of the type of files searched, and
 - (e) details of the results of these searches
4. I order the OHRC to provide the appellant with information as to the results of these further searches in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request, and without recourse to a time extension under section 27 of the *Act*.

5. If after conducting their searches, the OHRC concludes that records responsive to the appellant's request no longer exist, I order the OHRC to provide me with details about their record maintenance policies and retention schedules.
6. I order the OHRC to provide me with a copy of the correspondence referred to in provisions 1 through 5.

Original signed by: _____
Andrea Schwartz
Acting Adjudicator

December 21, 2001 _____