



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2237

Appeal PA-030037-1

Ministry of Health and Long-Term Care



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

I request a record or (records) detailing the expenses incurred by [the Ministry] in responding to [two identified Health Services Appeal and Review Board cases].

...

I am interested only in the dollar amount of expenses incurred (such as in-house and outside legal counsel & disbursements) by [the Ministry] in connection with these [cases]. A cumulative total would be fine, for example: "The [Ministry] incurred \$___ in related legal expenses and disbursements in connection with the [two identified] cases from January 1, 2001, to December 31, 2002."

The requester specified that he was asking for relevant records from January 1, 2001, to December 31, 2002.

The Ministry responded to the request by identifying that the request for records had been transferred to the Ministry of the Attorney General (MAG), under section 25 of the *Act*, because MAG has a greater interest in the records.

The requester (now the appellant) appealed the Ministry's decision. The appellant took issue with the Ministry's position that MAG has a greater interest in all of the records. He also stated that, although some records may have been produced at MAG, other records would be produced by the Ministry in the course of remitting payments to the MAG office, to evidence the Ministry's payment or acquittance of invoices submitted by MAG. The appellant took the position that records produced by the Ministry in the course of remitting payment for the statements of account rendered by MAG should exist. Accordingly, the issue of the reasonableness of the Ministry's search was included as an issue in this appeal.

Mediation did not resolve the issues, and this appeal proceeded to the inquiry stage. I sent a Notice of Inquiry to the Ministry, initially, and the Ministry provided representations in response. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant, who also provided representations.

One of the issues I asked the parties to provide representations on was whether or not the Ministry's decision to transfer the request to another institution should be upheld in the circumstances. The Ministry identified that the decision to transfer the request pursuant to section 25(2) was made because, in its view, MAG had a greater interest in the identified responsive records. The Ministry also identified the nature of the responsive records as follows:

The MAG generates the statements of account for individual files, but bills to the Ministry the fees and expenses on an aggregated – not on an individual file – basis for a period of time, for which a journal is prepared and attached by the MAG for delivery to the Ministry.

In response to the Ministry's representations, the appellant identifies in his representations that he accepts that, with respect to those records at issue in this appeal that were created by MAG, MAG has the greater interest in them. The appellant states:

The records at issue in this appeal are those responsive records, if any, that were created by the Ministry, not the MAG.

In light of the position taken by the appellant, the question of which Ministry has the greater interest in the identified responsive records is no longer an issue in this appeal, and I decline to make a finding on that issue. The sole issue remaining in this appeal is whether the Ministry's search for responsive records was reasonable.

DISCUSSION:

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, the Ministry must establish, however, that it has made a reasonable effort to identify and locate records responsive to the request.

The Ministry submitted representations, along with a copy of an affidavit, in support of its position that the search for responsive records was reasonable. In identifying how the Ministry processes records of the kind requested, the Ministry position is set out above. It states that MAG generates the statements of account for individual files, but bills to the Ministry the fees and expenses on an aggregated – not on an individual file – basis for a period of time. It also identifies that a journal reflecting this is prepared and attached by MAG for delivery to the Ministry.

In support of its position the Ministry then refers to the affidavit sworn by the MAG Freedom of Information Co-ordinator. That affidavit identifies the usual process for the submission and payment of accounts by both the Crown Law Office – Civil (CLOC) and the Constitutional Law Branch (CLB) of MAG to the Ministry. The affidavit identifies that the two MAG offices bill the Ministry on a periodic basis for fees and disbursements incurred in cases in which they act for the Ministry (including those for which records were requested in this appeal). MAG identifies that the statements of account are generated for individual files by the MAG financial officers.

However, the affidavit proceeds to identify that each of these offices separately groups all of their individual file statements of account for the Ministry, and that the aggregate total is directed to the Ministry for payment. It is the aggregate total which forms the basis of subsequent processing by the Ministry. The affidavit identifies that, therefore, apart from the statement of accounts themselves, there are no records at the Ministry which reflect a billing to the Ministry for any individual file.

Finally, the affidavit identifies the individual at the Ministry who is responsible for processing and payment of the accounts rendered to the Ministry by MAG, and who maintains those files. The affidavit identifies that the result of that individual's searches for responsive records was that only the records which have already been identified as responsive (and for which the request was transferred to MAG) were found. The search did not identify any accounting records responsive to the request.

The appellant was provided with a copy of the Ministry's representations, including the affidavit. He states that the records, which he claims are responsive and should exist, would be records created by the Ministry. He refers to the affidavit material provided by the Ministry in support of his position, and notes that the affidavit states that "[The] Ministry processes payment... for the aggregate amount". It is the appellant's view that this statement confirms the existence of some sort of payment process record. The appellant states that the Ministry has failed to make a reasonable search because the Ministry has not clearly identified the records it creates when it processes payment.

The appellant also takes the position that the material provided by the Ministry supports the view that the Ministry creates records as a result of processing payments to MAG - at the very least payments for amounts in the aggregate. The appellant then states that the Ministry should reveal what proportion of those aggregate "payment processes" records were attributable to the individual cases at issue.

Given that the Ministry has accounting records, produced by it in the course of remitting payment to MAG (albeit in the aggregate), the appellant takes the position that the Ministry is in possession of responsive records in which it has a "greater interest". The appellant states that the Ministry should take their own records and calculate the amounts pertaining to the requested files (by, for example, subtracting the amounts pertaining to other files).

Findings

The Ministry has provided a clear and detailed description of the efforts it undertook to locate records responsive to the appellant's request. It has also identified the process through which accounts are submitted and paid between the Ministry and MAG.

I am satisfied that the Ministry has made a reasonable effort to identify and locate records responsive to the appellant's request. The request was for records detailing the expenses incurred by the Ministry concerning two specific cases. The Ministry determined that MAG had a greater interest in records which contain this specific information, and transferred that request to MAG. The Ministry has also identified the individual at the Ministry who conducted the search for the records, and confirmed that no other responsive records were found.

I do not accept the appellant's position that the aggregated accounting records produced by the Ministry would be responsive to the appellant's request. The request was clearly for records relating to two specific cases. In my view, accounting records which contain the aggregate amounts of fees and payments for all cases over a period of time are not responsive to the appellant's specific request. I am also satisfied, based on the affidavit material provided to me, that the Ministry has adequately discharged its responsibilities under section 24 of the *Act* to conduct a reasonable search for all responsive records.

Finally, with respect to the appellant's position that the Ministry could take a number of records and calculate the amounts for individual cases (by, for example, subtracting all other amounts for all other files), in my view the Ministry has no obligation to create such a record in order to respond to the access request in these circumstances.

It has been established and recognized in a number of previous orders that section 24 of the *Act* does not, as a rule, oblige an institution to create a record where one does not currently exist. However, in Order 99, former Commissioner Sidney Linden made the following observation with respect to the obligations of an institution to create a record from existing information which exists in some other form:

While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions.

Although I accept the appellant's position that the Ministry could calculate the specific amounts requested, I find that the Ministry is not required to do so in the circumstances, and that it has met its obligations under the *Act*. As identified above, an institution is not, as a rule, obliged to create a record where one does not currently exist, and I find that the circumstances present in this appeal are not such as to warrant the creation of a record. In my view this is not the type of situation described by former Commissioner Linden in Order 99. The creation of a record as suggested by the appellant would, in this case, simply be creating a record containing information already contained in a record in the possession of the Ministry, but which the parties have agreed that MAG has a greater interest in. Furthermore, any calculation as proposed by the appellant would also be based on the information contained in those records for which the request was transferred. Accordingly, I find that the present circumstances are not such as to oblige the Ministry to create a record containing the requested information.

ORDER:

In all the circumstances, I find that the Ministry has made a reasonable search for records responsive to the request, and I dismiss the appeal.

Original signed by: _____

Frank DeVries
Adjudicator

February 3, 2004 _____