



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2173

Appeal PA-030035-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

On January 2, 2003, 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) as follows:

I believe meetings are held roughly every six months of representatives from provincial/territorial ministries of health to discuss issues pertaining to out-of-province and out-of-country health services. I do not know if these meetings bear an official name or committee title.

It is my understanding that at one or more of these meetings (held sometime prior to mid-September 2002), the issue of gene testing for retinoblastoma was discussed. I believe that some of the Ontario representatives were from the Provider Services Branch, Ministry of Health and Long Term Care.

I request access to the following documents having connection to the meeting, or meetings, at which gene testing for retinoblastoma was discussed:

1. Meeting(s) agenda
2. List of all participants and attendees at the meeting(s)
3. All records connected to the discussion of gene testing for retinoblastoma, whether the records were made before, during, or after the meeting(s), such as:
 - written presentations by the MOHLTC or others;
 - notes of any oral presentations;
 - computer presentations (e.g. PowerPoint);
 - notes to file made by the representatives/participants be they electronic notes or comments taken on laptop or regular computers during the meetings or thereafter, or handwritten;
 - e-mails and other correspondence;
 - handouts, overhead acetates, slides, or recordings;
 - preparatory or draft-only documents;
 - briefing notes (please sever privileged information, if any); and
 - legal opinions (please sever privileged information, if any).

I believe, but am not certain, that responsive records will be found at the Provider Services Branch, MOHLTC, in Kingston. I am interested in relevant records from January 1, 2001, to the present.

This is continuing request for access, in the event that retinoblastoma gene testing is discussed at subsequent meetings.

On January 20, 2003, the Ministry issued a decision advising that the record requested does not exist. In its decision letter, the Ministry also provided the following information:

The search was conducted in the Provider Services Branch of the Health Services Division. [A named individual], Director of Provider Services Branch, indicates

that a complete and thorough search of Provider Services Branch has been conducted and that no responsive records were found.

For your information, minutes and agenda for five meetings of Provincial and Territorial Medical Directors (between March of 2001 and September of 2002) were located but the subject matter of your request was not on the agenda or discussed at any of these meetings.

On January 24, 2003, the requester's representative (now the appellant) appealed the Ministry's decision to this office.

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*.

This office provided the appellant and the Ministry with a Notice of Inquiry informing them that a mediator was assigned to the file and if the appeal was not resolved by mediation, an oral inquiry would be held to determine whether the Ministry has conducted a reasonable search for records responsive to the request. The Notice of Inquiry also contained information provided by the appellant to this office to substantiate his belief that records should exist.

To substantiate his belief that records should exist, the appellant provided this office with a letter dated September 24, 2002 from [a named physician] from Nova Scotia. The appellant highlighted the fact that this letter specifically makes reference to "a meeting of the Medical Directors across Canada which was held in Kingston, and the issue of retinoblastoma was discussed". The appellant also referred to portions of the letter which states "We were advised by the Medical Director from Ontario that inquiries should be directed to the Molecular Lab at the Sick Kids in Toronto" and that "The Province of Nova Scotia has a reciprocal arrangement with the Province of Ontario and will pick up all laboratory costs under the reciprocal arrangement..." In the appellant's view, the statements in this letter support his view that the Ministry should have records responsive to his client's request. The appellant also advised this office that he spoke to the Medical Director of the Department of Health for the Province of Newfoundland and Labrador, who confirmed that he was at a meeting in September 2002 where the topic of retinoblastoma was discussed.

As the matter did not resolve during the mediation stage of this appeal, an oral inquiry was held at this office. The appellant attended with an assistant and provided oral representations. Present on behalf of the Ministry were the following individuals, who also provided oral representations: the Freedom of Information (FOI) Team Lead, an FOI Program Adviser, and Counsel from the Legal Services Branch. An individual from the Provider Services Branch (Administrative Services Co-ordinator) also provided oral representations via teleconference.

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*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

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.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records that are reasonably related to the request.

THE REPRESENTATIONS

At the start of the inquiry, I was advised that the Ministry had located four pages of responsive records as a result of a second search that was conducted during the mediation stage of this appeal. These documents include an agenda and two pages from the minutes of the Inter-Provincial Medical Directors Meeting of September 19-20, 2002. The appellant confirmed that he received the Ministry's revised decision of April 17, 2003 granting full access to these four pages. The appellant provided me with copies of these documents.

The Ministry explained that the initial search focused on meetings that had occurred since January 1, 2001, as requested. The Ministry advised that the agendas and minutes of these meetings were reviewed for any references to retinoblastoma testing. The Ministry explained that since none of the minutes contained any reference to *retinoblastoma*, it was determined that there were no responsive records. Upon a review of the agendas and minutes for references to *genetic testing* in general, the Ministry identified one meeting during which the issue of "Genetic testing across Canada – Billing through the reciprocal process" was discussed. This meeting occurred on September 19-20, 2002 in Kingston, Ontario.

The appellant then explained that he believes additional records responsive to his request should exist. In particular, he indicated that he did not receive records relating to item 2 (a list of all participants and attendees at the meeting), nor did he receive any further records connected to this meeting, as outlined in item 3 of his request.

During the inquiry, the Administrative Services Co-ordinator for the Provider Services Branch (the Co-ordinator) provided details regarding this meeting, and also described the searches that were conducted to locate responsive records related to the meeting.

Inter-Provincial Medical Directors Meetings

By way of background, the Ministry explained that Inter-Provincial Medical Directors Meetings are held biannually, and attended by representatives of the provincial/territorial ministries of health, with different provinces hosting the meetings. The purpose of the meetings is to provide senior medical staff with a forum to discuss issues on health care in their respective province/territory. The Ministry advised that the Provider Services Branch is the only Ministry Branch involved in these meetings, and that the primary attendee is the senior medical consultant from Provider Services Branch who attends these meetings on behalf of Ontario for the Ministry. The Co-ordinator explained that all agendas and minutes for these meetings are kept in one file (a binder), and that any records relating to these meetings should be contained in the file.

The Searches

The Co-ordinator explained that she is the FOI contact person for the Provider Services Branch. She indicated that she has been employed at this Branch for over 15 years and is therefore very familiar with the types of records held within the Branch and the types of issues that are dealt with by Branch staff. She explained that whenever she receives an FOI request, she consults with the Manager of the Branch to determine where responsive records should be located and which individuals should be contacted to obtain relevant records. In this case, it was determined that the Medical Consultant should be contacted, as he is the person responsible for these meetings on behalf of the Ministry and would be aware of any records relating to these meetings.

With respect to the meeting of September 19-20, 2002, during which gene testing was discussed, the Co-ordinator explained that two individuals from Ontario attended this meeting: the District Medical Consultant Co-ordinator (the Medical Consultant) and his secretary, who was responsible for taking notes at the meeting. She also advised that two back-up people – a doctor and a secretary – attended the meeting for a brief time when the Medical Consultant and his secretary were called out. She indicated that the Medical Consultant and the doctor did not take any notes at the meeting, nor did they prepare or receive any other documents relating to the meeting. The secretary took notes during the meeting and the back-up secretary stepped in to continue the notes in her absence.

According to the Co-ordinator, subsequent to the meeting, the secretary typed her handwritten notes into a draft agenda and minutes, which were forwarded to the Medical Consultant for review. The draft agenda and minutes were then finalized and circulated to all the provinces and territories. It was clarified during the inquiry that there should be two sets of agendas and minutes relating to the meeting – a draft version and a final version. The Ministry confirmed that the pages previously provided to the appellant, along with the revised decision, were taken from the draft version. A final version of the agenda and minutes was therefore identified during the

inquiry as an additional responsive record and the Ministry accordingly agreed to issue an access decision with respect to this record. During the inquiry, a review of the entire draft agenda and minutes also revealed a list of participants and attendees at the meeting. The Ministry agreed that this list was responsive to item 2 of the appellant's request and agreed to issue an access decision with respect to this record as well. The Ministry subsequently issued this decision on June 4, 2003.

With respect to item 3 of the request, the Co-ordinator explained that she had contacted all staff who had attended the meeting to determine whether they had any additional records relating to the meeting. All staff members advised her that they had no records relating to this meeting and that the only records produced in relation to this meeting were the agenda and minutes contained in the binder. She noted that a copy of the request was also provided to the Medical Consultant for review and sign-off, and that he confirmed in a memo that anything related to the meeting would be contained in the file. The Co-ordinator indicated that both she and the Medical Consultant conducted a second search through the file and did not locate any additional records relating to the meeting in question. The Medical Consultant also confirmed in a memo that no other files are kept in relation to these meetings and that there are no other locations in which responsive records would be kept. The Ministry submitted that, as the person responsible for Ontario's input into these meetings, the Medical Consultant is in the best position to determine whether any additional records exist in relation to these meetings.

Subsequent to the oral inquiry, the Medical Consultant provided this office with a memorandum dated May 27, 2003, in which he states that he conducted a further search for records and did not find any additional records responsive to this request.

FINDINGS

I have carefully considered all the representations submitted by both parties. As I indicated previously, my responsibility is to ensure that the institution has made a reasonable search to identify all responsive records. The *Act* does not require the institution to prove with absolute certainty that records do not exist. However, in order to properly discharge its statutory obligations, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

As described above, the Ministry has identified and located responsive records relating to items 1 and 2 of the request and has subsequently issued access decisions pertaining to those records. With respect to part 3 of the request, I am satisfied that the searches conducted by the Ministry were done by experienced and knowledgeable individuals and that all reasonable steps have been taken to locate any additional records responsive to the request.

Therefore, based on all of the above, I am satisfied that the searches conducted by the Ministry were reasonable in the circumstances.

ORDER:

I dismiss the appeal.

Original Signed by _____
Shaun Sanderson
Acting Adjudicator

_____ August 8, 2003