



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2567

Appeal PA-060144-1

Ontario Human Rights Commission



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BACKGROUND:

The appellant submitted two related access requests to the Ontario Human Rights Commission (the OHRC) under the *Freedom of Information and Protection of Privacy Act* (the Act). These two requests resulted in Appeals PA-060133-1 and PA-060144-1. I decided to address the issues arising from both of these requests in one Order.

I issued a Notice of Inquiry, initially to the OHRC and one affected party, and both parties provided representations in response. After their representations were sent to the appellant along with a Notice seeking the appellant's representations, the appellant contacted this office to advise that discussions were underway between the appellant and the OHRC relating to a number of related issues. The appellant indicated that it was possible that these discussions might result in the settlement of Appeal PA-060133-1. Nevertheless, the appellant submitted representations with respect to Appeal PA-060144-1.

As a result of these developments, I placed Appeals PA-060133-1 and PA-060144-1 on hold to provide the parties an opportunity to settle the matter. The appellant subsequently contacted this office to withdraw its appeal in Appeal PA-060133-1. Accordingly, this order will address only the issues arising in Appeal PA-060144-1.

NATURE OF THE APPEAL:

In the request that resulted in this appeal, the appellant requested access to records related to the OHRC's policies and procedures. The request specifically stated:

We are writing to request the following information and documents in the possession of the [OHRC]:

1. A copy of the [OHRC's] privacy policy and any records relating to the interpretation of that policy.
2. A copy of any [OHRC] policies or procedures, with respect to the confidentiality or privacy of information and documents provided to the [OHRC] by the parties to human rights complaint.

The OHRC indicated that it did not have policies responsive to the request. In responding to the request, the OHRC stated:

Please be advised that the [OHRC] does not have any privacy policies or any policies dealing with the confidentiality or privacy of information and documents provided to the [OHRC] by parties to a human rights complaint.

However, all requests for information received by the [OHRC], including all requests for any information or documents provided by parties to a human rights complaint, are processed by staff of the [OHRC's] Office of the Registrar in

accordance with legislative requirements set out in the *Freedom of Information and Protection of Privacy Act, 1990*.

The appellant appealed that decision on the basis that responsive records should exist.

During mediation, the mediator contacted the appellant and the OHRC to discuss the appeal. No responsive records were located. As a result the file proceeded to adjudication. As noted above, both the OHRC and the appellant made submissions. The sole issue in this appeal is reasonableness of the OHRC's search for responsive records.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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). A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (see Order M-909).

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 appellant believes that the OHRC improperly disclosed personal information and/or other information about it to an outside third party for the purpose of her creation of an "independent research paper" written for the OHRC. The appellant wants to understand the OHRC's internal privacy policies, procedures or directives with respect to disclosure of case information to external parties and is somewhat incredulous that the OHRC does not have any policies or procedures relating to confidentiality.

This issue was canvassed extensively with the OHRC at both the intake and mediation stages. In particular, at intake, the OHRC was asked whether it had an internal policy or procedural guideline for staff regarding the handling and disposal of confidential information submitted concerning complaints. The OHRC responded that only the Freedom of Information and Privacy Co-ordinator (FOIC) and one other person in the office handle this information and that both are fully aware of the *Act's* requirements. She indicated further that the OHRC does not have internal guidelines or procedures regarding privacy or confidentiality given the coverage of the

Act. She stated that when an issue arises, they go to the IPC website to look at orders for guidance.

She stated further that the OHRC investigators are also familiar with the requirements of the *Act* and abide by them. She confirmed that the OHRC does not have any procedural guidelines as reference for new staff that require guidance or training on confidentiality and privacy.

The mediator reiterated the appellant's disbelief that the OHRC could not have some kind of record, either directly or indirectly related to confidentiality and privacy. He specifically referred to a number of different possible documents, such as training manuals, orientation manuals for new staff, documents arising or related to internal training days, learning committee or lunch and learn seminars, comments in the annual report, or documents collected from the annual conference on Freedom of Information. The OHRC indicated that it conducted a search for these types of records but no policies were found.

The appropriateness of the OHRC's practices is not an issue that will be adjudicated in this appeal. The sole issue for me to determine is whether the OHRC has conducted a reasonable search in an effort to locate the requested records. Accordingly, the OHRC was asked to provide a written summary of all steps taken in response to the request.

The OHRC indicated that a Compliance Officer conducted a search of OHRC current policies and did not locate any records responsive to the appellant's request. The OHRC notes that a "policy" must be approved by the Commissioners of the OHRC and that no policy on this topic had been approved.

The OHRC indicated further that the Compliance Officer then contacted the Director of the Mediation and Investigation Branch to inquire whether anyone in that branch had any written training materials dealing with privacy issues arising out of the collection of personal information during the course of case processing. The Director forwarded this query to his Managers, who all confirmed that no such materials dealt directly with this issue.

The OHRC noted that during the Adjudication stage, the Compliance Officer located a copy of an old *Freedom of Information and Protection of Privacy Manual*, dated May 5, 1997. According to the Registrar of the OHRC, this document was used for training purposes at the OHRC's regional offices, which at that time, were responsible for processing access requests made under the *Act*. The OHRC states that it closed these regional offices in 1998 and the Office of the Registrar assumed responsibility for all access requests, intimating that this Manual is no longer in use.

The OHRC takes the position that it is not likely that the type of documents requested by the appellant ever existed because no policies have been formally approved by the Commissioners. The OHRC notes that internal training of staff involves matters concerning confidentiality and privacy, but has provided no documents that staff might use in conducting their activities in this regard.

The appellant simply cannot believe that the OHRC would not have policies given the amount of personal and sensitive information it deals with. Moreover, the appellant believes that if, as the OHRC states, it conducts internal training of staff, it is reasonable to expect that this training would include some form of written or electronic materials. The appellant points to a paper produced by the OHRC, entitled *Human Rights at Work*, and notes that the OHRC's policies aimed at employers suggest the importance of employers having policies and procedures relating to privacy and confidentiality. In these circumstances, the appellant finds it difficult to believe that the OHRC itself has no internal policies or guidelines relating to these issues.

The appellant also does not believe that the OHRC's search for records responsive to its request was reasonable as it has located the OHRC *Code of Ethics* on the OHRC website, which makes several references to matters that appear to relate to issues of confidentiality and privacy. The appellant submits that failure of the OHRC to identify this document leads it to question the OHRC's search procedure generally.

I am sympathetic to the appellant's position regarding this issue. The apparent lack of policies and guidelines for staff that deal with sensitive personal information such as that obtained by the OHRC in dealing with complaints raises significant concern about its collection, use and disposal of personal information. However, as I noted above, this appeal will only address whether the search for responsive records was reasonable.

I agree that the OHRC should have directed the appellant to its *Code of Ethics*, located on the OHRC website, as this record could be viewed as being "reasonably related to the request". However, as the appellant has noted, that document is publicly available and the appellant has a copy of it. Accordingly, I find that it would serve no useful purpose to address this document further. However, it is apparent from the appellant's request, that it is looking for internal policies and procedures that provide guidelines and/or directions for staff in how they should be dealing with personal information, as opposed to a document that simply provides a statement to the public regarding its services. I am not persuaded that failure to refer to a publicly available document necessarily renders the OHRC's search for documents of the kind requested by the appellant, suspect.

This appeal underwent extensive mediation, during which discussions between the mediator and the OHRC regarding possible locations for responsive records were held. In my view, the questions asked by the mediator, and responded to by the Co-ordinator for the OHRC were directed at addressing the appellant's concerns. I am satisfied that staff at the OHRC have turned their minds to the kinds of information the appellant is seeking and that experienced staff have been engaged in searching for responsive records in locations at which such records might reasonably be expected to exist.

As I noted above, the *Act* does not require the OHRC to prove with absolute certainty that further records do not exist. Rather, the OHRC must provide evidence that an experienced employee has expended a reasonable effort to locate records which are reasonably related to the request. Based on the OHRC's submissions and the discussions held during mediation, I am satisfied that

the OHRC has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

ORDER:

The OHRC's search for responsive records was reasonable and this appeal is dismissed.

Original signed by: _____

Laurel Cropley
Adjudicator

_____ April 25, 2007