



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1968**

**Appeal PA-010203-2**

**Ontario Human Rights Commission**



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## **BACKGROUND:**

The Ontario College of Art (OCA) made a request to the Ontario Human Rights Commission (OHRC) for approval to implement a special program, i. e. an employment equity program, in accordance with section 13 (now section 14) of the *Human Rights Code, R.S.O. 1990, c.H-19*. In 1990, the OCA obtained the requisite approval to implement its program known as the Equity 2000 Plan.

## **NATURE OF THE APPEAL:**

The OHRC received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all documents, notes, memoranda, etc. which are or have been in the possession of the OHRC in relation to the Equity 2000 Plan and recommendations of the OCA (also known as the Ontario College of Art and Design) from its outset to the present.

The OHRC issued a decision advising that it did not find any records responsive to the request.

The requester (now the appellant) appealed this decision because he believes that the records he is seeking must exist.

To substantiate his belief that records must exist, the appellant provided this office with a copy of a News Release Communique from the OHRC dated June 26, 1990 entitled "Ontario Human Rights Commission Approves OCA Equity Plan". It states that the OHRC issued an order approving the employment equity program at the OCA known as Equity 2000, and that the order will be in effect for two years. After the first year, the OCA must provide the OHRC with a detailed progress report on both phases of the program. The news release also states that the OHRC invited written submissions through media releases and newspapers advertisements, and received 23 briefs which dealt with a broad range of issues raised by the program and which were considered before the OHRC made its decision.

In addition, the appellant stated that he believes there must be a file containing records relating to the OCA because he was personally involved with the briefs and submission process. He submits that written communications should exist between the OCA and the OHRC's Director of Systemic Investigation and others, prior to and subsequent to the issuance of the order.

In appeals such as this one, involving the denial of access on the basis that no responsive records exist, the sole issue to be decided is whether the institution has conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

I sent the appellant and the OHRC a Notice of Inquiry at the same time that I sent the Confirmation of Appeal. The Notice of Inquiry identified the facts and issues raised in the appeal. It advised that a Mediator was assigned to the appeal and if the appeal was not resolved by mediation, an oral inquiry would be held to determine whether the Ministry had conducted a reasonable search for records which respond to the request. The Notice of Inquiry also contained the further information provided by the appellant to this office to substantiate his belief that records should exist.

During the mediation stage of this appeal, the OHRC located the following records:

1. Equity 2000, A Long Range Plan for Employment Equity OCA – Phase I and Phase II, November 11, 1991
2. Appendix A: Status of Recommendations of Equity 2000 Report, October 1989
3. Order – OCA Program - Equity 2000

As the matter did not resolve during the mediation stage of the appeal, an oral inquiry was conducted via teleconference. Present were the appellant, who is a member of the faculty at the OCA, the appellant's solicitor, the OHRC's Registrar, Executive Assistant to the Executive Director, and the Manager of the Mediation and Investigation Branch. Both the appellant and the OHRC provided oral representations.

## **DISCUSSION:**

### **REASONABLENESS OF SEARCH**

As set out above, in appeals involving a denial of access on the basis that no records or no additional responsive records exist, the sole issue to be decided is whether the institution has conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

Where a requester provides sufficient detail about the records he 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 any records that are responsive to the request. 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 obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

### **THE REPRESENTATIONS**

At the inquiry, the appellant submitted additional information to substantiate his belief that the records he is seeking must exist:

With respect to correspondence, he submitted

- that the President of the OCA initiated the request for a Special Program in 1985 or 1986;
- that Legal Counsel for the OCA submitted representations on behalf of seven clients;
- that there was considerable communication between the OCA and the OHRC Equity 2000 Committee advising the OCA of the viability of the OCA's plan;

- that OCA's Legal Counsel would have made a submission regarding the viability of the plan;
- that there was communication between the OCA and the former Director of the Systemic Unit who had intervenor status regarding an arbitration matter; and
- that there was communication between the OCA and the OHRC Phase II Committee regarding the arbitration matter.

The appellant submits that, in 1990, he contacted the Executive Assistant to the Director in the OHRC's Executive Director's Office to discuss the submissions provided to the OHRC by OCA's legal counsel.

He submitted that records ought to exist on the basis that OCA's request for a special program was high profile and subject to significant media attention at the time, including CBC's Fifth Estate.

The appellant also submitted that there should be records of media access requests for OCA documents.

In providing representations on behalf of the OHRC, the Registrar stated, at the outset, that the OHRC does not deny that, at one time, the records existed, but rather that they may now no longer exist. She described three records which were located during the mediation stage of the appeal, and one additional record located just prior to the hearing, namely, a News Release issued in April 1990 inviting written submissions on the employment equity program.

The Registrar then described the search she had conducted to locate responsive records.

Firstly, she advised that she took carriage of this access request after the appeal had been initiated because the Freedom of Information Coordinator (the Coordinator), went on leave. The Registrar advised that she contacted the Coordinator to discuss her search for the records, and stated that both she and the Coordinator had searched the same areas of the institution, with one exception. The Registrar explained that when the Coordinator conducted her search of the Systemic Unit, the employee who had had carriage of the OCA file ten years ago, had been on a leave of absence. This employee returned to work after the appellant filed his appeal of the OHRC's decision that no records exist.

#### Systemic Unit

The Registrar stated that, because of the changed circumstance, she was able to conduct a further search for records relating to the OCA request in the Systemic Unit. The employee who had had carriage of the file advised her that the OCA file had been closed years ago and that she does not know what happened to it. However, the employee believes that all OHRC files relating to the OCA would have been sent to the Records Centre. The employee also searched the files in her own office and located the two OCA reports described earlier.

The Registrar submitted that she searched the general correspondence files of the Systemic Unit as well as all files of the unit that are still on the premises of the OHRC, dating back to 1990. No records relating to the OCA were found.

The Registrar stated that she did not contact the former Director or five other individuals employed in the unit at the time of the OCA request. She stated the former Director and three of the employees no longer work at the OHRC and the other two employees did not have carriage of the OCA file.

However, the Registrar stated that all of the former Director's files which were not forwarded to the Records Centre, were passed on to the Director who succeeded her. This employee is now the Manager of the OHRC's Mediation and Investigation Branch (the Manager). She stated these files in the Manager's office were searched and no records relating to the OCA were located. The Manager attended the hearing very briefly, and provided the following information.

He confirmed that the OCA's request for a special program was assigned to the Systemic Unit. The Manager stated that he had never had carriage of the OCA file. However, he advised that, in addition to the employee referred to above, another employee who is no longer at the OHRC, also had carriage of the OCA file.

With respect to the records being sought, the Manager stated that all records relating to the OCA were kept in one file, including the 23 briefs and the report required to be submitted by the OCA. He stated that he does not know what happened to the OCA file and does not know whether it was ever sent to the Records Centre.

Lastly, the Manager confirmed that the former Director of the Systemic Unit made a presentation regarding the OCA request for a Special Program to the Chief Commissioner and Commissioners at their meeting, and that minutes are kept of these meetings.

At this point, the Registrar indicated that she would conduct a search for the minutes of this meeting and provide them to the appellant.

#### Policy and Communication Areas

The Registrar stated that she searched the Policy area and the Communications Department which is part of the Policy area, for records relating to the OCA dating back to 1989. Only one record, a press release described earlier, was located.

#### Records Centre

The Registrar stated that she submitted a request to the OHRC Records Centre for "any records relating to the OCA Equity 2000 Program". She indicated that any records relating to the OCA would have been kept in a box marked "OCA". The Records Centre advised her that it did not locate any records.

The Registrar stated that there is no record retention schedule for records relating to requests for special programs and she does not know how long such records were kept at the Records Centre. She stated that the OHRC record retention schedule relates only to complaints and complaint files remain at the Records Centre for seven years, after which they are sent to Archives.

Archives of Ontario

The Registrar stated that she also submitted a request for OCA records to the Archives of Ontario. Archives advised her that it does not keep records of the type she is seeking but rather only keeps records relating to complaints. The filing system is numerical. Each complaint file is assigned a number and located by this number.

Chief Commissioner's Office

The Registrar requested that the secretary to the Chief Commissioner, employed at the time of the OCA request, conduct a search for any OCA records. The secretary did not remember the OCA request. Nevertheless, she searched her computer and could not find any references to the OCA.

Executive Director's Office

The Executive Assistant to the Executive Director stated that she had assisted the Registrar in conducting a search for the records and attested that the search was conducted as described by the Registrar. With respect to the appellant's claim that he had contacted her about OCA's submissions, she stated that she does not recall the appellant contacting her to discuss the OCA submissions some ten years ago.

In conclusion, the Registrar submitted that she had conducted an exhaustive search for responsive files.

In response, the appellant re-iterated that records must exist because there had been an arbitration between the OCA and the OHRC in which the former Director of the Systemic Unit had had intervenor status.

The Registrar stated that, based on her memory, a complaint based on race had been made, and as a result, an order was issued which rescinded the order approving the OCA special program known as Equity 2000. She stated that had she been able to locate the OCA file, it likely would have contained a copy of the order.

**Findings:**

In Order M-909, Inquiry Officer Laurel Cropley stated that "A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. I agree with this statement.

It is undisputed that records responsive to the request did exist at one time. I find that the OHRC has provided me with sufficient evidence to conclude that its search for records responsive to the request was reasonable, with the following exceptions:

- The OHRC did not provide detailed evidence of the search conducted by the Records Centre. Other than indicating that the responsive records would be contained in a box marked “OCA”, the OHRC did not request that the Records Centre provide a detailed account of its search; of how records are filed at the center; nor an explanation as to why the box of records could not be located.
- The OHRC did not consider that there may have been arbitration related to the OCA’s request for a special program and, consequently, neither the Legal Department nor the Race Relations Department were searched
- The OHRC did not contact the one person who would have been most familiar with the OCA files, namely the former Director of the Systemic Unit.

## **ORDER:**

1. I order the OHRC to conduct a further search for any records relating to the OCA Equity 2000 plan which may be located at the Records Centre. The Records Centre should describe the results of its search, in detail, including describing how the boxes of records are filed, whether chronologically, alphabetically or by subject matter. The Record Centre should also provide an explanation as to what happens to records relating to requests for Special Programs.
2. I order the OHRC to conduct a further search for records relating to the OCA file in its Legal Department and Race Relations Department. The OHRC should describe the results of its search, in detail, including the areas searched, who was contacted in the course of the search, and what types of files were searched.
3. I order the OHRC to contact the former Director of the Systemic Unit to make detailed inquiries as to her knowledge of where the files might be located.
4. I order the OHRC to conduct a search for the minutes of the OHRC’s Commissioners’ meetings which refer to the OCA request for a special program.
5. I order the OHRC to provide the details of the searches and the results of the searches to the appellant in writing.

6. In the event that the OHRC locates additional responsive records as a result of the searches referred to in Provisions 1, 2, 3 and 4, I order the OHRC to render a final decision on access to such records in accordance with the provisions of sections 24 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.

Original signed by: \_\_\_\_\_  
Susan Ostapiec  
Acting Adjudicator

November 15, 2001  
\_\_\_\_\_  
Date:

**POST SCRIPT:**

A key witness for the OHRC, the Manager who had worked in the Systemic at the time of the OCA request, and who subsequently became Director of the unit, allocated only a half hour to attend the oral inquiry. As sometimes occurs in inquiries of this nature, preliminary issues arose that had to be dealt with prior to hearing the parties' evidence on the search. The Manager was not present to address all of the issues which were raised during the hearing. It is possible that the Manager could have provided sufficient evidence for me to conclude the search was reasonable, thus avoiding the necessity of the institution doing another search.

It is critical that institutions in particular, which bear the burden of proof in these types of inquiries, ensure that all staff on which it relies to provide evidence be available for the inquiry and that they remain until the hearing is completed.