



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2754-F

Appeal PA07-47 and PA07-47-2

Ministry of Education



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NATURE OF THE APPEAL:

This order disposes of the remaining issues arising from my interim decision in Order PO-2717-I.

The appeal arises from a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to meetings, teleconferences, letters and emails that pertain to any member of the requester's family or information pertaining to Intensive Support Amount (ISA) funding for the period November 2005 to June 2006.

The Ministry issued a decision stating, "A search has discovered that no records exist in the custody of the Ministry that respond to this request." The requester (now the appellant) appealed that decision on the basis that records should exist. The parties were unable to resolve any of the issues at mediation and the appeal was transferred to the adjudication stage of the appeals process.

Before the Ministry submitted its representations it issued a revised decision letter advising that it had conducted another search and located responsive records. The Ministry granted the appellant access in full to some of the records and partial access to the remaining records. The Ministry claimed that the discretionary exemption at section 13(1) (advice to government) and mandatory exemption at section 21(1) (personal privacy) applied to the withheld portions.

After obtaining representations from the parties, including an affidavit from the Ministry, I issued Order PO-2717-I, which resolved the issues relating to the application of the exemptions at sections 13(1) and 21(1) of the *Act*. However, I found that the Ministry had not conducted a reasonable search for responsive physical and electronic records that may be located in the Minister's office for the period November 2005 to June 2006.

The following order provisions were made in Order PO-2717-I:

1. I uphold the Ministry's decision to withhold access to the portion of Record 6 I found exempt under sections 13(1) and 49(a) of the *Act*.
2. I order the Ministry to disclose Records 4 and 5 along with copies of appellant's letters dated January 3, 2006 and January 10, 2006, in their entirety, by sending the appellant, copies of these records no later than **October 30, 2008**, but not before **October 24, 2008**.
3. I order the Ministry to conduct a search for responsive physical and electronic records in the Minister's office for the time period identified in the request. I order the Ministry to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:
 - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

- (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
 - (d) the results of the search.
4. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit 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.
 5. If, as a result of the further search, the Ministry identifies any additional records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this Order as the date of the request.
 6. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Subsequent to the issuance of Order PO-2717-I, the Ministry wrote to the appellant on October 29, 2008. The Ministry's letter confirmed that it had conducted a further search for records in accordance with order provision 3. The Ministry advised that it had located four additional records. The Ministry withheld a portion of one of the records pursuant to section 19 of the *Act* (solicitor-client privilege) and granted access, in full, to the rest.

The Ministry also provided me with an affidavit setting out its search efforts, as required by order provisions 3 and 4. Upon her receipt of the Ministry's revised decision letter, the appellant appealed the Ministry's decision relating to the application of section 19 to one of the records. The appellant also asserted that further responsive physical and electronic records in the Minister's office for the period November 2005 to June 2006 should exist. As a result, appeal file PA07-47-3 was opened to address the issue of whether this record is exempt under section 19 of the *Act*. That appeal is presently at the mediation stage of the appeals process. I subsequently wrote to the appellant and invited her representations. The appellant provided representations in support of her position that additional records should exist.

This order addresses the issue of whether the Ministry's search for additional responsive records in the Minister's office that was ordered in Order PO-2717-I was reasonable.

DISCUSSION:

As I have already ordered the Ministry to conduct a further search, the issue to be determined is whether the Ministry's further search was reasonable. The Ministry was ordered to conduct a further search of the Minister's office for responsive records for the time period of November 2005 to June 2006. The request sought access to records relating to the appellant's involvement with either the Ministry or ISA funding.

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.

Order PO-2717-I required that the Ministry provide an affidavit from the person or persons who conducted the further search. As noted above, the Ministry provided an affidavit to this office. For the remainder of this order, I will refer to this affidavit as the Ministry's second affidavit. The affidavit was provided by an individual holding the title of Legislative Assistant/ Issues Coordinator (Legislative Assistant) in the Minister's office who states:

I have personally searched the records in the current Minister's office, and found no further responsive records as a result of my search.

It is a common practice for Minister's office records to be logged by Communication Branch, and maintained according to the records schedule set out for the Minister's office.

I am advised and I believe that [named individual], an experienced employee of the Ministry and Executive Assistant, in the Communications Branch, personally conducted a search of previous Minister's Office records that are maintained in the Communication Branch, in response to the Interim Order. The search was focussed on these records based on additional information provided by the appellant in her representations.

Four new records were located. The records located consist of the appellant's correspondence with various Ministry employee during the period of November

9, 2005 and January 10, 2006 as well as e-mails between the appellant and Ministry employees in respect to the appellant's correspondence. Two of the records located consist of a chain of e-mails that begin as early as February 2004. Although they fall outside the dates of the request, as they relate to communication within the timeline, are being included with responsive records.

The Ministry's second affidavit was provided to the appellant along with my letter seeking her representations. The letter sought the appellant's representations as to whether the Ministry's further search for responsive physical and electronic records in the Minister's office was reasonable. The appellant takes the position that the Ministry's further search was inadequate. The appellant's representations state:

The question revolves around the issue of admitted inadequacy of past searches by the Ministry. We submit that subsequent searches do not affect the inadequacy of earlier searches; a search can not be held to be 'reasonable' overall when it takes two years to declare responsive documents.

The appellant also raises concerns about previous searches conducted by the Ministry. In this regard, the appellant argues that the Ministry's search for responsive records in the Deputy Minister's office was too narrow taking into consideration the Ministry's advice that the Communication Branch logs and maintains records from the Minister's office. The appellant also argues that there must exist records that connect the appellant's and her husband's input with the Ministry's revised policies. The appellant already raised this issue in PO-2717-I, though she did not refer to the Ministry's 2008 report on Special Education at the time.

In my view, the above-noted concerns raised by the appellant do not address the issue before me. Furthermore, I already considered the appellant's arguments regarding the delay or the adequacy of the Ministry's searches for responsive records outside the Minister's office in PO-2717-I. Accordingly, there will be no further discussion in this order about issues already discussed and decided in Order PO-2717-I. Similarly, I will not address the appellant's requests that this office "take whatever steps it needs to protect the public and ensure democracy by enforcing the Acts under its control" and order the Ministry to search for records relating to whether the filing of freedom of information appeals infringe on citizens constitutional and human rights. In any event, the relief requested by the appellant is outside the jurisdiction of this office or scope of the appeal before me. The issue I am to decide is whether the Ministry's further search ordered in Order PO-2717-I was reasonable. If I am not satisfied with the Ministry's further search efforts, I have the authority to order the Ministry to conduct another search.

With respect to the adequacy of the Ministry's further search for physical and electronic records in the Minister's office the appellant states:

... Order PO-2717 deflected our focus on the Deputy Minister's office, and seized on an email we had submitted which had not been disclosed, as evidence that the *Minister's office* had not been searched adequately. This was never alleged by us

in our submissions, and in our view the key decisions and actions were co-ordinated by the Deputy Minister ...Yet PO-2717 ordered the Ministry only to 'conduct a search for responsive physical and electronic records in the Minister's office for the time period identified by the request', and to provide the adjudicator with 'an affidavit from the individual(s) who conducted the search'.

Even so, the Ministry failed to respond to the requirements of this order. [Emphasis in Original]

In support of her position the appellant raises the following three questions:

1. If it is 'a common practice for Minister's office records to be logged by Communication Branch', why was the Communications branch of the Ministry not contacted in the first place when our FOI request was originally made in January 2007 (now almost two years ago), or at any time subsequently (eg July 2007)? This information makes it impossible to conclude that there has been at any point a 'reasonable search' for the requested records.
2. Why was the affidavit sworn by the present Minister's 'Legislative Assistant', and not (as ordered by PO-2717) by the person who actually conducted the search in the 'Communications Branch' – which is apparently where all records relating to the time period in question are stored or logged.
3. It does not appear that [the individual who provided the Affidavit] is in a position to be 'satisfied' that all records have now been located, given the Ministry's track record in this FOI request (denying documents exist, then finding them, now in its second iteration); given the fact that his own first hand 'search' of the Minister's office turned up no documents at all; given that he merely passed on the request to the communications branch, and has no first-hand knowledge of what searches were conducted there; and given that [he] has apparently no first hand knowledge of what other documentation might exist in the Communications Branch which might respond to our request.

As previously stated, 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. In my view, the three questions raised by the appellant fail to adduce sufficient evidence which would provide a reasonable basis for concluding that additional records exist. Rather, the appellant's evidence raises concerns about the length of time it took the Ministry to conduct its search and raises questions about the qualifications of the individuals conducting the further search. With respect to the appellant's concern about the length of time it took the Ministry to conduct its search, I refer back to my comments about issues already considered in Order PO-2717-I.

I have carefully reviewed the affidavit provided by the Ministry and am satisfied that it was prepared by an experienced and knowledgeable Ministry employee who conducted the Ministry's search for further records in the Minister's office. I am also satisfied that the evidence this individual provided in relation to the search that was conducted in the Communications Branch is sufficient. In my view, the appellant's evidence that the Ministry's previous searches failed to locate records subsequent searches found fails to demonstrate that the search the Ministry conducted after the issuance of Order PO-2717-I was not reasonable.

Turning now to the remainder of the appellant's evidence. The appellant also argues that the Ministry's further search should have located additional records. In support of her position that additional records exist, the appellant refers to records the Ministry located and provided to her as a result of the search it conducted in accordance to Order PO-2717-I. The appellant submits that the Ministry provided her with a copy of an e-mail but failed to locate the four attachments to the e-mail. The appellant also argues that the Ministry's search for responsive records in the Minister's office should have located records created or used by two named individuals employed at the Ministry. In particular, the appellant submits that records relating to communications these individuals had with one another should exist.

Upon my receipt of the appellant's representations I wrote to the Ministry and sought their clarification about the attachments referred to in the e-mail and the two individuals the appellant advises work in the Minister's office.

The Ministry responded that the attachments are not responsive to the appellant's request. The Ministry submits that the rich text format file (.rtf) attachment is a detail correspondence report which logs incoming correspondence. The Ministry advises that the report captures correspondence received by the appellant for the period of May 2004 to February 2005. With respect to the tagged image file (.tif) attachments, the Ministry advises that the three attachments are copies of the Ministry's responses to communication received from the appellant on June 17, 2004, January 11, 2005 and January 18, 2005.

With respect to the appellant's position that the Ministry's further search should have located responsive records created or used by two named individuals, the Ministry responded that one of the individuals identified by the appellant is a Special Assistant in the Minister's Office. The Ministry submits that its second affidavit already indicates that it conducted a further search in the Minister's office and did not locate any responsive records. The Ministry also advises that the other individual does not work in the Minister's Office. This individual is an Education Officer, Field Services Branch, Toronto and Area Regional Office. The Ministry advises that its first affidavit indicates that the Education Officer conducted a search for responsive records, however no records were located. The Ministry confirmed that no further search for responsive records was undertaken by the Education Officer as none was required pursuant to Order PO-2717-I.

Decision and Analysis

As noted above, 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.

I have carefully considered the evidence set out in the Ministry's second affidavit along with the representations of the parties and am satisfied that the Ministry has now conducted a reasonable search for responsive physical and electronic records in the Minister's office for the period of November 2005 to June 2006. In making my decision, I accept the Ministry's evidence that the tif and rtf documents attached to the November 21, 2005 e-mail fall outside the scope of the appellant's request for records for the period of November 2005 to June 2006. Accordingly, the Ministry had no obligation to conduct a search for these records. Should the appellant wish to seek access to these records, the appellant may exercise her rights of access by filing a new request under the *Act*.

I also considered the appellant's evidence that additional records relating to two individuals should exist. 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. In my view, the appellant has failed to adduce sufficient evidence to support a conclusion that there is a reasonable basis for concluding that responsive records in the Minister's office exist. Having regard to the Ministry's evidence that it has now conducted a further search, I am satisfied that the Ministry has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records. Again, the appellant may exercise her rights of access and file a new request under the *Act* for records she believes exist in the Toronto and Area Regional Office.

As previously stated, I am also satisfied that the Ministry's second affidavit sets out in sufficient detail the nature of its physical and electronic searches conducted and directed by an individual having knowledge about the circumstances of this appeal.

Having regard to the above, I find that the Ministry conducted a reasonable search for responsive records. Accordingly, I find that there is no basis to order the Ministry to conduct further searches relating to the appellant's request for access to records relating to meetings, teleconferences, letters and emails that pertain to any member of the requester's family or ISA funding for the period November 2005 to June 2006.

ORDER:

I find that the Ministry's further search pursuant to order provision 3 of Order PO-2727-I was reasonable and I dismiss this appeal.

Original signed by: _____
Jennifer James
Adjudicator

_____ January 21, 2009