



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2692

Appeal PA07-398

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a representative of the requester for access to certain information relating to the requester's incarceration at a particular jail during a specified time period.

The Ministry identified records responsive to the request and granted partial access to them. The Ministry relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information) of the *Act*, in conjunction with sections 14(1)(k) (jeopardize security of detention centre), 14(1)(l) (facilitate unlawful act), 14(2)(d) (correctional record) and 15(b) (information received in confidence from another government or its agencies); the discretionary exemption in section 49(b) (personal privacy) with reference to the consideration in section 21(2)(f) (highly sensitive); and the discretionary exemption in section 49(e) (confidential correctional record), to deny access to those parts of the responsive records it withheld. The Ministry further advised that some of the information in the records was not responsive to the request and that some photographs, which were responsive to the request, could not be located.

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

At mediation, the Ministry agreed to release additional information to the appellant and to conduct further searches for the photographs. The Ministry advised the mediator that it would provide a revised decision letter if further records were found. The appellant was satisfied with the release of the additional information and advised the mediator that the only matter remaining at issue was the adequacy of the Ministry's search for the photographs.

Mediation did not resolve the appeal and it was moved to the adjudication phase of the appeals process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. The Ministry provided representations in response to the Notice. In an affidavit included with its representations, the Ministry set forth details about its additional search efforts. The Ministry also provided the appellant with a further supplementary decision letter and enclosed a severed version of the records it had agreed to disclose at mediation. The Ministry also advised that despite its additional search efforts it was unable to locate copies of the photographs the appellant sought. The affidavit indicated, however, that in the course of its additional search the Ministry learned of a photograph of the appellant taken at a Federal correctional institution. I then sent the appellant a Notice of Inquiry, along with a copy of the complete representations of the Ministry. The appellant provided representations in response to the Notice.

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,

- (a) make a request in writing to the institution that the person believes has custody or control of the record;
- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.....

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

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 within its custody or control. [Orders P-85, P-221, PO-1954-I]

Although an appellant 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 within its custody or control [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).

The appellant's position is set out concisely in his representations as follows:

I understand that the issue is the reasonableness of the search, as articulated in [this Office's] previous rulings. I would only add that there should be an issue of the Ministry's records management [system] as it is simply inexplicable that the photographs of the appellant's injuries taken by security disappeared without a trace or explanation. While there may be alternative means of obtaining other photographs taken federally, this does not obviate the Ministry's onus as the record holder in this matter.

The affidavit included with the Ministry's representations describes in detail the multiple searches it conducted in an effort to locate the photographs sought by the appellant. These included searching files involving the appellant where the requested photographs may have been placed in error. In my opinion, these searches were extensive and wide-ranging. Unfortunately, the photographs were never found. The appellant's representations challenge the adequacy of the Ministry's record keeping processes, but do not provide an evidentiary basis to refute the Ministry's position that it has now conducted a reasonable search for the photographs. As set out above, in order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624]. In my view, based on the multiple searches it conducted, the Ministry has made a reasonable effort to locate the photographs sought by the appellant that are within its custody or control.

In all the circumstances, I find that the Ministry has provided sufficient evidence to establish that it has now conducted a reasonable search for the photographs within its custody and control sought by the appellant and I dismiss the appeal.

ORDER:

1. I find that the Ministry has conducted a reasonable search for the photographs sought by the appellant.
2. The appeal is dismissed.

Original Signed By:
Steven Faughnan
Adjudicator

July 10, 2008