



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2067

Appeal PA-010203-3

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

copies of all documents, notes memorandums, etc. which are or have been in possession of the Ontario Human Rights Commission in relation to the Equity 2000 plan and recommendations, of the Ontario College of Art, also known as the Ontario College of Art and Design from its outset to present.

The requester filed a “deemed refusal” appeal initially as the OHRC failed to respond to the request within the timelines established by the *Act* for doing so. The Commissioner’s office opened Appeal Number PA-010203-1, which ultimately led to a decision by the OHRC that no records responsive to the request existed.

The requester, now the appellant, appealed this decision and the Commissioner’s office opened Appeal Number PA-010203-2 in response. The issues in that appeal were adjudicated in Order PO-1968, dated November 15, 2001. In that decision, Acting-Adjudicator Susan Ostapec ordered the OHRC to conduct a number of additional searches for responsive records. The order provisions of Order PO-1968 specified that the OHRC was to:

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.

In one of two letters dated December 18, 2001 in accordance with the requirements of Order Provision 5 of Order PO-1968, the OHRC provided the appellant and this office with a written description of the searches which it had conducted in response to Order Provisions 1 to 4. By separate letter also dated December 18, 2001, the OHRC issued a decision with respect to records located as a result of the additional searches. In this decision, the OHRC indicated that access in full would be granted to 78 pages of records upon payment of the sum of \$15.60. The OHRC also informed the appellant that it would undertake a search of its record-holdings for “minutes of Commission meetings for the period 1988 to 1992” upon payment of a fee of \$1,099.80. In this regard, the OHRC’s decision was not issued in accordance with Order Provision 6, which, as I noted above, required a “final decision on access”.

The appellant appealed the OHRC’s decision on the basis that the searches conducted were not sufficiently thorough and that the fee estimates for both the proposed search of Commission minutes and the fee for those records actually provided to him was unreasonable.

The appeal then moved into the mediation stage of the process. By letter dated June 17, 2002, the appellant set out in detail his position with respect to what he perceived to be the issues remaining outstanding in this appeal. Specifically, the appellant took the following positions:

- 1. Late Response to Order PO-1968 & Late Issuance of Decision**

The appellant took issue with the fact that the OHRC did not issue their response to Order PO-1968 nor the decision letter by December 15, 2001 as ordered by the Acting Adjudicator. Both of these documents were issued on December 18, 2001.

- 2. Limit of Time Lines for Further Searches**

The appellant is of the view that the OHRC should have searched records covering the period from 1985 to 1995 instead of limiting it to the period from 1988 to 1992.

- 3. Lack of Evidence or Details of Further Searches**

The appellant took issue with the fact that the OHRC’s response does not offer any further details or evidence of the results of further searches conducted in response to Order Provisions 1, 2, 4, 5, and 6. The appellant also pointed out that no dates for the destruction of files were offered by the OHRC.

4. Searches Regarding Order Provision 4

The appellant took issue with the fact that the OHRC did not undertake the searches in response to Order Provision 4 of Order PO-1968. The OHRC issued a fee estimate of \$1,099.80 and advised the appellant that they will conduct the search which was ordered only upon receipt of a deposit of \$549.90

5. Searches Regarding Order Provision 2

The appellant is of the view that the OHRC ignored Order Provision 2 and did not conduct searches relating to the Race Relations area of the OHRC.

6. Response to Order Provision 3

The appellant is of the view that the OHRC's response to Order Provision 3 is inadequate in that it did not address matters relating to the former Director of the Systemic Unit's involvement in Arbitration and/or Boards of Inquiry and that no further searches were undertaken in this regard.

7. OHRC in Conflict of Interest

The appellant is of the view that the OHRC is in a conflict of interest situation because they are aware of his financial situation and have nonetheless charged him fees for accessing records.

8. Availability of Records at Public Library

The appellant took issue with the fact that contrary to what the OHRC advised him, Board of Inquiry decisions from prior to 1996 are not available through his Public Library nor are they posted on the OHRC web site.

In addition, the appellant indicated that he requested a fee waiver from the OHRC but has yet to receive a reply. The fee estimates of \$1,099.80 for the search of Commission minutes and the fee of \$15.60 for the records provided to the appellant also remain at issue. The appellant also raised concerns with the manner in which the OHRC tendered its evidence at the oral hearing before Acting Adjudicator Ostapec. Because that evidence involved a separate proceeding before another decision-maker, I am unable to address those concerns in the present inquiry.

In response to each of these enumerated items, in a letter dated June 27, 2002 the OHRC indicates that:

1. Late Response to Order PO-1968 and Late Issuance of Decision

The OHRC acknowledged that it responded 3 days late. The decision was to have been completed on Saturday, December 15, 2001 and OHRC responded on

Tuesday, December 18, 2001. OHRC's late response is due to lack of staff resources available at that time.

2. Limit of Time Lines for Further Searches

The information requested by the requester dates back to 1990. To ensure that the search was exhaustive, the OHRC searched back to 1988 and up to 1992. The OHRC is prepared to expand the search to the period from 1988 to 1995. A fee estimate will be provided upon request.

3. Lack of Evidence or Details of Further Searches

The OHRC has provided all available information with respect to the searches. The OHRC has no dates for the destruction of files and therefore could not offer such dates. The OHRC is aware that it did not have a retention schedule for special programs as a subject group. Nevertheless, it did check with the Archives of Ontario. The Archives of Ontario conducted an exhaustive search as outlined in the response to Order PO-1968 and confirmed that it had no such records. It should be noted that in the existence of the OHRC, it has only approved one special program, that involving the Ontario College of Art. Shortly after that program was approved, the OHRC developed guidelines for special programs. The OHRC also indicated that it does not "approve" special programs, rather they are to be implemented on a voluntary basis with the understanding that failure to adhere to Commission policies, guidelines or the [*Human Rights*] Code may result in a human rights complaint.

4. Searches regarding Order Provision 4

Staff time must be allocated to locate and manually search for information representing over a decade of materials. These materials are not centralized and no index or catalogue exists. Rather, staff will be required to search through various departments and offices of OHRC staff to first locate, and then review the located materials for the requested information. This labour intensive process is dependent on the availability of staff. It is public knowledge that the OHRC has limited human resources. Further, it should be noted that the OHRC did not charge the appellant for fees related [to] the search of records in the Legal Department nor the searches it conducted to locate documents in the various departments and offices of staff of the Commission.

5. Searches regarding Order Provision 2

In looking at the retention schedules of the OHRC, records relating to the defunct Race Relations Department were kept for six years then destroyed. Therefore, there were no records available to search. This division was separated from the Commission around 1990 and was no longer operational after 1993. As such there is no Race Relations Division to search. Further, as stated in the response

[to Order PO-1968], the Race Relations Division was not responsible for special programs rather; it was the compliance section of the Commission that was responsible for these types of programs.

As stated in the response to the order, a manual search, by the Registrar of the OHRC was conducted with respect [to] the records of the Legal Services Branch and no records were found relating to the request.

6. Response to Order Provision 3

The OHRC simply states that it has complied with this order provision as it contacted the former Director of the Systemic Unit and was advised by this individual that she had no knowledge of the whereabouts of any responsive records.

7. OHRC in Conflict of Interest

The appellant has made an assumption with respect to the OHRC's awareness of his financial situation. It goes on to add that it has not charged the appellant a fee for the searches conducted to this point.

8. Availability of Records

Boards of Inquiry records are public documents and while all records may not be available at the specific library searched by the appellant, these records can be requested from and/or are available at other libraries. For example, the Great Library at the Law Society of Upper Canada and libraries in the Faculties of Law, subscribe to Board of Inquiry decisions. Moreover, the Canadian Human Rights Reporter may also contain the Board decisions being sought by the requester.

As further mediation was not possible, I decided to seek the representations of the OHRC initially on the issue of its compliance with the terms of Order PO-1968 and the question of the appropriateness of the fee estimates provided. I also asked the OHRC for its position with regard to the granting of a fee waiver to the appellant. I received submissions from the OHRC which were then shared with the appellant, in their entirety. The appellant made lengthy representations in response to the Notice provided to him and these submissions were also shared with the OHRC, which made additional representations by way of reply.

DISCUSSION:

REASONABLENESS OF SEARCH

Searches Undertaken for Records Responsive to Order Provisions 1 to 4 of Order PO-1968

The initial representations of the OHRC on this issue are vague and unspecific, for the most part. Its reply representations similarly do not adequately address the questions posed in the Notice of

Inquiry regarding the scope of the searches undertaken for responsive records. I will attempt to discern from the material provided to me what, exactly, the OHRC did in order to comply with the requirements of Order Provisions 1 to 4 of Order PO-1968.

Order Provision 1

In response to the questions which I posed in the initial Notice of Inquiry and the Reply Notice with respect to the adequacy of the searches required by Order Provision 1 of Order PO-1968, the OHRC has provided me with some evidence of the inquiries which it made with respect to the existence and location of responsive records. It indicates that any records that may have once been stored within its own record-holdings relating to the Ontario College of Art's "special programme" were sent to a facility operated by the Government of Ontario which it refers to as the "Records Centre". From there, according to the records retention schedules appropriate to OHRC documents, records which may relate to the request were sent to the Archives of Ontario. It also indicates that neither the "Records Centre" nor the Archives of Ontario have been able to locate any of the requested records despite conducting various on-line searches of their computerized record-keeping systems using a variety of key words pertaining to the subject matter of the request.

I find that the OHRC has taken all reasonable steps to locate responsive records from both the "Records Centre" operated by the Government of Ontario and from the Archives of Ontario for records responsive to this part of the request.

Order Provisions 2 and 3

The OHRC has provided me with a description of the searches it has undertaken for responsive records in its Legal Department and in the record-holdings of the now-defunct Race Relations Department. Based on these submissions, which are similar to those contained in its December 18, 2001 decision letter, I find that these searches, albeit unsuccessful, were reasonable. In addition, I am satisfied that the OHRC made the inquiries which it was ordered to undertake of its former Director of the Systemic Unit. Again, these inquiries did not result in the OHRC locating any responsive records.

Order Provision 4

Based on the representations of the OHRC, I am not satisfied that it has conducted a reasonable search for the minutes of its Commissioners' meetings which refer to a request by the Ontario College of Art for a Special Programme. The OHRC has conceded that it has not undertaken to search for these records because it believes that to do so would be prohibitively time-consuming since it would be required to review minutes of all meetings held between 1988 and 1992.

In my view, the searches required of the Commission's meetings for records relating solely to the Ontario College of Art's special programme need not include the minutes of all meetings held between 1988 and 1992. In his initial response to the OHRC's December 18, 2001 decision letter, the appellant indicates that the search ought to include records for the period 1985 to 1992. On my reading of this correspondence, this assertion from the appellant relates to the OHRC's

search for all relevant records relating to the special programme issue, not just to the search required of the Commission's minutes. In my view, and in accordance with the position taken by the appellant in his representations, this portion of the search need only be conducted for the time period between the time when the OHRC met and discussed the Ontario College of Art's request for a special programme in November 1989, and the date of the announcement of the approval by the OHRC of the special programme in June 1990. This suggestion was first made by the appellant in January of this year and was not acted upon by the OHRC, which insisted that searches for a five-year period were required. In my view, this was an unreasonable position to take and it has caused the appellant inordinate delay in the processing of this part of his request.

As a result of these findings, I will order the OHRC to undertake a search of the Commissioners' meeting minutes for the period November 1989 to June 1990 only. It should also be noted that the appellant is only seeking access to the minutes relating to the Ontario College of Art's request for a special programme, and not to all the minutes of Commission meetings.

OTHER ISSUES RAISED BY THE APPELLANT:

NON-COMPLIANCE WITH THE TIME PERIOD PRESCRIBED BY ORDER PO-1968

The appellant argues that the OHRC did not issue its decision letter within the time frames set forth in Order PO-1968 as its decision letter is dated December 18, 2001, rather than December 15, 2001 as ordered. While I agree that the OHRC was technically not in compliance with the requirements of the order, I find that the appellant did not suffer any real prejudice as a result of this three-day delay in responding.

POTENTIAL CONFLICT OF INTEREST

In his representations, the appellant sets out what he perceives to be a conflict of interest in the manner in which the OHRC managed the application by the Ontario College of Art for a "special programme". This issue is beyond the purview of my inquiry and I decline to comment on these allegations.

The appellant also makes reference to prejudice to his position as a result of the OHRC's decision to charge a fee, despite its knowledge of his financial situation. In light of my findings below with respect to the fees which the OHRC will be entitled to charge him, I find that this issue is adequately addressed elsewhere in this decision.

AVAILABILITY OF BOARD OF INQUIRY DECISIONS

The appellant submits that because Board of Inquiry decisions are not available through his local library or on the OHRC's website, they are not, in fact, publicly available documents. In its letter to the appellant dated June 27, 2002, the OHRC indicates that:

Board of Inquiry records are public documents and while all records may not be available at the specific library searched by the appellant, these records can be requested from and/or are available at other libraries. For example, the Great

Library at the Law Society of Upper Canada and libraries in the Faculties of Law, subscribe to Board of Inquiry decisions. Moreover, the Canadian Human Rights Reporter may also contain the Board decisions sought by the requestor.

In my view, the OHRC has provided the appellant with sufficient information to allow him to locate the requested Board of Inquiry decisions. Despite the fact that they are not generally available through a public library, I find that the decisions of the Board of Inquiry are available through various law libraries in Ontario law schools and through the publishers of the Canadian Human Rights Reporter series.

IS THE OHRC ENTITLED TO CHARGE OF FEE FOR THE SEARCHES IT HAS UNDERTAKEN FOR RESPONSIVE RECORDS?

In its second letter to the appellant dated December 18, 2001, the OHRC indicates that it was able to locate some responsive records and that, upon payment of a fee of \$15.60, it would provide these documents to the appellant. Later, in the representations provided to me in response to the Notice of Inquiry, the OHRC indicates that it has disclosed these records to the appellant, a fact which the appellant disputes. As the OHRC has indicated its willingness to disclose these records to the appellant without charge, I will order it to provide the appellant with the records identified in its letter of December 18, 2001.

The OHRC originally provided the appellant with a fee estimate of \$1,099.80 for the cost of conducting searches of its record-holdings for minutes of Commission meetings held between 1988 and 1992. As a result of my discussion above regarding the narrowing of the time frame of this search to include only those minutes for the period November 1989 to June 1990, I expect that this cost will be substantially reduced. The narrowing of the scope of this aspect of the search was first suggested by the appellant in January of this year and was reiterated in his representations, which were shared with the OHRC. This appeal has been fraught with delays, misunderstandings and confusion with respect to the scope of the request and the breadth of the records which are responsive to it.

I find that, in the interests of resolving the outstanding issues between the parties without further delay or additional cost to the appellant, it would be fair and equitable for the OHRC to conduct its search for Commission minutes covering the period November 1989 to June 1990 without recourse to charging the appellant a fee under section 57(1) for either search time or any other cost. The OHRC indicates that the Commission meets approximately every month and that minutes of those meetings are kept. In my view, it would be reasonable to expect that a search of the minutes for this relatively short period of time would not be onerously expensive for the OHRC to undertake.

CONCLUSION

The OHRC summarizes its position with respect to the searches undertaken for responsive records by indicating that it has never denied that “some of [the] records existed related to the appellant’s request concerning the issuance of the special programme order.” The OHRC adds that:

it has been unable to find such records which is due to the passage of time, 10 to 12 years, moving and amalgamation of offices, numerous changes in personnel and several restructuring exercises as outlined in the response of July 27, 2002. Key personnel involved with the record were unaware if the record was even stored and/or sent to [the] records centre. Further, since the record was the first and the only special programme order with which the Commission was involved there appears to have been no method in place of tracking the whereabouts of the record once the time period in the order (two years from June 1991) had expired.

It is apparent that the OHRC's record-keeping practices with respect to the responsive records in this case were wholly inadequate. In a postscript to Order P-350, Assistant Commissioner Tom Mitchinson commented on certain deficiencies in the record-keeping practices of another provincial institution as follows:

Although I am satisfied on the evidence before me that the institution has conducted a reasonable search for records in this case, the representations provided by the institution regarding the inability to locate *REBBA* registration records for the period 1954-68 cause me some concern. The institution acknowledges that microfiche registration records for other individuals exist for this period, and the explanation offered for the absence of records relating to the appellant is that they may have been inadvertently destroyed or misplaced.

If an institution's records retention schedules require that a certain category of records be maintained, or if the institution decides for other reasons to maintain certain types or records, it is vital to the integrity of the institution's records management system that procedures are put in place to ensure that these records are carefully and properly maintained. It is not acceptable, in the absence of particular justifiable circumstances, for members of the public to be denied access to records which they would otherwise be entitled to receive, solely on the basis that the institution's records management systems are inadequate or deficient.

In my view, these comments are equally applicable to the present situation. I urge the OHRC to implement more systematic and careful record-keeping practices in order to avoid situations in the future where it is simply unable to find requested information because of its inadequate record retrieval mechanisms. To conclude, I find that the OHRC has conducted many of the searches required by Order PO-1968 to locate records which are responsive to the appellant's request. However, owing to the inadequacies of its records management practices, it was simply not able to locate the requested information.

ORDER:

1. I order the OHRC to conduct a search of its record-holdings for the minutes of Commission meetings held between November 1989 and June 1990 for records relating to the Ontario College of Art's request for a special programme. The OHRC is not

entitled to charge the appellant a fee under section 57(1) of the *Act* for either this search, or the provision of records identified in its letter of December 18, 2001 to the appellant.

2. In the event that the OHRC locates additional responsive records as a result of the searches referred to in Provision 1, I order the OHRC to render to the appellant 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.
3. I find that the OHRC's searches for other records relating to this request were reasonable.
4. I do not uphold the OHRC's fee of \$15.60 for those records which it has already located or the fee estimate of \$1,099.80 for the cost of undertaking searches for Commission meeting minutes.

Original signed by: _____
Donald Hale
Adjudicator

November 13, 2002