



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER PO-2697-F**

**Appeal PA07-194-2**

**Ministry of Children and Youth Services**



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## **NATURE OF THE APPEAL:**

This order disposes of issues arising from my interim decision in Order PO-2665-I.

This appeal arises out of a request submitted to the Ministry of Children and Youth Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act) for the following information:

Any and all agreements related to complaints made by [a named individual] that directly and/or indirectly refer to [the appellant 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 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 was whether the Ministry had conducted a reasonable search for records responsive to the appellant's request.

I conducted an inquiry by way of written representations. I first received representations from the Ministry, which were shared in their entirety with the appellant, who then responded with

representations of her own. I invited the Ministry to respond to the appellant's representations. The Ministry chose not to do so.

I subsequently issued Order PO-2665-I in which I concluded that the Ministry had not conducted a reasonable search for records responsive to the appellant's request under section 24 of the *Act*. I arrived at this conclusion for two reasons. Firstly, I found that the Ministry had not provided me with sufficient evidence to establish that it had conducted a reasonable search, having only provided a cursory and general review of three searches that were conducted by senior staff of the Youth Centre and having failed to provide affidavit evidence from the individuals who conducted the searches. Secondly, I found that the Ministry had unilaterally narrowed the scope of its search by restricting its search efforts to only specific senior management of the Youth Centre. In this regard, I stated that 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. In addition, I noted that the appellant had given examples of events or grievances which she believes would have given rise to the creation of agreements and I stated that the Ministry's evidence on the search issue should address these examples.

Pursuant to my decision, I issued the following order provisions:

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.

The Ministry submitted representations in response to my interim order, including nine affidavits sworn by Ministry employees. I provided the appellant with copies of the nine affidavits and invited her to provide representations in response. The appellant responded with representations. As the appellant's representations raised additional issues in response to the Ministry's affidavit evidence, I sought and received reply representations from the Ministry.

## **DISCUSSION:**

Having ordered the Ministry to conduct further searches, the issue to be determined is whether, as a result of its additional search efforts, the Ministry has conducted a reasonable search for records as required by section 24 of the *Act*.

### **Parties' representations**

The nine Ministry employees who submitted affidavits each state that they conducted additional searches in response to my interim order for records responsive to the appellant's request. The nine affidavits include one from a Regional Director, Youth Justice Services, Northern Region, North Bay Regional Office, one from a Regional Manager, Youth Justice Services, Northern Region, four from individuals who work at the Youth Centre, including a Youth Centre Administrator, a Deputy Youth Centre Administrator, a Secretary, and an Office Manager, two from individuals employed by the Ministry's Human Resources office in Sudbury, including a Human Resources Assistant and a Human Resources Consultant, and one from an Employee Relations Advisor with the Ministry's Centre for Employee Relations.

The Regional Director states in his affidavit that he conducted a search focused on the scope of the appellant's request and that he searched and reviewed all the hard copy files and available

email files located in the office of the previous Regional Director and on the server assigned to this person's office. He submits that he located two hardcopy documents, an agreement between the appellant and a Corporate Investigator with the Forensic Investigation Team, Ontario, signed April 19, 2007 (the April 19<sup>th</sup> agreement) and an exchange of emails between the appellant and the Ministry's Human Resources Consultant, dated April 17, 2007 (the April 17<sup>th</sup> email exchange). The Regional Director states that no electronic copies of these documents were located.

The other eight Ministry employees report that they too conducted independent searches with a focus on the scope of the appellant's request and, in so doing, searched hard copy and electronic records. All eight of these individuals report that they did not locate records responsive to the appellant's request.

The appellant is suspicious of the Ministry's additional search efforts and critical of the nine affidavits produced.

The appellant states that she does not believe that the Ministry has appropriately addressed the issues identified in my interim order, noting that its submissions avoid addressing the specific examples of agreements/resolutions that she has provided to this office. In addition, with regard to those Ministry employees that conducted searches and reported in their affidavits that no responsive records exist, the appellant states that the Ministry has failed to meet its burden of proof since these individuals have not addressed whether records existed but have since been archived or destroyed. The appellant is adamant that some form of agreement/resolution documentation regarding a grievance filed in February 2006 by a named individual should exist in light of statements made by this named individual during the course of the grievance process. The appellant also suggests that the fact the Regional Director located two particular records while the others did not is evidence that several of these individuals have made false and/or misleading statements, since these same records were distributed electronically to many of these individuals.

The appellant submits that further affidavits are required from the named individual who initiated the February 2006 complaint and another named Ministry employee. In addition, the appellant suggests that the Ministry should be required to provide an affidavit from an information technology representative with regard to whether the electronic documents located by the Regional Director were received by any other Ministry employees and whether they were archived or destroyed.

I invited the Ministry to reply to the points raised by the appellant in her representations. In particular, I asked the Ministry to comment on the appellant's assertion that the two documents located by the Regional Director should have been accounted for by the other Ministry employees who had been sent copies of them. In presenting this issue, I asked the Ministry to explain why the Regional Director located these records while the other employees did not and I requested particulars regarding the archiving and possible destruction of the copies of these records, including information pertaining to the Ministry's record retention and destruction practices and procedures.

The Ministry responded with reply representations, in which it stated that the two records found by the Regional Director were not “agreements” and, therefore, were not responsive to the appellant’s request. The Ministry went on to state that the Regional Director had only been appointed to his position fairly recently and was, therefore, new to this matter. The Ministry submits that during the course of searching his predecessor’s emails, he located these two records and disclosed them with his affidavit. Conversely, the other employees were familiar with the request and were aware that that these records were not responsive to the appellant’s request. Accordingly, the Ministry states that these other employees did not refer to these records in their affidavits.

As I was concerned that the Ministry had not addressed my questions regarding the whereabouts of these records and the retention and possible destruction of them, I instructed an Adjudication Review Officer to follow-up with the Ministry. In a telephone conversation between an Adjudication Review Officer with this office and a Ministry representative, the Ministry advised that the records in question address a human resources issue relating to a grievance and are outside the scope of the *Act*. The Ministry’s representative also advised that the records are over one year old and none of the individuals who received copies would have retained them.

Unsolicited, the appellant then forwarded further representations reiterating her view that the Ministry should be held to account for the records that were found by the Regional Director, but not located by other Ministry employees who had been involved in these communications. In particular, she points out that the April 17<sup>th</sup> email exchange originates from an email from the Human Resources Consultant to the appellant regarding her grievance against an identifiable individual. The appellant asserts that it is clear from this original email message that the Youth Centre Administrator has “failed to declare that a grievance file [...] was located.” The appellant also states that it is also clear that the Human Resources Consultant has “failed to declare that the email message that she originated and [the] associated responses [...] have been archived and/or destroyed.”

### **Analysis and findings**

I have carefully reviewed and considered all of the evidence presented to me in response to my Interim Order PO-2665-I. I am satisfied that the Ministry has complied with the provisions of my interim order and has conducted a reasonable search for records responsive to the appellant’s request.

I appreciate the appellant’s concerns regarding the breadth, scope and efficacy of the Ministry’s search efforts. I take issue with the Ministry’s view that the two records located by the Regional Director are non-responsive. The April 19<sup>th</sup> agreement is clearly, on its face an “agreement”, and therefore a record responsive to the appellant’s request. The April 17<sup>th</sup> email exchange is also responsive as it previews a pending agreement regarding the processing of the appellant’s grievance. The fact that the Ministry has argued, at this late juncture, that these records are non-responsive and outside the jurisdiction of the *Act* is, in my view, an attempt to avert the focus of this appeal from the reasonable search issue that is before me. In any event, the Ministry’s submissions on responsiveness and jurisdiction are moot because the records have already been disclosed to the appellant.

Again, the issue for me to decide is whether the Ministry has taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. 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]. The key is, therefore, *reasonableness*. An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

In the circumstances of this case, I am satisfied that the Ministry has made a reasonable effort to respond in good faith to the issues raised in my interim order and has complied, in an appropriate way, with provisions 1 and 2 of my interim order.

The affidavits submitted by the Ministry may not specifically address all of the examples of agreements/resolutions that the appellant has provided to this office. However, I note that the Regional Director's affidavit and the two records he located demonstrate an awareness and consideration of the February 2006 complaint and that each of the nine affidavits makes direct reference to the appellant's request, demonstrating a clear understanding of the nature and extent of the information being sought by the appellant.

In my view, the Ministry has made a reasonable effort 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. As well, the Ministry has furnished affidavits by those individuals who conducted the searches, and I am satisfied that these affidavits adequately cover the information requested in provision 2 of my interim order and that their affidavits were made in good faith.

With particular regard to the April 17<sup>th</sup> email exchange and the April 19<sup>th</sup> agreement, I conclude that if these other employees still maintained copies of these records they would have turned up in their searches. With the exception of the Human Resources Consultant, all of the individuals involved in these communications were "copied" on these emails, possibly indicating that their involvement in the matters addressed in them was peripheral. In the culture of email communication, it is not unreasonable or unusual for individuals to purge their email "in" and "out" boxes a year after an event, particularly where their involvement in the matter was peripheral. I accept that this may have been the case with regard to those employees that received copies of the April 17<sup>th</sup> email exchange and the April 19<sup>th</sup> agreement.

However, with regard to the Human Resources Consultant, I acknowledge that this individual was the author of the initial email sent April 17<sup>th</sup> and the recipient of the response. Accordingly, this individual was not a peripheral player in this matter and one would think that he would have retained a copy, in one form or another, of the April 17<sup>th</sup> email exchange. That said, I am not in a position to comment on the Ministry's record keeping practices generally or the reasons why, in this case, the Human Resource Consultant did not locate at least a hardcopy of the April 17<sup>th</sup>

email exchange. As stated above, I am satisfied that the Ministry has taken reasonable steps to search for records responsive to the appellant's request and that the affidavits provided were sworn in good faith.

Under the circumstances, in my view, it would not be reasonable to ask the Ministry to consult again with its staff, particularly the Human Resources Consultant, in an attempt to determine the whereabouts of two records to which the appellant has already been provided access. However, in the future, I would encourage the Ministry to pay greater attention to its record retention practices, particularly with regard to email communication.

To summarize, based on all of the evidence before me, I reiterate that I am satisfied that the Ministry has conducted a reasonable search for records responsive to the appellant's request. Accordingly, I see no basis for ordering further searches.

**ORDER:**

On the basis of the Ministry's compliance with Interim Order PO-2665-I, I uphold the Ministry's new searches for records responsive to the appellant's request and dismiss the appeal.

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

July 22, 2008 \_\_\_\_\_