



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2741

Appeals PA07-426, PA07-446, PA07-447

University of Ottawa



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NATURE OF THE APPEAL:

The University of Ottawa (the University) received three requests from the same requester under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

1. ...all records mentioning and/or discussing me and appearing in the office of [name], Vice-President Resources at the University of Ottawa from May 16, 2007 inclusive to June 7, 2007 inclusive.
2. ...all records mentioning and/or discussing me and/or my activities and communicated by/to [name] personally and/or to [name] in all his official capacities at the University of Ottawa, including but not limited to Vice-President Academic and Provost at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communications from March 20, 2007 inclusive to present.
3. ...all records mentioning and/or discussing me and/or my activities and communicated by/to [name] personally and/or to [name] in all his official capacities at the University of Ottawa, including but not limited to Dean of the Faculty of Science at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communications from March 20, 2007 inclusive to present.

The requester subsequently clarified the first request by means of a letter to the University where he advised that he did not require access to any records in which he was the communicator or recipient.

In the first request, the University advised the requester that no responsive records existed. In the other two requests, the University located responsive records and granted the requester with access to them, in their entirety.

The requester, now the appellant, appealed the University's decisions.

During the course of mediation, the University provided the appellant with a letter describing for each request the extent of searches conducted to locate responsive records. The appellant maintained that additional responsive records existed; however, the reasonableness of the University's searches is at issue in these three appeals.

As mediation did not resolve these appeals, the files were transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues for each of the three appeals to the University, initially, seeking its representations. I received representations from the University, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I sent a copy of the appellant's representations to the University seeking reply representations. I received reply representations. I then received further representations from the appellant, which I shared with the University. I received further representations from the University.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

The sole issue to be determined in this appeal is whether the University conducted reasonable searches for records responsive to the three requests.

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].

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.

The University was asked to provide a written summary of all steps taken in response to the request. In particular, the University was asked to respond to the following questions:

1. Did the University contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the University did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the University outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the University inform the requester of this decision? Did the University explain to the requester why it was narrowing the scope of the request?
3. 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? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

If the University provides an affidavit, it should be from the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations.

Representations

The University provided affidavits from the Dean of the Faculty of Science, the Vice-President Resources and his administrative assistant, as well as the administrative assistant to the the Vice-President Academic and Provost setting out the nature and the extent of the searches they conducted for responsive records. By way of a generalized representation, the University also submitted in response to each of the appellant's requests that:

An e-mail message was sent, from the University's [Freedom of Information] Coordinator (FOIC) to the [three] individuals mentioned in the appellant's requests, asking them to provide the University with records that responded to the parameters of the request.

With respect to requests [2 and 3], the individuals named in [the appellant's] request as well as some of these individuals' assistants conducted searches for any documents responsive to the request... The individuals conducted searches for records using the search term [appellant's last name]. Some individuals also conducted searches for the term [appellant's first name].

With respect to request [1], the individual named in the request, [name], Vice-President of Resources, and his administrative assistant searched in [his] records for the name [appellant's last name] from [dates].

Individuals identified in requests [1 and 2], did not think they had any hard copy paper records concerning the appellant, other than any documents that may have been sent to their attention from the appellant himself or that would have already been provided to the appellant. Therefore, paper records were not searched. To do so, would have simply increased the search time significantly and hence the fees payable by the appellant.

All the corresponding records were then produced and forwarded to the legal counsel where the records were reviewed to confirm that they met the parameters of the request. The records were then provided to the appellant....

Since there was no need for clarification, the University decided to respond literally to the request...

The decision by certain individuals to search for the term [appellant's last name] rather than [appellant's first name] was appropriate as there are no doubt several students and/or employees of the University named [appellant's first name]. Searching for this term would only have increased the research and preparation time and therefore increase the fees required of the Appellant.

The individuals were not expected to search for all possible spelling variations of the term [appellant's last name] therefore, a document with a spelling error would not have been found. Considering the time required and the cost, it would have been unreasonable to search for all other possible spelling variations.

In response, the appellant submits that:

[The University] without justification incorrectly and unilaterally restricted the scope of their searches for records to records that contained my name, rather than records that substantively relate to me and my activities - it calls this "respond[ing] literally to the request"... If there was no need for clarification, then there was no need for the University to "decide" on anything, but merely to respond to the requests. Their statement is contradictory and illogical....

The University did not respond to my requests for records related to "my activities". In fact, it is not possible for the University to respond to such requests with their literal restrictions.

The University has not provided an affidavit from [name], Vice-President Academic and Provost of the University, who is the respondent to my request [2].

Due to the individuals involved, the severity of what has been actuated by certain members of the University's upper administration, and the political circumstances surrounding my requests to records ..., it is not unreasonable to expect that there are additional records that would not have necessarily named me explicitly. It is common for members of an institution to refer in internal correspondence to an individual who has been critical of the institution other than by name...

EVEN IF the University intended to conduct only literal searches, the searches could not have been complete [since all] of the individuals who were asked to respond to the ...requests (except [name], who's affidavit is missing...) limited their searches to ONLY EITHER my first OR my last names;

I have included an example record [the example record] that I believe puts into disrepute the affidavits of at least [Vice-President Resources and his administrative assistant]. This respondent record was not disclosed by the University in its response to my [request 1] and subsequent clarification and contains the correct spellings of my first and last names several times, thereby contradicting ...their affidavits that "This search did not produce any records..."

I am known by the individuals concerned in my ...requests, and ...a literal interpretation may have been used to answer my requests as a device by the University to unduly limit access to records...

I remain concerned, given the broad context of my relation with the University, that it appears that the manner in which the University responded to my requests was a device to limit access. There was no reason or justification to answer my requests using their literal restrictions. If the University did in fact restrict its searches to only literal interpretations concerning requests for records concerning me as it claims it has done, then it is impossible for it to have produced as it did a responsive record [to request 3] through the Dean of Science's office a record discussing matters relating to me substantively but not naming me explicitly, neither my first nor last names. This document is another example of members within the institution internally corresponding about a person without explicitly naming them.

In reply, the University submits that it did not disclose the example record as the appellant was a recipient of this communication. It notes that the appellant clearly indicated that he was not seeking access to the records where he was the recipient.

Concerning the appellant's position that searches should have been conducted in another manner besides searching under his name, the University submits that there was no other reasonable way to conduct the search. It submits that searching by name is the most effective and least expensive way to conduct searches. The University disputes the appellant's contention that it should have been able to search for records concerning the appellant without using the appellant's name as a search criteria. It states that:

The appellant has nothing to support [this] contention, except an example that was used in another context to refer to another individual not related to the appellant's requests. With all due respect, it is not the University's responsibility to conduct searches under all the possible spelling variations of the appellant's name or all possible appellations.

Such procedures would only increase the search time significantly and increase the fees payable by individuals making requests. The University has the obligation to conduct a reasonable search, and, in this instance, performing a search for the appellant's name was reasonable.

Concerning the appellant's query about the disclosure of a record which does not name him, the University states that this communication was found by the Dean of the Faculty of Science while he was conducting his search. The Dean knew that this communication was about the appellant and therefore, included it in the responsive records which the Dean identified.

With respect to the lack of an affidavit from the Vice-President Academic and Provost, the University states that this individual cannot swear an affidavit on the searches done since it was his administrative assistant who had access to his records and who conducted the searches, rather than the Vice-President Academic and Provost himself.

In response, the appellant provided an index of records provided to another requester who sought records from the University's President. The appellant submits that these records were not disclosed to him in response to his request for records maintained by the University's President.

Analysis/Findings

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.

The appellant claims that the University should have located a particular record, namely, the example record referred to above. However, as stated above, this record was copied to the appellant. As it had already been sent to the appellant, it was excluded from the scope of the

request, as the appellant clearly indicated that he did not seek records where he was the communicator or recipient.

The appellant has also claimed that additional responsive records that are in the custody or under the control of the University's President should have been located. However, I note that the appellant's request for responsive records in the custody or under the control of the University's President is the subject of a separate appeal, Appeal PA07-445. The existence of additional responsive records in the custody or under the control of the University's President will be considered in a separate order that deals with that request and the subsequent appeal.

I disagree with the appellant that the University was obligated to search for responsive records concerning the appellant in a manner other than using the appellant's name as a search criterion. The appellant has requested records mentioning and/or discussing him or his activities. Although one responsive record was located that did not contain the appellant's name, this record was located because the Dean of the Faculty of Science who had conducted the search knew that this record related to the appellant. I find that this record was discovered by chance. I further find that it is not reasonable to expect that the University would be able to locate other responsive records without searching for records that contain the appellant's name.

As set out above, the issue before me is whether the searches carried out by the University for responsive records was reasonable in the circumstances. In my view, with respect to request 3, I find that the University has provided a thorough explanation of the efforts made by experienced employees to identify and locate any records, both electronic and paper, responsive to this request, as well as an explanation as to why no additional responsive records could be located.

With respect request 2, the appellant has taken issue with the fact that the Vice-President Academic and Provost did not provide an affidavit concerning any searches undertaken by him to locate responsive records. The University has provided contradictory information as to whether the Vice-President Academic and Provost has searched for responsive records. In its initial representations, it states that this individual himself searched for records; however, in its reply representations, it states that only the administrative assistant to the Vice-President Academic and Provost searched for responsive records. Even if the Vice-President Academic and Provost did not personally search for electronic records, I accept the University's explanation that his administrative assistant is familiar with his record holdings and that she performed a thorough search for responsive electronic records. Based upon my review of her affidavit, I find that she is an experienced employee and that she has expended a reasonable effort to conduct a search to identify any electronic records that are reasonably related to request 2 [Order M-909].

However, I find that in response to both requests 1 and 2, that the University should have conducted searches for responsive paper records, as well as electronic records. In requests 1 and 2, the appellant seeks:

1. ...all records mentioning and/or discussing me and appearing in the office of [name], Vice-President Resources at the University of Ottawa from May 16, 2007 inclusive to June 7, 2007 inclusive.
2. ...all records mentioning and/or discussing me and/or my activities and communicated by/to [name] personally and/or to [name] in all his official capacities at the University of Ottawa, including but not limited to Vice-President Academic and Provost at the University of Ottawa, to/by another person or other persons ...from March 20, 2007 inclusive to present.

In its representations, the University states that:

Individuals identified in requests [1 and 2], did not think they had any hard copy paper records concerning the appellant, other than any documents that may have been sent to their attention from the appellant himself or that would have already been provided to the appellant. Therefore, paper records were not searched. To do so, would have simply increased the search time significantly and hence the fees payable by the appellant.

In my view, the University cannot unilaterally decide not to search for records on the basis that to do so would increase the search time and, as a result, the fee payable by an appellant. If the University had wished to restrict its search to electronic records only, then it could have sought the agreement of the appellant to do so. If the appellant did not agree, then the University could have recovered any additional fees incurred by means of the fee provisions in the *Act*.

As the University did not conduct searches for paper records responsive to requests 1 and 2, I find that it has not provided sufficient evidence to establish that it has made a reasonable effort to identify and locate all responsive records. Accordingly, I find that the University has not conducted reasonable searches for records that are responsive to the appellant's requests 1 and 2 as required by section 24 of the *Act*. As a result, I will order it to conduct further searches for paper records responsive to requests 1 and 2.

ORDER:

1. I order the University to conduct further searches of the record-holdings of the Vice-President Resources and the Vice-President Academic and Provost for paper records responsive to requests 1 and 2 and to provide the appellant with a decision letter in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.
2. I further order the University to provide me with a copy of this decision letter to the appellant.

3. I uphold the University's search for records responsive to request 3.

Original signed by: _____
Diane Smith
Adjudicator

_____ December 8, 2008