

ORDER PO-2257

Appeal PA-020262-3

Ministry of Training, Colleges and Universities

NATURE OF THE APPEAL:

This is an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) arising from a decision of the Ministry of Training, Colleges and Universities (the Ministry). This matter has a fairly long and complex history; however, for the purpose of this order, it is not necessary to review in detail the history of the previous appeals.

This specific appeal arose from a revised decision letter issued by the Ministry in response to a request for 13 particular records relating to the following request:

... all documents, notes memoranda, etc. which are or have been in the possession of the Ministry relating to the development of Bill 88 2001, also known as “*An Act to revise the Ontario College of Art Act 1968-69*”.

The Ministry’s revised decision was to grant partial access to 13 responsive records (approximately 90 pages), and to deny access to the severed portions of the records on the basis of a number of identified exemptions.

The requester (now the appellant) appealed the Ministry’s revised decision, and this appeal file was opened.

During the mediation stage of the appeal, all but two issues were resolved between the parties. One remaining issue is whether an identified three-page record qualifies for exemption under section 12 (cabinet records) of the *Act*. The other issue is whether certain identified records exist.

Mediation did not resolve these two issues, and this appeal was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry, initially, asking for representations on these issues. The Ministry provided representations on both issues, and I then sent the Notice of Inquiry, together with the non-confidential portions of the Ministry’s representations, to the appellant. The appellant responded with representations which I provided to the Ministry and the Ministry provided reply representations. I then shared the non-confidential portions of the Ministry’s representations with the appellant, who provided representations by way of surreply.

RECORD:

The record remaining at issue is a three-page document entitled “Comments re: OCAD [Ontario College of Art and Design] Draft Act”.

DISCUSSION:

CABINET RECORDS

The Ministry takes the position that section 12(1) applies to the record at issue. In its representations, the Ministry identifies that it is relying on the introductory wording to section 12(1), as well as section 12(1)(f), to deny access to the record. These sections read:

- (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
 - (f) draft legislation or regulations.

Previous decisions of this Office have established that the use of the word "including" in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-331, P-894, P-1570]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [See Orders P-361, P-604, P-901, P-1678, PO-1725].

The Ministry submits:

The record at issue in this appeal is an attachment to the email identified in the Appendix ... It contains comments on the [Ontario College of Art and Design] draft legislation, which were reviewed by Senior Legal Counsel in the Ministry's Legal Services Branch and two policy advisors in the Universities Branch. The Ministry withheld this attachment under section 12 of the Act ...

The comments in the record at issue refer to specific sections of draft legislation... Since the comments in the record at issue bear directly on passages in the draft legislation, disclosure of this record would certainly permit the drawing of accurate inferences with respect to the deliberations of Cabinet and its committee. Also, it would disclose aspects of draft legislation.

In the confidential portions of its representations the Ministry then identifies the specific deliberations of Cabinet or its committees which it maintains would be revealed if the record at issue were to be disclosed.

The appellant notes in his representations that whether section 12 applies will depend on whose comments are contained in the document. He also takes the position that simply because

comments are reviewed by Counsel, or that Counsel is aware of them, does not necessarily mean that the records qualify for exemption under section 12.

In this case, the Ministry takes the position that the record at issue would reveal the substance of the draft legislation, which was the subject of deliberations and decisions by Cabinet and its committees. The Ministry also specifically identifies the deliberations of Cabinet or its committees which would be revealed. Based on my review of the record at issue and the Ministry's representations, I am satisfied that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences with respect to the substance of deliberations of Cabinet or its committees. Accordingly, the record is subject to the mandatory exemption from disclosure established by the introductory language of section 12(1).

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional 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*. 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.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further 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 or further 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

During the mediation stage of this appeal, the appellant identified that, although he had been granted access to three identified appointment letters, these letters were undated. The appellant was of the view that dated letters should exist. The Ministry conducted a number of additional searches for responsive records, and advised that dated letters did not exist. The Ministry explained that the undated letters had been sent by facsimile, and that this was an oversight. The appellant maintained that dated letters should exist, and/or that logbooks or cover sheets showing when the letters were mailed or faxed should exist. The existence of dated letters remained an issue in this appeal.

In the Notice of Inquiry sent to the Ministry, the Ministry was invited to address whether either dated copies of the three appointment letters, or other records showing when these letters were mailed or faxed, existed. The Ministry was also invited to identify the steps it had taken in searching for these records.

In its representations the Ministry identifies the steps it took to locate records when the request was received, and the subsequent searches conducted for the responsive records. The Ministry identifies the senior policy advisor who dealt with these letters, and states:

No dated letters exist. ... the appointment letters it holds are, in fact, the undated originals, which were prepared by [the senior policy advisor] and sent from the program area by [the senior policy advisor] via the Deputy Minister's office to the Minister's office for signing. A further review of the relevant files during mediation located the standard cover approval sheet that accompanied the package of three letters sent by [the senior policy advisor] via the Deputy Minister's office to the Minister for the Minister's signature. The sheet indicates that the Deputy signed off the package on March 27, 2000, which was the nearest that the Ministry could pinpoint the mailing/fax date during mediation.

The signed undated letters were returned to the Universities Branch and [the senior policy advisor] faxed them to the three panel members, with cover sheets that she prepared personally.

The Ministry conducted a number of additional searches to try to locate the fax cover sheets. In a final effort to locate the cover sheets ... [the senior policy advisor] came in to the Ministry [from a leave of absence] and undertook an additional search both of the records that responded to the request and non-responsive records that reside in her office. While making the search of non-responsive records, she located the cover sheets, which had, apparently,

inadvertently, been misfiled. The cover sheets are dated April 11, 2000. The Ministry has provided the appellant with copies of these cover sheets.

Based on the additional records located by the Ministry, the Ministry took the position that the issue of the reasonableness of the search for records was resolved.

The Ministry's representations were shared with the appellant. The appellant did not agree that the issue of the reasonableness of the Ministry's search was resolved. In addition to questioning whether the letters were the fax cover letters to the Minister's undated letters, and noting what he considered to be inconsistencies, the appellant took the position that letters of this nature would not only be faxed, but that the originals would have been mailed or couriered to the panel members for their own personal records. The appellant also states:

The Ministry's response to [this issue] speaks [to] searches for mailed and faxed material, not of searches for records of correspondences sent by courier.

It is my position that the Ministry has not provided conclusive evidence that these faxes are cover faxes for the Minister's undated letters to the named Panel Members and that the uses of couriers in communications with the panel members has not been covered in the Ministry's searches.

As set out above, the appellant's representations were shared with the Ministry, and the Ministry was asked to respond in particular to the appellant's position that records concerning the use of couriers in communications with the panel members were covered in the Ministry's searches.

In its reply representations, the Ministry confirms the steps it took to search for responsive records, and also provides an affidavit, sworn by the senior policy advisor who dealt with these letters. The affidavit details the history of this individual's dealings with this file, and also states:

After I sent the faxes on April 11, 2000 and later when I sent the background materials to the panel members, I did not include the original, signed letters. I have not sent the original letters to the panel members, by ordinary mail or by courier. As the file was kept in my office and I was not away from work at the relevant time, I believe that no other person sent the original letters to the panel members. That the original letters were never sent is evidenced by the fact that the original letters, signed by the Minister, were located in my file during the search for records responsive to the request.

The Ministry's non-confidential reply representations and the affidavit were shared with the appellant, who provided representations by way of surreply. The appellant questions some of the information set out in the affidavit, and also reiterates some of the points he made in his initial representations. In addition, the appellant suggests that other correspondence may have been sent to the panel members at some other point in time, and also attaches to his representations a copy of a letter which raises some additional issues. He then refers to a conversation which was

relayed to him which suggests that an issue exists concerning the date of the appointment of the panel members. The appellant refers to this information as suggesting a motive for why dated letters may not have been located.

The appellant concludes by stating that, in light of what he considers the Ministry's "lack of transparency" involving related issues, he believes searches for records of correspondences sent by courier should be ordered, as they may "reveal yet undisclosed information related to requested records". The appellant concludes by stating:

... it is submitted that reasonable searches for records relating to the request for access to information has not occurred and that further searches for records related to these correspondences, which may have been sent by courier, be ordered.

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, 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*. In this appeal, if I am satisfied that the Ministry's search for responsive records was reasonable in the circumstances, the Ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

Based on the information provided by the Ministry, I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances. The appellant specifically identified the records he claimed should exist (dated copies of the three appointment letters), and he maintained that dated letters should exist, and/or that logbooks or cover sheets showing when the letters were mailed or faxed should exist.

The Ministry conducted a number of searches for these records, as set out in their representations and the affidavit, and did not locate dated letters; however, the Ministry did locate the original undated letters. Based on the results of the Ministry's search, I am satisfied that the Ministry's search for dated letters is reasonable in the circumstances.

With respect to the appellant's position that logbooks or cover sheets showing when the letters were mailed or faxed should exist, the Ministry's subsequent searches located the three dated fax cover letters signed by the senior policy advisor. This individual has provided a sworn affidavit in which she states:

I personally prepared fax cover sheets for each of the letters sent by fax to the respective panel members and I dated these sheets "April 11, 2000" and sent the signed letters by fax on that same date.

The Ministry also provided the appellant with a copy of the signed letters and the fax cover sheets.

Furthermore, as set out above, the affidavit sworn by the senior policy advisor also specifically addresses the questions raised by the appellant concerning the possible existence of records relating to the use of a courier.

I accept the evidence provided by the Ministry concerning its search for responsive records. In my view this evidence, particularly the affidavit evidence provided by the senior policy advisor with carriage of this matter at the relevant time, is persuasive. Although the appellant questions some of the information, and also identifies the reasons why, in his view, additional records may exist, I am not convinced that this information is sufficient to support a finding that the Ministry's search for the records was not reasonable in the circumstances of this appeal. Accordingly, I find that the Ministry's search for records was reasonable.

Conclusions

I find that the Ministry has adequately discharged its responsibilities under section 24 of the *Act* to conduct a reasonable search for all responsive records.

ORDER:

I uphold the decision of the Ministry and dismiss the appeal.

Original signed by: _____
Frank DeVries
Adjudicator

March 25, 2004