



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2652

Appeal PA07-105

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), from a former complainant seeking access to his file relating to a human rights complaint made against a named company. The requester also provided the OHRC with a file number identifying the complaint.

The OHRC advised that despite extensive searches at both the Records Centre and the Archives of Ontario they were unable to locate the requester's file.

The requester (now the appellant) appealed the OHRC's decision to this office.

The appeal was not resolved during mediation and was transferred to the adjudication stage of the appeal process.

I decided to begin my inquiry into this appeal by sending a Notice of Inquiry to the OHRC. The OHRC responded with representations.

I then sent a copy of this Notice of Inquiry to the appellant along with a copy of the OHRC's representations. The appellant provided representations in response.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to request 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).

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, expending reasonable effort, conducts a search to identify any records that are reasonably related to the request [Order M-909].

Representations in response to the Notice of Inquiry

The OHRC's representations

In support of its position that it has conducted a reasonable search for the records at issue, the OHRC provided an affidavit sworn by a Compliance Officer responsible for processing access requests received by the OHRC under the *Act*. The affidavit details the searches that the Compliance Officer conducted for records related to the complaint made by the appellant.

The affidavit states that the Compliance Officer initially searched the following databases in the following way for responsive records:

- The OHRC's current CMIS database under the file number and the appellant's name;
- the OHRC's former Q & A database, under the category of closed files, for any human rights complaint with the given file number;
- The OHRC's former Q & A database, under the category of closed files, for any human rights complaint under the appellant's name.

In her searches of those databases, the Compliance Officer submits that she found no references to the file number identified by the appellant. However, in the former Q & A database, under the category of closed files, she did locate a reference to a different file number that cited the appellant as the complainant and the named company as the respondent. As a result, she asked the file clerk to retrieve that file from the Records Centre. The file clerk advised that he was unable to locate any transfer numbers or schedule lists for that file. As a result, the file could not be located.

The Compliance Officer submits that she then conducted another search of the Q & A database under the category of Head Office Tracking and found a reference to a third file number which listed the complainant as the appellant and the named company as the respondent. The reference indicated that the file was returned to the OHRC's Toronto West Office in 1995. The Compliance Officer states that this office was closed in 1997.

The Compliance Officer submits that she then asked the OHRC Manager of Administrative Services to conduct a search for a transfer number or a schedule list under the third file number. The Compliance Officer submits that the Manger of Administrative Services advised her that she was unable to locate a transfer number or schedule list for the third file number.

The Compliance Officer submits that she then contacted the Records Information Officer at the Freedom of Information Office of the Ministry of the Attorney General and asked her to conduct a search in the Records Centre and the Archives of Ontario for all three files numbers now associated with the request.

The Compliance Officer submits that the Records Information Officer advised that neither the Records Centre nor the Archives of Ontario were able to locate any files connected to the file numbers.

The Compliance Officer submits that it is not possible to determine whether the file existed but no longer exists because no transfer numbers or schedule lists exist to assist in locating the file. She submits that for this reason it is also not possible to determine conclusively whether the file was sent to the Records Centre or the Archives of Ontario, and whether it was retained or subject to culling at the Archives of Ontario under the applicable Retention Schedules.

The appellant's representations

The appellant's representations consists of a list of five records related to his human rights complaint against the named company to demonstrate that records related to his complaint must exist. He enclosed all five records with his representations. They include:

- A letter dated November 13, 1980 from an individual representing the appellant, to a Human Rights Officer at the OHRC. The subject matter of the letter clearly relates to the appellant's complaint against the named company and includes the file number provided to the OHRC by the appellant in his request. The letter clearly indicates that the matter had been before an arbitrator;
- a letter dated February 19, 2003 addressed to the OHRC from the appellant. The letter references his prior complaint against a named company;
- a letter dated July 4, 2006 to the OHRC from the appellant requesting a reconsideration or a new investigation into his complaint against the named company. The appellant included the OHRC file number on his letter and attached a medical report dated June 6, 2006;
- a decision from the Workplace Safety and Insurance Appeals Tribunal that includes the full details of the appellant's case from 1976 to 2006; and

- an affidavit sworn April 29, 1993 by the appellant's son that appears to have been submitted as part of the complaint made by the appellant under the *Human Rights Code, 1991*.

Analysis and finding

As set out above, the issue before me is whether the search carried out by the OHRC was reasonable in the circumstances. The *Act* does not require the OHRC to prove with absolute certainty that further records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to identify and locate responsive records [Order P-624].

I have reviewed all of the relevant material in this appeal, including all of the documents that were provided by the appellant. I accept that at one time, records related to the appellant's complaint existed and that they should perhaps continue to exist. However, it is not my role to determine whether records *should* exist but rather, whether the OHRC has conducted a reasonable search for records as required by section 24 of the *Act*.

In my view, through its affidavit, the OHRC has provided a thorough explanation of the efforts made by an experienced employee, to identify and locate any records responsive to the appellant's request, as well as an explanation as to why no responsive records could be located. Therefore, I find that the OHRC has provided sufficient evidence to establish that it has made a reasonable effort to identify and locate responsive records.

Accordingly, I find that the OHRC has conducted a reasonable search for records that are responsive to the appellant's request as required by section 24 of the *Act*.

ORDER:

I uphold the OHRC's search as reasonable.

Catherine Corban
Adjudicator

March 25, 2008