



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2760**

**Appeal PA08-205**

**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:

...all copies of all documents, communications, and correspondence, including electronic, produced or received by, or in the possession of [name of University's President] and/or the Office of the President that pertain or relate in any way to York University's practice regarding the observance of religious holidays. This would include, but is not restricted to, records relating to the review of York's practice by the Ontario Human Rights Commission and the Human Rights Tribunal of Ontario.

The University located responsive records and released seven records and denied access to the remaining 13 records (either in whole or in part), on the basis of sections 65(6)3 (labour relations and employment records), 19(c) (solicitor-client privilege) and 21(1) (personal privacy) of the Act.

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

During mediation, the appellant narrowed his appeal to the following four records: Records 7, 12, 13 and 14.

With respect to Records 12 and 13, the University claimed the application of section 21(1). The mediator contacted the two individuals whose personal information was contained in these records (the affected persons). Both affected persons objected to the release of their personal information. The appellant confirmed that he wished to pursue access to these records.

With respect to Record 7, the appellant confirmed that he was only interested in one email between two named individuals dated March 30, 2008. He advised that it appeared that the email had been severed. He commented that there was a large gap between the subject line of the email and the commencement of the email text. He noted that the email text seemed to begin mid-sentence and that the first word of the text did not begin with a capital letter. The mediator raised this matter with the Freedom of Information and Privacy Coordinator (FOIC) who advised that was the record she had received from the University's President's Office and that she had not severed out any information from that email. The appellant believes that there is a copy of the email which does not have this gap and which contains additional text. As a result, the appellant raised the issue as to whether the University conducted a reasonable search for Record 7.

As mediation was unable to resolve these matters and the appellant wished to proceed, the appeal proceeded to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the University and the two affected persons, initially. I received representations from the University only. The University also issued a supplemental decision letter disclosing parts of Records 12 and 13 and all of Record 14 to the appellant. Therefore, section 65(6)3, which only was claimed for Record 14, was no longer at issue in this appeal. A complete copy of the University's representations was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I then received a letter from the appellant. In this letter, the

appellant withdrew his appeal concerning Records 12 and 13; therefore, section 21(1) was no longer at issue. Accordingly, the only issue remaining is the reasonableness of the University search for Record 7.

## **DISCUSSION:**

### **SEARCH FOR RESPONSIVE RECORDS**

The only issue in this appeal is whether the University conducted a reasonable search for the information the appellant claims is missing from Record 7, which is an email dated March 30, 2008.

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, preferably in affidavit form:

1. Did the institution 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 institution 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 institution 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 institution inform the requester of this decision? Did the institution 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.

The Record is an email in an email chain. The email at issue was sent by the University's Chief Marketing Officer to the University's General Counsel and copied to the Vice-President Finance & Administration, the University's President and the Vice-President Students. This email, along with a message in reply, was then forwarded by the Vice-President Students to the Chief Marketing Officer, with a copy to Vice-President Finance & Administration, the General Counsel and the President of the University. The University submits that:

Record 7 ...is the fifth of six messages in an email thread between senior executives ... It appears to be severed because there is a gap between the subject line and the start of the text, and because the text starts with a small letter.

No severing was carried out on that email message. This email was disclosed by York University's Information and Privacy Office to the appellant exactly as it was received from the President's Office by the Information and Privacy Office for processing the original request.

The University also provided an affidavit of the FOIC who is both the University's Director, Records & Information Management and its Privacy Coordinator, describing the search for this record and follow-up. She coordinated the search for documents related to the appellant's request. In response to the appellant's request, she obtained the responsive records from the Office of the President. Included in the documents was the email thread comprising Record 7.

The FOIC asked the Executive Officer, Marketing and Communications to ask the Chief Marketing Officer, if he still had a copy of the email he sent. The Chief Marketing Officer responded that he did not have a copy of this email.

The FOIC also directed her administrative assistant to check with the University's General Counsel and with the Vice-President Students to see if they still had the email in their email accounts. Although the General Counsel did not have a copy of this email, the Vice-President Students did have a copy of the email. The FOIC also asked the Coordinator, Administrative Supports Services to ask the Vice-President Finance & Administration if he still had the copy of

the email in his account. This person did have a copy and forwarded the email to the Coordinator. This email was the same as the copy initially received from the President's Office.

The FOIC also spoke directly with the sender of the email, the Chief Marketing Officer. He did not remember the circumstances surrounding sending that particular email; however, he informed the FOIC that, he often sent messages without taking time to correct spelling errors. He further informed the FOIC that as the message includes a signature block at the bottom, it was sent from his desk computer and not his Blackberry.

In response, the appellant submits that the email must be severed and missing information as the subject heading refers to the appellant as well as to a specific Ontario Human Rights Commission case, yet there is no mention of these references in the text. The sentence fragment at the start of the text contains the adverb "however", yet there is no previous statement in the text, to which the word "however" clearly refers.

The appellant had received a copy of this March 30, 2008 email on July 7, 2008 and sent a copy of this record to the President of the University, who was the recipient of the email. The appellant informed the President that in his opinion, the statement in the email was false and potentially libelous and that he had sent a copy of this record to others to complain about its content. The appellant finds it implausible that the author of this record, who he refers to as the Vice President, Communications, and its recipient, the Counsel for the University, both of whom claimed to have destroyed the document, could have been unmindful of the circumstance of its production, severance, and potential implications. He submits that:

[The] University was required to "provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules." The University has not complied with this requirement. Nevertheless, given that my request for records was submitted less than three months after Record 7 was created on March 30, 2008 and that less than ten months have elapsed since that time, it is certain that the University still has possession of and control over the original unsevered email and should be ordered to retrieve and produce it forthwith.

### **Analysis/Findings**

Based upon my review of the parties' representations, I find that the University has searched for all existing copies of the email with each sender and recipient. It obtained copies from the three individuals copied in the email and all copies were identical to the one disclosed to the appellant.

Although both the author of the email and the named recipient no longer have a copy of this record, I find that the University's publicly available email and records retention policies did not require the original sender and recipient to retain a copy of this email. On its website the University has posted a Tip Sheet concerning Email Management. In this document, University members are advised to retain email messages that are sent and received only if they relate to

University business; all other messages can be treated as transitory and deleted. The University has also posted on its website a Tip Sheet concerning the disposal of Transitory Records. Transitory Records are defined as records that “have no ongoing operational, informational, evidential or historical value”. A transitory record can be disposed of as soon as the holder of the record has finished with it.

The email at issue is email 5 of a six email chain. Based upon my review of the information in emails 5 and 6, I find that this information is transitory and that the sender and recipients of these two emails could have disposed of this portion of the email chain.

Although the appellant provided his concerns about the contents of Record 7 to the University, he did not do so until over three months after the creation of this record. In addition his request which led to the disclosure of this record was made over two months after this record was created.

I find that the University has provided sufficient evidence to show that it has made a reasonable effort to identify and locate copies of Record 7 to show whether any further information exists in it [Order P-624]. The University has provided a comprehensive description of the steps it undertook to locate the information sought by the appellant. I find that the appellant has not provided me with a reasonable basis for concluding that additional responsive information exists. Accordingly, I find that the University has performed a reasonable search.

**ORDER:**

I uphold the University’s search for responsive records and dismiss the appeal.

Original Signed By: \_\_\_\_\_  
Diane Smith  
Adjudicator

February 24, 2009 \_\_\_\_\_