



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2665-I

Appeal PA07-194-2

Ministry of Children and Youth Services



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NATURE OF THE APPEAL:

The Ministry of Children and Youth Services (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Any and all agreements related to complaints made by [a named individual] that directly and/or indirectly refer to [the requester including variations of her name] between [a named youth centre (the Youth Centre)] and/or any other representative and/or organizational element of the [Ministry]. This request is being made in the context of s. 10, Right of access, and s. 65(7), Exception to s.65(6) of the Freedom of Information and Protection of Privacy Act (FIPPA). Specifically, s. 65(7) 2 and 3 apply to an agreement between an institution and one or more employees. If no agreement exists this should be noted.

The Ministry issued a decision in which it stated that the agreements requested are employment related records and denied access to them pursuant to the exclusion in section 65(6) (labour relations and employment records) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision. In her appeal letter, the appellant requested that the Ministry supply an index of the requested agreements and explain how the exception in section 65(7) does not apply to these agreements.

During the mediation stage of the appeal process, the Ministry issued a new decision letter stating that

[i]n order to conduct a further search, I contacted [a named individual], Superintendent at the [Youth Centre] and access cannot be provided to the above records as the records do not exist. There were no agreements "...related to complaints made by [a named individual] that directly and/or indirectly refer to [the appellant including variations of her name] between [the Youth Centre] and/or any other representative and/or organizational element of the [Ministry]."

In response, the appellant indicated that she believed an agreement exists relating to a grievance filed in February 2006. Accordingly, the Ministry undertook another search for responsive records. The Ministry subsequently advised the mediator that no records were found.

The appellant indicated that she was not satisfied with the Ministry's response and asked that the matter proceed to adjudication. Accordingly, the file was moved to the adjudication stage for an inquiry where the issue to be determined is whether the Ministry has conducted a reasonable search for records responsive to the appellant's request.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Ministry. The Ministry delivered representations and agreed to share them in their entirety with the appellant.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Ministry's submissions. The appellant submitted representations in response.

I then decided to seek reply representations from the Ministry and provided it with a complete copy of the appellant's representations. However, the Ministry chose not to submit further representations.

DISCUSSION:

SEARCH FOR RESPONSIVE 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).

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 conducted 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 the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution 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

The Ministry's representations are brief. The Ministry states that it did not see the need to seek clarification from the appellant regarding her request since it clearly related to a labour relations matter.

The Ministry submits that it conducted "three thorough searches" on July 26, 2007, August 8, 2007 and November 2, 2007. The July 26th search was completed by the Superintendent and Deputy Superintendent of Administration of the Youth Centre. The August 8th and November 2nd searches were conducted by the Superintendent, Deputy Superintendent and Regional Manager of the Youth Centre. The Ministry submits that grievance files, personnel files and email accounts were searched and that both paper and electronic records were examined. The Ministry states that only senior management was contacted with regard to this matter due to the "sensitive nature" of the appellant's request. The Ministry states that no records have been archived or destroyed.

In response, the appellant takes issue with the Ministry's failure to provide affidavit evidence from those involved in the search for responsive records. The appellant believes that these individuals either are or were in possession of complaint records and are aware that a reasonable search for the requested records would result in positive results. The appellant suggests that the Ministry unilaterally narrowed the scope of its search by restricting its search efforts to only specific senior management of the Youth Centre, namely the Superintendent, Deputy Superintendent and Regional Manager. The appellant states that her request "explicitly identifies that agreements could involve other representatives and/or organizational elements beyond the areas searched – the Youth Centre and Northern Region." The appellant submits that what was searched is "not obvious" as the Ministry has not "explicitly indicated what the results of the searches were."

The appellant states that she has provided several examples of events or grievances which she believes would have given rise to the creation of agreements, including those raised in her letter to the mediator, dated August 7, 2007. Included in these examples is a grievance filed in February 2006 by the appellant, an agreement dated April 19, 2007 pertaining to an understanding that the appellant's grievance would be held in abeyance, and "agreements/resolutions relating to the extension of temporary staffing arrangements associated with the [Youth Centre] Psychometrist position...", including the extension of temporary employment as a probation officer to a named individual.

Finally, the appellant questions the Ministry's avoidance of the section 65(7) issue and requests that it be required to explain why it did not address this issue.

Analysis and findings

As stated above, the issue for me to determine is whether the Ministry has conducted a reasonable search for records responsive to the appellant's request. While the *Act* does not require the Ministry to prove with absolute certainty that records do not exist, it must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. If, based on the evidence before me, I am not satisfied that the Ministry's search efforts were reasonable then I can order that further searches be completed.

In this case, I find that the Ministry has not conducted a reasonable search for two reasons.

Firstly, in my view, the Ministry has not provided me with sufficient evidence to establish that it has conducted a reasonable search. In the Notice of Inquiry that I initially issued to the Ministry to commence my inquiry, I requested that the Ministry provide me with a "written summary of all steps taken in response to the request." In particular, I asked the Ministry to provide this information "in affidavit form" from the "person or persons who conducted the actual search[es]." Not only has the Ministry failed to deliver affidavit evidence, it has provided only a cursory and general review of three searches that were conducted by senior staff of the Youth Centre, namely the Superintendent, Deputy Superintendent and Regional Manager, and the types of records that they collectively searched. In my view, the Ministry has not provided adequate detail about the searches completed, including what was actually searched by each individual on each of the three occasions, who was consulted during the course of each search and the results of each search.

Secondly, I also concur with the appellant that the Ministry appears to have unilaterally narrowed the scope of its search by restricting its search efforts to only specific senior management of the Youth Centre. The Ministry has stated that only senior management was contacted with regard to this matter due to the "sensitive nature" of the appellant's request. However, I fail to see how the sensitivity of this matter has any relevance to whether responsive records exist or not. In my view, the Ministry should have consulted with and obtained evidence from any and all individuals who may have been involved in matters that resulted in the creation of agreements that are responsive to the appellant's request. The appellant has given examples of events or grievances which she believes would have given rise to the creation of agreements. While I am not convinced that all of these events or grievances give rise to the existence of records that are responsive to the appellant's request, in my view, the Ministry's evidence on the search issue should at least, address these examples.

Accordingly, for the reasons set out above, I conclude that the Ministry has not conducted a reasonable search for records responsive to the appellant's request and I will order the Ministry to conduct further searches.

Finally, I will address the appellant's raising of the application of section 65(7) and her request that the Ministry be ordered to explain why it did not address this issue in this inquiry. After the conclusion of the mediation stage of an appeal process the mediator issues a Mediator's Report

that confirms the issues remaining in dispute that are to be adjudicated. The parties then have two weeks to report any errors or omissions to the mediator. In this case, a Mediator's Report was issued on August 8, 2007, in which the reasonableness of the Ministry's search was reported as the sole remaining issue. The cover letter sent with the Mediator's Report indicated that the parties had until August 20, 2007 to report any errors or omissions. Neither the appellant nor the Ministry raised any errors or omissions during this period and the matter proceeded to adjudication with reasonable search as the sole issue to be determined. Therefore, I find that the reasonableness of the Ministry's search is the one issue before me in this appeal and, accordingly, the application of section 65(7) is not within the scope of this inquiry.

ORDER:

1. I order the Ministry to conduct further searches for responsive records, whether in printed form, on videotape, by electronic means or otherwise, within its record holdings. In conducting these searches, the Ministry is requested to consult all staff that may have been privy to or involved with the creation of any agreements concerning complaints made by the individual named in the appellant's request against the Youth Centre and/or any other representative and/or organizational element of the Ministry that directly and/or indirectly refer to the appellant.

With regard to this provision, I order the Ministry to provide me with affidavits sworn by the individuals who conduct the searches by **May 20, 2008**. At a minimum, each affidavit should include information relating to the following:

- (a) information about the employee(s) swearing the affidavit describing his or her qualifications, position and responsibilities;
- (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
- (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
- (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
- (e) the results of the search;
- (f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

2. If further responsive records are located as a result of the searches referred to in Provision 1, I order the Ministry to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
3. The affidavits referred to in Provision 1 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.
4. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Bernard Morrow
Adjudicator

April 28, 2008