



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2577**

## **Appeal PA06-335**

### **Ministry of Government Services**



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## **NATURE OF THE APPEAL:**

The Ministry of Government Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records from the Alcohol and Gaming Commission of Ontario (AGCO). The requester sought the following for the period 1990 to the present:

1. copies of Notices of Proposal (NOP) to suspend or otherwise sanction licences issued to all wineries and two named breweries by the AGCO or by its predecessor, the Liquor Licence Board of Ontario (LLBO)
2. orders or sanctions issued by the AGCO or the LLBO pursuant to the NOPs

The request was, subsequently, narrowed to the period from 1992 to the date of the request.

The Ministry issued a decision letter, in which it agreed to provide partial access to records that it identified as responsive. The Ministry stated that it was denying access to the undisclosed portions pursuant to the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During the mediation process, the appellant confirmed that he is not appealing the Ministry's decision to withhold access to the undisclosed portions of the records. Accordingly, the application of section 21(1) is no longer at issue in this appeal.

However, the appellant takes the position that additional records should exist. In particular, the appellant makes reference to an NOP dated November 27, 1998 (record # 24) (the November 27<sup>th</sup> NOP), which lacks a corresponding document respecting its disposition. (I also note that there is no decision for record # 25; however, record # 25 is a duplicate copy of the November 27<sup>th</sup> NOP.) The appellant, therefore, believes that additional records exist that are responsive to the November 27<sup>th</sup> NOP.

The Ministry's position is that the November 27<sup>th</sup> NOP was withdrawn by the AGCO and there was no written decision confirming this disposition. The appellant is not satisfied with this explanation. He believes that there must be a written decision relating to the disposition of this NOP.

Subsequently, the Ministry conducted a follow-up search and confirmed that it did not find any further responsive records.

The appellant stated that he wished to proceed with his appeal to an inquiry with the sole issue being whether additional records responsive to his request exist.

I scheduled an in-person oral inquiry for May 2, 2007. Prior to the hearing the Ministry submitted an affidavit sworn by the former Supervisor of Records and Forms in the Corporate Services Branch of the AGCO (the former Supervisor), dated April 24, 2007. The Ministry also

provided me with a copy of a printout from the AGCO's computer system showing the November 27<sup>th</sup> NOP as withdrawn (the computer printout).

On May 2, 2007 I conducted an in-person oral inquiry into the reasonable search issue. The appellant represented himself at the inquiry. Participating for the Ministry were its Freedom of Information Coordinator (the Coordinator), the former Supervisor and AGCO's Legal Counsel. Two additional Ministry employees also attended the hearing as observers, as did the Mediator assigned by this office.

## **DISCUSSION:**

### **REASONABLE SEARCH**

#### **Introduction**

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.

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.

Where a requester provides sufficient detail about the records that 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 a record does not exist. However, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

#### **Parties' representations**

As indicated above, prior to the oral hearing the Ministry submitted an affidavit sworn by the former Supervisor, which documents AGCO's search efforts in response to the appellant's request. In my view, this affidavit is the key piece of evidence in this hearing.

The affidavit outlines the steps that the former Supervisor took to respond to the appellant's request, including computer queries of "Manufacturer's Licence files where NOP's had been issued between 1992 and the date of the request" followed by "a manual search of the files

identified through the computer search.” The former Supervisor submits that he reviewed the responsive records, recommended severances of personal information and then forwarded the completed search to the Coordinator’s Office. The former Supervisor asserts that in response to the appellant’s appeal he carried out an additional search in respect of the November 27<sup>th</sup> NOP. The former Supervisor states that the Coordinator’s Office advised the Mediator that the November 27<sup>th</sup> NOP had been withdrawn and that the Coordinator’s Office forwarded the computer printout showing that this NOP had been withdrawn to the Mediator. This is the computer printout referenced above. I am satisfied that the appellant was also provided with a copy of this computer printout on or before the hearing date.

The former Supervisor states that when the appellant expressed dissatisfaction with the Ministry’s position regarding the withdrawal of the November 27<sup>th</sup> NOP, he undertook further manual searches in respect of the November 27<sup>th</sup> NOP, but found no additional records.

The appellant questions why the former Supervisor was chosen to swear the affidavit in this case, suggesting that the more suitable representative would have been the current Supervisor. The Ministry disagrees, submitting at the inquiry that the former Supervisor was the individual who was directly involved in conducting the searches and, as a result, was the most appropriate witness. I concur with the Ministry on this point.

However, the crux of the search issue seems to lie with AGCO’s process in disposing of NOP’s prior to or on the date of a hearing. This issue is addressed by the former Supervisor in paragraph 14 of his affidavit, in which he states:

I am advised by AGCO Legal Counsel and verily believe that many NOPs are settled by the parties on the day of the hearing. Once a matter is settled, the NOP is withdrawn verbally by counsel for the Registrar of Alcohol and Gaming, therefore, there is often no record explaining why the NOP was withdrawn, as is the fact in this case.

The appellant takes issue with both the source and substance of the information contained in the above paragraph. The appellant believes that in relying upon the advice of the AGCO Legal Counsel, it was incumbent upon the former Supervisor to identify this lawyer by name and set out his or her level of experience with the AGCO. In the appellant’s view, the source of this information carries weight and impacts upon the credibility of the former Supervisor’s statement. In addition, the appellant disagrees with the former Supervisor’s contention regarding the withdrawal of NOPs. In the appellant’s view, in cases where the AGCO and a licensee reach a settlement on the date of a scheduled hearing the NOP is not withdrawn, but rather disposed of in the following way:

- counsel for the Registrar and counsel for the licensee prepare and sign an agreed statement of facts
- the agreed statement of facts is presented as a joint submission before the Board Member of the AGCO assigned to hear the case

- assuming the Board Member accepts the agreed statement of facts, he or she would then issue an order to include the provisions of the agreed statement of facts

The appellant asserts that he has years of experience representing licensees before the Board in NOP proceedings and has never seen an NOP withdrawn. He submits that the process that would have been followed in this case is the one outlined above and, as a result, there should be an order disposing of the November 27<sup>th</sup> NOP on file. The appellant points to another NOP in the group of records identified by the Ministry as responsive to his appeal that reflects this procedure. In this example, an agreed statement of facts, along with a joint submission followed by the Board Member's order is appended to the NOP.

Accordingly, the appellant believes that there must be some evidence regarding the disposition of the November 7<sup>th</sup> NOP. He states that it is his understanding that all hearings are recorded. He states that at a minimum the AGCO should be able to furnish him with an audio recording of the hearing involving the November 27<sup>th</sup> NOP and he questions why this issue was not addressed in the former Supervisor's affidavit. The appellant also wonders whether the Registrar's counsel who dealt with the November 27<sup>th</sup> NOP was ever consulted during the course of the Ministry's search to determine whether he had any notes of the proceeding. The appellant points out that the former Supervisor's affidavit makes no mention of whether such an inquiry was ever made.

Accordingly, the appellant now requests

- the audio recording of the proceeding
- the names of counsel involved, on behalf of both the Registrar and the licensee
- a copy of any minutes of settlement prepared and submitted to the Board by counsel for the Registrar and counsel for the licensee
- the notes taken by the Registrar's counsel and any submissions he made at the hearing
- the names of the Board Members involved with this matter and any written reasons they prepared regarding the disposition of this matter

The appellant contends that the AGCO follows a two-tiered approach to the handling of NOPs for violations of the *Liquor Licence Act* by licensees. The appellant believes that the AGCO deals with larger breweries and wineries differently than smaller ones. The basis for the appellant's assertion is that larger licensees employ more people than smaller licensees and so the impact of a licence suspension or revocation would be greater on employees employed by larger licensees than by smaller ones. The appellant believes that the AGCO is subverting information responsive to his request to protect its two-tiered system from public scrutiny. The appellant indicates that he is motivated to acquire this information in order to demonstrate the existence of the two-tiered approach to dealing with NOPs. The appellant feels that an absence

of further information regarding the disposition of the November 27<sup>th</sup> NOP would raise serious questions about the efficacy of the NOP process.

In response, the Ministry states that searches were carried out in response to the appellant's request by an experienced staff person with the AGCO. The Ministry submits that the searches were conducted by the former Supervisor, whose responsibilities at the time included the processing of requests under the *Act*. The Ministry states that since the date of the request the former Supervisor has left the AGCO and assumed a position with similar responsibilities with the Ministry's Freedom of Information Office. The Ministry states that at the time of the request the former Supervisor had over 30 years of records management experience with various ministries and agencies of the Ontario government. The Ministry states that because of this individual's vast experience he had the ability to pinpoint with accuracy where responsive records might be found when requests for information are received.

The Ministry states that the only issue before me is whether the searches conducted were adequate under the *Act*. The Ministry does not question the appellant's own experience before the AGCO. However, the Ministry feels that the appellant has raised issues at the hearing, regarding its record keeping practices and the file management practices of Ministry staff, that are intended to turn the focus of the inquiry to matters beyond the scope of the inquiry, namely the manner in which the AGCO prosecutes licensees under the *Liquor Licence Act* and the conduct of Registrar's counsel in the handling of the November 27<sup>th</sup> NOP.

The Ministry states that it has provided details of the searches conducted and the results of those searches through the former Supervisor's affidavit. The Ministry states that all the appellant has said in response to those search efforts is to claim that there ought to be additional documentation.

The Ministry states that in cases where the Registrar decides, in conjunction with counsel, not to proceed against a licensee, for example, where a witness does not attend the hearing and there is no evidence for the Registrar to call, the NOP has to be withdrawn. In such circumstances, the Ministry states that it would not be in the interests of justice to proceed with the hearing. The Ministry states that it does not have information regarding the reasons for the withdrawal of the November 27<sup>th</sup> NOP, and that it serves no useful purpose to speculate as to the reasons for the withdrawal in that case. What is important, according to the Ministry, is to examine the efforts of the former Supervisor to respond to the appellant's request.

The Ministry states that it worked with the appellant to narrow the request to the time frame after 1992, and that the former Supervisor conducted computer and manual searches in an effort to locate records responsive to the request. The Ministry states that it located one record that addresses the disposition of the November 27<sup>th</sup> NOP, the computer printout, which provides only that the November 27<sup>th</sup> NOP was withdrawn. The Ministry states that while the computer printout is not directly responsive to the wording of the appellant's request, it was provided to the appellant in an effort to confirm the disposition of the November 27<sup>th</sup> NOP and to try to explain why there was no order or sanction.

In response to the appellant's assertion that there is a different form of justice for licensees of a certain size, the Ministry states that it finds this suggestion insulting but, more importantly, beyond the scope of this inquiry.

The Ministry submits that on the evidence before me, the searches were not only reasonable, but thorough, complete and in keeping with the Ministry's obligations under the *Act*.

### **Analysis and findings**

The issue before me is whether the Ministry conducted a reasonable search for records responsive to the appellant's request. In addressing this issue, an appellant must provide a reasonable basis for concluding that additional records exist that are *responsive* to the request.

In this case the appellant's request is clear. He requested NOPs issued by the AGCO and the LLBO for the period after 1992 and *orders or sanctions* issued by the Board of the AGCO or the LLBO in respect of those NOPs.

The Ministry has provided evidence of its efforts to locate records responsive to the appellant's request. One of several records that the Ministry located during the course of its searches was the November 27<sup>th</sup> NOP. The Ministry's position is that this NOP was disposed of by way of a withdrawal and that, in the circumstances of that case, no order or sanction was issued. While not directly responsive to the request, the Ministry provided the appellant with a computer printout confirming that the NOP was withdrawn.

The Ministry's disclosure has not satisfied the appellant. He believes that the AGCO's NOP process requires the issuance of an order or sanction when an NOP is disposed of by the Board. He has suggested that the Ministry is hiding this information from him to safeguard a "two-tiered" approach in the handling of NOPs. The appellant has stated that he wants access to other information that he feels will support his theory, including

- the audio recording of the proceeding
- the names of counsel involved, on behalf of both the Registrar and the licensee
- a copy of any minutes of settlement prepared and submitted to the Board by counsel for the Registrar and counsel for the licensee
- the notes taken by the Registrar's counsel and any submissions he made at the hearing
- the names of the Board Members involved with this matter and any written reasons they prepared regarding the disposition of this matter

While I acknowledge the appellant's interest in this other information, I find that it falls beyond the scope of his request. In addition, it is not for me to examine the efficacy of the AGCO's NOP process. I can only decide whether the Ministry's search for records responsive to the

appellant's request was reasonable. Accordingly, an examination of the appellant's proposed theory is beyond the scope of this inquiry.

In my view, the Ministry has provided credible and thorough evidence of the steps that were taken to respond to the appellant's request for information. I am satisfied that the AGCO's former Supervisor, with his considerable experience and expertise, was the appropriate person to conduct the searches. I am satisfied that his search efforts, and by association those of the Ministry, were reasonable in the circumstances.

In my view, the Ministry has been very fair to the appellant, even going so far as to provide him with the computer printout confirming the withdrawal of the November 27<sup>th</sup> NOP in an effort to address his concerns, despite the fact that the printout is not directly responsive to the request.

If the appellant remains intent on seeking additional information that is beyond the scope of this request, he is free to submit another request to the Ministry for access to such information under the *Act*.

**ORDER:**

I uphold the Ministry's search for records responsive to the appellant's request.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ May 18, 2007