



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER PO-2444-F

Appeal PA-030241-1

Ministry of Community, Family and Children's Services



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NATURE OF THE APPEAL:

This is my final order disposing of the outstanding issue in this appeal.

This appeal arose from a decision of the Ministry of Community, Family and Children's Services (now the Ministry of Community and Social Services) (the Ministry) in response to a request under the *Freedom of Information and Protection of Privacy Act* (the Act). The requester (now the appellant) had asked for all documents held by the Ministry relating to her deceased daughter covering an identified period of time.

The Ministry responded to the request by advising the appellant that access was granted to certain records and denied to others. This appeal was opened and, following the successful mediation of a number of issues, the file was transferred to the inquiry stage of the appeals process. After receiving representations from the parties, I issued Interim Order PO-2379-I, in which I addressed the issues raised regarding access to the records. I also addressed the issue of the adequacy of the search undertaken by the Ministry for the responsive records. I found that the searches conducted by the Ministry for certain records were reasonable, and upheld the searches. However, with respect to the issue of whether the search for records which may exist at a Minister's office was reasonable, I stated:

The Ministry appears to be taking the position that responsive records which may exist in the Minister's office are not in its custody or control. As the parties have not had the opportunity to address this issue, I have decided to defer my finding regarding the nature of the search conducted by the Ministry for these records, to provide the parties with the opportunity to address this issue.

Accordingly, I deferred my finding regarding the nature of the search conducted by the Ministry for these records, and remained seized of this matter in order to address this remaining issue. Interim Order PO-2379-I addressed all of the other issues raised in this appeal.

I then sent a Supplementary Notice of Inquiry to the Ministry, inviting it to make submissions on whether any of the requested records that may have existed at the Minister's office remain in the Ministry's custody and/or control. I received representations from the Ministry, and then sent the Supplementary Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant, who also provided representations.

DISCUSSION:

In Interim Order PO-2379-I, I found that the searches conducted by the Ministry for responsive e-mails and for other correspondence was reasonable. With respect to the appellant's position that additional records existed at the Minister's office, I identified the Ministry's position that it was only during the mediation stage of the appeal process that the appellant indicated to the Ministry that she had a meeting with one of the Minister's staff and that he took notes. The Ministry stated at that time that "... any handwritten notes that may have been written by the Minister's staff would no longer exist" and that "due to the change in Government the handwritten notes would not have been included as part of the records retained by the Ministry".

In response to the Ministry's position that, due to a "change in government" certain records were no longer retained by the Ministry, the appellant took the position that her request for records was made to the Ministry four months prior to the change in government, and that the responsive records were with the Ministry at the time of the request.

The Ministry responded by stating:

Only at the mediation stage of the appeal did the Ministry become aware that the appellant had raised the issue of the adequacy of search and the assertion that further records should exist, including the fact that a meeting had taken place with staff from the Minister's office. However, by that time, there had been a change in government.

The Ministry also stated that, due to the change in government, it was unable to search further for meeting notes, as the Minister's office records from the previous Government had been sealed and could not be accessed.

Based on the Ministry's representations, I understood the Ministry to be taking the position that the issue was whether the Ministry exercised custody or control of the records, and accordingly deferred my finding regarding the nature of the search conducted by the Ministry for these records, to provide the parties with the opportunity to address this issue. However, based on the representations now provided by the Ministry, I am of the view that the issue to be decided in this appeal remains whether the search conducted by the Ministry was reasonable.

REASONABLE SEARCH

Where a requester 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 [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.

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].

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 Ministry's Representations

The Ministry has now provided further representations on the issue, in which it provides new information relating to the timing of the request, the nature of the searches conducted for

responsive records, the nature of the records requested by the appellant, and the record-keeping practices relating to records of that nature.

With respect to the timing of the request and the nature of the records that may have been responsive to the request, the Ministry re-affirms that it received the request and conducted a search for the responsive records in its possession at the time of the request. It also confirms that it was only at the appeal stage of the processing of this file, and as a result of the information provided by the appellant, that the Ministry became aware that records may exist at the Minister's office. With respect to why the Ministry did not conduct a search of the Minister's office at the time the request was received, the Ministry states:

It was not reasonable for the Ministry to search the Minister's Office, because in general practice, that office does not manage individual cases. Ordinarily, individuals who contact the Minister's Office are referred to the Ministry's Program Management Division for additional information and/or action on an individual case.

The Ministry then states that, at the time of the initial request, the Minister who had been involved in this matter had been replaced by a new Minister. Furthermore, by the time the appellant identified to it that records may exist at the Minister's office, there had also been a change in government, resulting in a further change of the Minister. Accordingly, the Ministry states that when information about possible records at the Minister's office was received by it, two subsequent Ministers had been appointed.

The Ministry also provides information relating to the nature of the records requested from the Minister's office. It confirms that any correspondence or notes from the Minister or his/her staff are placed in the client's file if the regional office responded to the issue or provided the Minister's office with any information. It also states that the searches for any records of this nature in the Ministry's Regional office resulted in no responsive records being located.

The Ministry then identifies that any informal handwritten notes from staff at the Minister's office are considered transitory records, and it refers to an Archives of Ontario Information Bulletin (#4) entitled "Guideline for the Disposition of Minister's Records". The Ministry states that this bulletin is designed to assist ministers and their staff in understanding their responsibilities under the *Archives Act*, and that the Information Bulletin:

... provides direction on the retention and disposal of records for the following situations:

- A. Change of Minister due to a Change in Government.
- B. Change of Minister without a Change in Government.

The Ministry indicates that both of these situations occurred prior to it being advised that records may exist in the Minister's office. It refers specifically to the portion of Information Bulletin #4

which describes how transitory records may be disposed of, and quotes from the Information Bulletin as follows:

Transitory Records

In either situation A or B [as described above], transitory records are not required to be transferred to the Archives of Ontario or to the deputy minister. They may be disposed of when no longer of any use.

The Ministry attaches a copy of Information Bulletin #4 to its representations.

The appellant's representations

The appellant provides representations relating to a number of issues raised in this appeal.

A portion of the appellant's representations raise questions regarding the other searches that were conducted by the Ministry, which I found were reasonable in Interim Order PO-2379-I. Furthermore, another portion of the appellant's representations respond to some of the findings in Interim Order PO-2379-I. In the circumstances, I need not address these issues, as this order specifically relates to the searches conducted for records which may have existed at the Minister's office, only.

With respect to records that may have existed at the Minister's office, the appellant states:

The Minister's office is part of the Ministry and therefore is included in my request. Under section 25(1) of the *Act*, the Ministry has a responsibility to forward a request within days after receiving it, where another institution has custody or control of the records. Further the Ministry must give written notice to the person who made the request that it has been forwarded to the other institution.

The appellant then identifies her disappointment that she was not advised of the Ministry's practices with respect to the use and disposition of records at a Minister's office at the time that this issue was raised in this appeal.

The appellant also identifies that, in light of the fact that the Minister did deal with the matters relating to her daughter, it would have been logical to include the Minister's office in the original search. Furthermore, although the appellant accepts that, at the time of her request, the previous Minister who had been dealing with the issues relating to her daughter was no longer the Minister, she takes the position that, based on the documents provided by the Ministry relating to transitory records, certain types of records relating to her request would not have been destroyed. The appellant takes the position that notes made by assistants, notes used to inform the Minister of what occurred at an identified meeting, and other notes, would not have been destroyed.

In addition, the appellant submits that any other records from the Minister's office relating to actions to be taken, etc., would have been kept on file in the regional offices.

Finally, the appellant identifies that if certain records contained in the Minister's office had been sent to Archives, she should have been notified of the possible existence of the responsive records at that institution, rather than simply advised that no responsive records exist.

Finding

The circumstances of this appeal are unique. The request resulting in this appeal was for all documents held by the Ministry that pertain to the appellant's deceased daughter. As identified in Interim Order PO-2379-I, the Ministry located many responsive records, and issues relating to these records were resolved through the issuance of that Order.

At the time the appellant's request for information was made to the Ministry, the previous Minister, who had been consulted about some of the issues raised by the appellant, had been replaced by another Minister (though not due to a change in government). In the course of processing and mediating this appeal, the appellant identified her concern that additional responsive records may exist, and that responsive records may be located in the Minister's office. However, by the time this was conveyed to the Ministry, there had been an actual change in government, and a second new Minister had been appointed as a result.

Upon my review of the representations and attachments provided by the Ministry, I am satisfied that the searches conducted by the Ministry for records which may have existed in the Minister's office were reasonable. The material provided by the Ministry, and the earlier material provided by the appellant, confirm that the records responsive to the appellant's request which may have existed at the Minister's office would have involved the Minister who had left office before the time the request was made to the Ministry. The Ministry has identified the process for dealing with records when there is a change of Minister without a change in government, as well as when there is a change of Minister due to a change in government, which also occurred. Furthermore, the Ministry identified the process in place for dealing with records of the nature requested - that any correspondence or notes from the Minister or his/her staff are placed in the client's file in the regional office in certain circumstances. The Ministry states that searches for responsive records in those locations were conducted, and has confirmed that no responsive records were located.

Based on the information provided by the Ministry, I am satisfied that the Ministry has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records, and that the searches conducted by the Ministry for responsive records were reasonable. Accordingly, I uphold the Ministry's search.

As a final note, the Ministry provided the detailed information relating to its practices with respect to records at the Minister's office in response to the Supplementary Notice of Inquiry I sent to it following Interim Order PO-2379-I. The appellant indicates in her representations that she is disappointed that she was not advised of the Ministry's practices with respect to the use and disposition of records at the Minister's office at the time in this appeal when this issue was

initially raised. It is possible that a full explanation by the Ministry of its practices at the time the issue was raised by the appellant may have resolved this issue at an earlier stage in the process, and I encourage institutions to provide full information relating to their record-keeping practices to all parties when issues pertaining to the reasonableness of searches for records are raised.

ORDER:

I uphold the Ministry's search for responsive records.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ January 17, 2006