



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2659

Appeal PA07-405

York University



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NATURE OF THE APPEAL:

York University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to:

all documents and correspondence, including electronic, produced by, received by, or in the possession of Paul Marcus, York University Vice President/Development, or anyone in his Office, that identifies me or relates or pertains to me in any way.

In its decision dated October 31, 2007, the University stated that:

A search was conducted and there are no records produced by, received by, or in the possession of the Vice President, Development, or anyone in his Office, that identify, relate or pertain to you in any way. Note that Paul Marcus does not correspond with anyone in his capacity as Vice President, Development.

The requester (now the appellant) appealed the University's decision that no records exist.

During mediation, the University advised that Paul Marcus acts in two capacities for the University: as President and CEO of the York University Foundation (the YUF), and also as Vice President, Development. The University noted that any records relating to Paul Marcus in his capacity as President and CEO of the YUF were the subject of a separate request and appeal (PA07-158). In that request, the requester sought:

...copies in full of all documents, communications, and correspondence, including electronic, created or received by any members of the Staff or Board of Directors of the York University Foundation that identify me or pertain or relate to [the requester].

With respect to this request for records relating to Paul Marcus in his capacity as Vice President, Development, the University advised that there are no responsive records.

Also during mediation, the University provided an affidavit to the appellant outlining details of the searches that were conducted to locate responsive records, as well as the nature of the position of Vice President, Development at York University.

The appellant subsequently advised the mediator that there should be records responsive to his request and that he wished to pursue this matter further in adjudication.

As mediation did not resolve this appeal, the file was transferred to me to conduct an inquiry. I scheduled an oral inquiry for April 1, 2008 and I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the University and the appellant. The University provided me with written documentation in advance of the hearing, which consisted of another copy of the affidavit that it had earlier provided to the mediator and the appellant, along with a covering letter from its Freedom of Information Coordinator (the Coordinator), which contained submissions and enclosures. The University provided the appellant with a copy of this documentation.

On April 1, 2008, I conducted a hearing into the issue of whether the University had conducted a reasonable search for records responsive to the appellant's request. The Director, Records and Information Management and Coordinator, Information & Privacy Office (the Coordinator), who oversaw, and also conducted, searches for responsive records, and a lawyer from the Office of the Counsel (the Counsel), attended on behalf of the University. The appellant also attended the hearing. All three individuals testified at the hearing.

DISCUSSION:

As stated above, Paul Marcus is the President and CEO of the YUF and is also the Vice President, Development of the University. In the letter which was provided to me before the hearing, the Coordinator states that the University has searched for and located all records pertaining to or mentioning the appellant that originated in the office of Paul Marcus or his staff, as well as those that were sent to the University, or that originated in the University and were sent to Mr. Marcus. None of these records were addressed to or received from Mr. Marcus in his capacity as Vice President, Development.

In her affidavit, the Coordinator was advised by the Vice President, Operations of the YUF, (the VP of the YUF) that there were three files set aside within the YUF Offices containing documents acquired by Mr. Marcus when he attended meetings in his capacity as Vice President, Development, but that such files were not retained for any length of time as official copies of these documents are kept in the University President's Office. The VP of the YUF searched these files and Mr. Marcus' email for any records produced by, received by, or in the possession of Paul Marcus, York University Vice President, Development, or anyone in his Office, that identified the requester. The VP YUF and Mr. Marcus also searched through Mr. Marcus's email inbox in the event that someone had corresponded with Mr. Marcus in his capacity as Vice President, Development regarding the requester. No responsive records were located.

The VP YUF also informed the Coordinator that the title of Vice President, Development for the University was given to Mr. Marcus as a courtesy title that is not linked to a position, department, or resources in the University, but rather is intended to promote confidence in the YUF and its activities among donors. This title also allows Mr. Marcus to attend certain senior executive meetings at the University.

In the Notice of Inquiry, I advised the appellant that he would be asked at the hearing to provide any details he is aware of concerning responsive records which have not been located, or any other information to indicate that the search carried out by the University was not reasonable.

In the Notice of Inquiry, I informed the University that it should have all individuals who conducted the search(es) available for the oral inquiry.

At the hearing the appellant testified first and objected to the fact that Mr. Marcus was not present at the hearing. He then testified that he disagreed with the distinction made by the University that Paul Marcus functioned in two capacities, namely, as the President and CEO of

the YUF and also as the Vice President, Development of the University. The appellant maintained that Mr. Marcus functions in only one capacity, that is, to direct fundraising for the University and that he referred to Mr. Marcus by his official title in his request.

As the YUF was not mentioned in his request, the appellant objected to the Coordinator contacting the VP of the YUF asking her to search for responsive records. He submitted that the distinction made by the University that Mr. Marcus functions in two capacities, one at the University and another at the YUF, is a device to shield University records from public scrutiny by classifying records as YUF records and, therefore, not subject to the *Act*. As a result, the appellant maintains that all records in the possession of Paul Marcus, including records that he has in his capacity as the President and CEO of the YUF, that identify or relate to the appellant in any way are responsive to his request.

In the Notice of Inquiry, I indicated to the University that it would be asked at the hearing to provide a summary of all steps taken in response to the appellant's request. In particular, the University was to be asked to respond to the following questions and to provide documents or other evidence to support its position:

1. Was the appellant contacted for additional clarification of his request? If so, please provide details including a summary of any further information the appellant provided.
2. Please provide details of any searches carried out including:
 - by whom were they conducted
 - what places were searched
 - who was contacted in the course of the search
 - what types of files were searched and finally
 - what were the results of the searches
3. Is it possible that such records existed but no longer exist? If so, you will be asked to provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

At the hearing, primarily the Coordinator testified. She testified that, by the wording of the request, the request was for Mr. Marcus's records that are maintained in his capacity as the Vice President, Development of the University. In her opinion, the appellant's request was clear and there had been no need for her to contact the appellant for additional clarification. She approached the VP of the YUF to conduct the searches referred to in her affidavit as she does not normally speak to Mr. Marcus. The VP of the YUF is her contact at the YUF and that Mr. Marcus preferred contact through this VP.

The Coordinator further testified that Mr. Marcus is the only YUF officer who has a cross-appointment with the University and that his appointment at the University is a courtesy title only, which permits Mr. Marcus to attend three committee meetings of the University's senior executives. As such, Mr. Marcus has three files set aside within the YUF Offices for these three University committees which contain documents acquired by Mr. Marcus when he attended meetings in his capacity as the Vice President, Development. These three files were for the Board of Governors Committee, the University Executive Committee and the President's Priorities Committee.

These three files were searched in October 2007 by Mr. Marcus's Executive Assistant, in response to the request. She did not locate responsive records in these files. The Coordinator also searched these three files herself on February 27, 2008, in order to determine if these files contained responsive records. The Coordinator did not find responsive records in these three files nor in the desks and filing cabinets in both Mr. Marcus's and his Executive Assistant's offices, which she also searched on February 27, 2008.

The Coordinator also testified that the position of Vice President, Development, is not linked to a University department; nor are there University resources or staff allocated to this position. Mr. Marcus's sole office is at the YUF and he reports to the Board of Directors of the YUF. He is not compensated by the University and he is not an employee of the University.

Analysis/Findings

I accept the position of the University that Paul Marcus functions in two capacities, as reflected in the University's affidavit. This was not only confirmed by the University at the hearing, but is also reflected on the University's website, where it describes Mr. Marcus as follows:

The President and CEO [of the YUF] is the principal interface between the [YUF], its Board of Directors and the senior administration of the University and Faculties. His portfolio includes the cultivation, solicitation and stewardship of donors from the private sector, including individuals, corporations and foundations. He is cross-appointed as Vice President Development, York University.

Although the appellant wishes to have disclosed to him records concerning him in the custody or control of Paul Marcus, functioning both as the President and CEO of the YUF and Vice President, Development for the University, this was not how his request was worded. In this request, the appellant sought records in "the possession of Paul Marcus, York University Vice President/Development, or anyone in his Office". He did not seek records in the possession of Paul Marcus in his capacity as the CEO and President of the YUF in this request.

As noted above, the appellant has made a separate request for any records of the Staff or Board of Directors of the YUF that identify, pertain or relate to him. This request would encompass any responsive records in the possession of Paul Marcus as the President and CEO of the YUF.

The preliminary issue being adjudicated in that appeal (PA07-158) is whether the YUF is an institution under the *Act*.

The University has satisfied me that Mr. Marcus functions in two capacities, one with the University and one with the Foundation. In his role as the Vice President, Development at the University, he is able to attend and participate in certain committee meetings that he would not be allowed to do without being appointed a University vice president. Whether Mr. Marcus is separately compensated for these two roles is not relevant to my determination. I accept the evidence of the University that he functions in two capacities and that he maintains a separate filing system for each role.

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].

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.

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].

Although there is no burden of proof specified in the *Act* in this instance, the burden of proof in law generally is that a person who asserts a position must establish it.

As set out above, the issue before me is whether the search carried out by the University for responsive records was reasonable in the circumstances. In my view, the University has provided a thorough explanation of the efforts made by its experienced employees, 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 University has provided sufficient evidence to establish that it has made a reasonable effort to identify and locate responsive records.

Accordingly, I find that the University 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 University's search as reasonable.

Diane Smith
Adjudicator

April 8, 2008