



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2389**

**Appeal PA-040276-1**

**Ministry of Health and Long-Term Care**



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## **NATURE OF THE APPEAL:**

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

Any and all documents related to grants and other funding provided by the Province of Ontario to [a named organization] in the period of 1988 to the present.

In response, the Ministry wrote to the requester to advise that a decision had been made to grant full access to 17 records which were subsequently provided to the requester. The requester (now the appellant) appealed the Ministry's decision on the basis that he believed that additional records exist. In that regard, the appellant indicated that the released records referred to additional records, such as financial reports, work plans, contracts, budgets and other correspondence that had not been released to him.

I sent a Notice of Inquiry to the appellant and the Ministry informing them that an oral inquiry would be held to determine whether the Ministry conducted a reasonable search for records. After receiving the Notice of Inquiry, the appellant provided copies of the following documents to the IPC and Ministry:

- Submissions and Authorities;
- Correspondence Record; and
- Schedule of References in Released Records to Unreleased Records and Index of Records (Schedule)

The day before the scheduled oral inquiry, the Ministry wrote to the appellant to advise that a subsequent search had located 11 records. The Ministry provided the appellant with copies of the 11 records. On the day of the oral inquiry, the appellant indicated that additional records responsive to his request should exist. The oral inquiry was adjourned as the Ministry agreed to conduct a further search for records.

The Ministry conducted a further search for records and wrote to the appellant to advise that a further 53 records had been located. The Ministry provided the appellant with copies of the 53 records. The appellant, in turn, forwarded a revised Schedule to the IPC and the Ministry and advised that he believed that more additional records should exist.

Since the appellant remained of the view that additional records exist, an oral inquiry was held at this office. The Ministry was represented by its Freedom of Information Program Advisor and the Program Co-ordinator for the Tobacco Unit of the Chronic Disease Prevention and Health Promotion Branch (program area). The appellant spoke on his own behalf.

## **DISCUSSION:**

### **Introduction**

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

### **Appellant's Representations**

During the oral inquiry, the appellant raised four main concerns.

The appellant submitted that additional records beyond those identified by the Ministry must exist on the basis that the released records referenced correspondence, reports and documents that had not been located. In this regard, the appellant highlighted numerous instances where the released records identified enclosures and appendices that should have been attached. The appellant also provided examples where the content of the released record identified the existence of another record not yet located.

The appellant also submitted that additional records, such as work plans, budgets and financial reports should exist taking into consideration the business relationship between the Ministry and the named organization. In that regard, the appellant explained that the records released to him suggest that the named organization was to provide narrative and financial reports to the Ministry each fiscal year. The appellant submitted that it appeared that there was a lack of documentation, particularly for the fiscal years between 1998 to 2005.

The appellant questioned whether the search was reasonable taking into consideration the lack of non-financial records, such as letters and memoranda, located as a result of the Ministry's searches. The appellant also questioned whether the Ministry completed a thorough computer search for e-mails and other computer-generated records.

Finally, the appellant advised that he was unsatisfied with the Ministry's position that they were "unable to conduct a search for records in the Archives of Ontario" as set out in their last decision letter dated February 3, 2005. The letter also directed the appellant to "submit a request directly to the Archives of Ontario, as they have custody and control of the records". The appellant submitted that the Ministry has control of the records held at the Archives of Ontario and thus should have conducted a search at the Archives of Ontario. The appellant indicated that if the Ministry could not conduct a search at the Archives of Ontario it should have transferred his request.

### **Ministry's Representations**

The Ministry explained that a total of three searches of the physical files were conducted. The first search team involved former program area staff who subsequently left in 2004. The second and third search teams involved current program area staff. The Program Co-ordinator indicated that she was personally involved in the third search and had conducted a search for e-mails and electronic records on the computers of former program area staff.

The Program Co-ordinator advised that the initial search was restricted to the records held in the program area. The second search sought to locate records held in the program area that the appellant indicated should exist as they were identified in records already released to him. The third search requested Central Records, Legal Services and Supply/Financial Services to search for responsive records in their possession. In response, Central Records located and shipped its responsive records to the program area which were subsequently disclosed to the appellant. The Program Co-ordinator advised that with the exception of the computer printouts provided by Supply/Financial Services, which were also disclosed to the appellant, no other records were located by Legal Services or Supply/Financial Services.

The Program Co-ordinator advised that the retention period for the responsive records is ten years and the records date back to the creation of the program area in 1992. She confirmed that all records from 1992 to present were searched. She also advised that the records are kept together and any misfiled records would be filed in another year's file as opposed to another location. She indicated that the contracts related to the named organization are kept in the program area files, which were searched by the Ministry, as opposed to the files maintained by Legal Services.

In response to the appellant's concern that additional records related to the named organization's reporting requirements should exist, the Program Co-ordinator responded that she too would have expected that relevant proposals, budgets, grant requirements and work plans would have been attached to each contract. She, however, advised that all of the narrative and financial reports located have been provided to the appellant.

With respect to the appellant's concern that additional records such as e-mails, letters and memoranda should exist, the Program Co-ordinator indicated that the lack of documentation in this regard may be explained by the program area's use of telephone and in person meetings to communicate with the named organization.

Finally, the Ministry advised that it was their understanding that once records are in the custody and control of the Archives of Ontario a separate request to access such records must be made.

### **Findings**

I have carefully considered all of the oral and written representations of the parties, including Orders M-1013, MO-1308 and PO-2135 cited by the appellant. Though the appellant presented evidence that additional records may exist, the *Act* does not require that the institution prove with absolute certainty that records do not exist. Rather, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate the records responsive to this request.

I am of the view that the Ministry provided clear and detailed evidence that its search for physical records was reasonable in the circumstances. However, I am not satisfied with the Ministry's efforts regarding its search for responsive electronic records. In particular, the evidence presented at the inquiry suggested that the Ministry's computer search for responsive records was limited to the computers of former program staff. In my opinion, a reasonable search for responsive electronic records would have also included a search of all computer record holdings held at the program area, Central Records, Legal Services and Supply/Financial Services.

Accordingly, I will order the Ministry to conduct a further computer search for responsive records. The Ministry's computer searches, however, should not be restricted to the identified areas if it finds that additional records may be located elsewhere.

With respect to the appellant's position that the Ministry should search for records held at the Archives of Ontario, I do not have the delegated authority to determine whether the Ministry has custody or control of the records held at the Archives of Ontario pursuant to section 10 of the *Act*. Should the appellant wish to pursue this issue, he should advise me in writing by **May 18, 2005**. This office will then open a separate appeal file, which will be streamed directly to the inquiry stage.

### **ORDER:**

1. I order the Ministry to undertake additional computer searches of the electronic record holdings of its program area, Legal Services and Supply/Financial Services, which respond to the request.

2. If searches of the areas mentioned in Provision 1 above result in the identification of other areas within the Ministry where responsive records may exist, I order the Ministry to conduct searches in those areas.
3. I order the Ministry to provide the appellant with information as to the results of these further searches in accordance with the requirements of sections 26 and 29 of the *Act*, without recourse to a time extension under section 27 of the *Act*, using the date of this Order as the date of the request.

Original signed by: \_\_\_\_\_  
Jennifer James  
Acting Adjudicator

\_\_\_\_\_ May 4, 2005