Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2889

Appeal PA08-372-2

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a legal action that the requester had commenced against a government official. The requester had received an official document entitled "Notice of Intent to Defend" in response to his legal action, and the request referred to that notice.

Initially, the Ministry issued a decision to transfer the request to the Ministry of Transportation under section 25 of the *Act*. The requester, now the appellant, appealed the Ministry's decision and appeal file PA08-372 was opened. That appeal file was subsequently closed during the mediation stage when the Ministry agreed to issue an access decision. The Ministry then wrote to the appellant to clarify the request, and stated:

> In order to obtain access to a record, you must provide sufficient detail to enable an experienced employee, upon a reasonable effort, to identify the record. This letter is to advise that your request does not provide sufficient detail to enable me to locate or identify the records you have requested. I am writing to obtain more precise information.

The appellant appealed the Ministry's decision, and the current appeal PA08-372-2 was opened.

During mediation, the appellant clarified his request, and the Ministry issued a revised decision letter to the appellant. The revised decision stated:

> Your request has recently been clarified by [the mediator]. I understand you are seeking answers to the following questions:
>
> - Why did the Ministry admit service for [a named individual]?
>
> - Should [the Ministry] through its agent [a named Crown Attorney] admit service for [the named individual]?
>
> Please be advised that a search was conducted and that no responsive records were located.

The appellant did not accept the Ministry's decision, and the issue of whether the Ministry conducted a reasonable search for records was raised in this appeal. The appellant also raised four additional issues in this appeal.

Mediation did not resolve the issues, and this file was moved to the inquiry stage of the process. The adjudicator formerly assigned to this file decided to begin the inquiry by sending a Notice of Inquiry, identifying the facts and issues in this appeal to the Ministry, initially. Although she identified the issues raised by the appellant in the Notice, she only invited the Ministry to provide representations on the reasonable search issue at that time. She did, however, advise the Ministry that representations regarding the other issues might be sought at a later date.

The Ministry provided representations, and the adjudicator then sent the Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant. The appellant was invited to respond to the reasonable search issue, and was also invited to respond to any issues arising from the Ministry's representations or to address the other issues raised during mediation.

In response to the Notice of Inquiry, the appellant provided the previous adjudicator with a 28-page letter containing his representations, as well as a number of attachments. In his representations the appellant also stated that he believed there are "additional factors" which are relevant to this appeal. The appellant also identified what he considered to be errors in the Notice of Inquiry, and asked that these be corrected.

After receiving the appellant's representations, the previous adjudicator wrote to the appellant. With respect to the appellant's request that certain corrections be made to the Notice of Inquiry, the adjudicator reviewed the requested corrections and stated:

> I have considered your correction requests and do not share your position that correction is required to prevent "bias" and the "illegality in adjudgment". In fact, the Notice of Inquiry ensures that the parties are aware of the relevant facts and issues in the appeal which is an important aspect of procedural fairness.
>
> However, given that two of your correction requests address the issue of the scope of the request, I will seek your further representations on this issue.

The previous adjudicator then identified that the "Scope of the request/Responsiveness of records" was an issue in the appeal, and invited the appellant to address this issue.

The appellant provided additional representations in response to the adjudicator's letter.

This file was subsequently transferred to me to complete the inquiry process.

DISCUSSION:

PRELIMINARY ISSUES

Request to correct errors in correspondence

In his second representations to this office, the appellant takes a similar position to the one he took in his initial representations. The appellant again refers to alleged errors in the most recent letter sent to the appellant by the previous adjudicator, and states:

> That letter has errors included in it that are factors that when corrected make the proceeding relevant to the mandate of the inquiry – to address the issues in the appeal, and that without correction show unconcern and bias as illegality in adjudgment.

The appellant then proceeds to identify the alleged errors in the adjudicator's letter. These include some typographical errors made in transcribing the appellant's representations; some

changes the appellant believes ought to have been made to the background and other sections; and corrections to reflect what the appellant believes the adjudicator is attempting to convey.

I have carefully reviewed the material in this file and the appellant's requests to have certain "errors" corrected, and I make the following findings:

- With respect to the appellant's request to correct certain typographical errors, I accept that a few minor errors in transcribing certain words exist. These errors have been identified by the appellant, and I will have reference to these corrections in making my decision in this appeal.
- With respect to the appellant's request that the previous adjudicator re-word certain sections of her letter and the previous Notice of Inquiry, I am not satisfied that there is any purpose served in making these changes, and I decline to do so. I am satisfied that the wording used by the previous adjudicator in her correspondence reflects her review of the Mediator's Report and material in the appeal file. Again, the appellant has identified his concerns regarding the wording of the earlier material, and I will have reference to his position in making my decision.
- With respect to the appellant's attempt to re-word the previous adjudicator's correspondence to reflect what the appellant believes the previous adjudicator was attempting to convey, I do not accept the appellant's characterization of the previous adjudicator's position. In particular, the previous adjudicator clearly asked the appellant for representations on the scope of the request.
- Given the manner in which I have addressed the appellant's requests to have information corrected, I not am satisfied that further actions relating to any corrections are necessary, nor that failure to take further actions would result in showing "unconcern and bias as illegality in adjudgment". I am satisfied that the Notice of Inquiry and the subsequent letter by the previous adjudicator ensured that the parties were aware of the relevant facts and issues in the appeal, and were given the opportunity to address them.

Additional Issues raised by the appellant

As identified earlier, the appellant raised four additional issues in response to the Mediator's Report, which are:

- Is the Ministry's revised decision adequate pursuant to sections 29(1)(b)(ii) and 29(3.1) of the *Act*?
- Does the Ministry have custody and/or control of the responsive records?
- Should the Ministry revise its electronic file management system?
- Should the Ministry be ordered to produce responsive records under section 52(4)?

The appellant addresses these issues in his initial representations as follows:

> The adjudicator will notice that not all of the issues raised during mediation have been addressed. The reason for this is that [the four issues set out above] are dependent upon valid rationale for the Ministry's reasonable search claim, and may or may not be at issue.

The Notice of Inquiry sent to appellant clearly invited the appellant to respond to the issues set out in it, including the four issues set out above. In the absence of representations on these four issues, and in light of my findings regarding the scope of the request and the reasonableness of the searches conducted, I will not address these four issues in this order.

ISSUES

SCOPE OF THE REQUEST

The scope of a request is often an important issue in reasonable search appeals, as the scope determines the parameters of the search and accordingly the types of searches that ought to be conducted.

Although the issue of the scope of the request appears to have been addressed during the mediation stage of this appeal, the appellant's initial representations again raised this issue, and the previous adjudicator sought further representations on it.

During mediation, the appellant clarified his original request, and referred to a specific "Notice of Intent to Defend" document and its cover letter, which was written using Ministry letterhead. The appellant maintained that additional responsive records pertaining to these documents ought to exist since the cover letter originated from the Ministry. Following further clarification, the Ministry issued its decision which confirmed that the appellant was seeking access to records which would respond to the two questions identified above, and stated that no responsive records were located.

As identified by the previous adjudicator, the appellant's initial representations indirectly raised the issue of the scope in two of his correction requests. The first is in his reference to section 24(1) and (2) of the *Act* which read:

> 24 (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The appellant refers to section 24(2) and states that the Notice of Inquiry ought to have been redrafted to reflect the fact that "the institution is not conditionally bound to a redefinition of scope and a duty to inform the requester, but is directed to do so by the *Act* unconditionally if the scope is to be limited to suit the mandated access procedure in [section 24(1)(b)]."

The second reference to the issue of the scope of the request, found in the appellant's initial representations, is the appellant's concern that the "summary" of the request set out in the Notice of Inquiry is not correct. He refers to the background section in the Notice of Inquiry, and states that:

> … [T]he first sentence … is at issue, because the request is an irreducible quantum of quanta and can only be related to a record by its totality, not just by the informal clarification.
>
> … the record(s) sought relate(s) to the irreducible quantum of quanta, (the full wording of the request), not just one quantum, (a specified court file involving the requester), of the totality of its perceived quanta.

The appellant then states that this issue would be resolved by declaring the search unreasonable.

Analysis and findings

Determining the scope of the appeal is vital in ensuring that the records at issue are responsive to a request. Previous orders of the Commissioner have established that to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request.

I agree with the above statement. Clarity concerning the scope of an appeal and what the responsive records are is a fundamental first step in responding to a request and, subsequently, determining the issues in an appeal.

To begin with, I accept the appellant's position that section 24(2) of the *Act* places a positive obligation on an institution to not only inform a requester that a request does not sufficiently describe the record sought, but also requires an institution to offer assistance in reformulating the request so as to comply with subsection 24(1). Previous orders have established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

In the circumstances of this appeal, however, I am satisfied that the request was properly clarified, and the scope properly identified.

Although the appellant refers to his concern that the request be read in its "totality", and not be restricted to what the appellant calls the "informal clarification", on my review of the appellant's six-page request and the subsequent actions by the parties, I am satisfied that the Ministry properly sought to clarify the request and that the resultant clarification correctly reflects the scope of the request. The appellant's six-page request, which consists of a three-page request and a three-page endnote, and which refers to various scholarly works in various languages, is somewhat confusing. The core of the request, found on page two, focuses on why a named crown attorney, through his articling student, admitted service of a document.

The Ministry, in its representations, states:

> The Ministry did ask for clarification of the request through the IPC's mediator. The mediator advised the Ministry that the requester clarified that he received a Notice of Intent to Defend from the Ministry of the Attorney General … on behalf of the named individual.
>
> According to the Amended Mediator's Report dated September 8, 2009, the requester "maintained that additional responsive records pertaining to [the Notice of Intent to Defend] ought to exist since the cover letter originated from the Ministry".

After clarifying the request, the Ministry sent the appellant its decision letter in which it indicated that the records requested would respond to the following questions:

- Why did the Ministry admit service for a named individual?
- Should the Ministry through its agent (a named Crown Attorney) admit service for the named individual?

In the circumstances of this appeal, I am satisfied that the scope of the appeal is as identified in the Ministry's letter, and would include records relating to the appellant's court action that contain information which would respond specifically to the questions set out above, as well as any records relating to the Notice of Intent to Defend related to the identified court action.

Furthermore, although the appellant suggests that the scope of the Ministry's search should have been broader, I am satisfied that the Ministry fulfilled its obligations to offer assistance in reformulating the request so as to comply with section 24(1) and, in fact, did reformulate the request. As set out above, the manner in which the request is worded makes it somewhat confusing. Without setting out the request in full, on my review of it, I find very little in it that relates directly to a request for records. Most of the request contains bracketed information, citations, and asides. The Ministry, working with the mediator and the appellant, reformulated the request as set out above, and the appeal proceeded on that basis. Although the appellant now characterizes the clarification as an "informal clarification" and states that the request is an "irreducible quantum of quanta," only related to a record "by its totality," I am satisfied that the request was properly clarified, and the scope properly identified. I also note that, notwithstanding the appellant's position that records sought are "not just one quantum … of the totality of its perceived quanta," the appellant provides no specific information regarding how or

in what manner the request could be otherwise clarified, or what other records may be responsive.

REASONABLE SEARCH

Introduction

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made 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 records or further records do not exist. However, in my view, 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Ministry's representations

The Ministry provided representations identifying the searches conducted for responsive records.

The Ministry begins by reviewing its position regarding which records were responsive to the request and also by identifying the reasons why certain records would not exist with the Ministry. The Ministry states:

> … the requester clarified that he received a Notice of Intent to Defend from the Ministry of the Attorney General … on behalf of the named individual.
>
> According to the Amended Mediator's Report … the requester "maintained that additional responsive records pertaining to [the Notice of Intent to Defend] ought to exist since the cover letter originated from the Ministry".
>
> The Ministry has not been provided with the cover letter or the Notice of Intent to Defend. However, it appears that the Notice of Intent to Defend was delivered by [a named crown attorney who] … is a lawyer with the Legal Services Branch of the Ministry of Transportation. If that is the case, then the cover letter did not originate from the Ministry of the Attorney General.
>
> The reason that the Ministry of the Attorney General may be referenced on the cover letter is that lawyers who work in the legal services branches of the various government ministries are technically employees of the Ministry of the Attorney General. They generally use letterhead which lists both the Ministry of the Attorney General and the specific government ministry. However, the lawyers are generally physically located within the host Ministry, as are their files.
>
> Because [the named crown attorney] is located at the Ministry of Transportation, there would be no files within the Ministry of the Attorney General. Rather, any records relating to the Notice of Intent to Defend would be located within the Legal Services Branch of the Ministry of Transportation. [The named crown attorney] has confirmed that is the situation in this case. (See paragraph 7 of the [attached affidavit]) The Ministry of the Attorney General understands that a separate request has been made to the Ministry of Transportation.

The Ministry's representations then provide details about the searches carried out for responsive records. The Ministry begins by identifying that a File Intake Clerk with the Crown Law Office-Civil was asked to conduct a search for responsive records. The Ministry then states:

> [The File Intake Clerk] searched the Office's electronic database to see if the Office had a file in the name of the requester or of the named individual, and for various other fields. No file was found.
>
> A search of the electronic database of the Crown Law Office-Civil by the File Intake Clerk is reasonable for the following reasons.
>
> Any documents coming into the Ministry of the Attorney General relating to civil actions would be referred to the Crown Law Office-Civil.

> When a document is personally served on Crown Law Office-Civil, the document is picked up in the lobby at 720 Bay Street by one of the Office's assistants or occasionally a lawyer, who stamps the document with the Office "admission of service" stamp and then brings the document to the Office's receptionist. The receptionist logs the served document in the Service Log Book and then forwards the document to the File Intake Clerk, unless it bears the name of a person in the Office, in which case it is directed to that person.
>
> The File Intake Clerk searches the Office electronic database to determine if the file is already in existence. If the file already exists, the document is forwarded to the counsel or clerk in charge of the file.
>
> If the file does not exist, the File Intake Clerk creates a new file in the electronic database, including the names of the plaintiff/applicant and the defendant/respondent and related names.
>
> The File Intake Clerk then brings the document to the attention of the File Assignment and Case Management Co-ordinators to have it evaluated for urgency and sensitivity. The File Assignment and Case Management Co-ordinator then brings the file forward for assignment. Once the file is assigned, the remaining details are entered into the electronic database system by the File Intake Clerk and the entire file is then provided to the individual with carriage (counsel or clerk).
>
> Documents that are not served, but rather arrive in the mail from inside or outside government, are not logged into the Service Log Book at reception. They are passed directly to the File Intake Clerk. Those documents are date-stamped instead of given an admission of service. The same process is then followed.

With respect to the question of whether it is possible that responsive records existed but no longer exist, the Ministry states:

> If a responsive record had existed on or about December of 2007, it would not have been destroyed by May of 2009.

The Ministry also provides an affidavit sworn by the File Intake Clerk which reviews the searches conducted by him. In addition, the affidavit provides information regarding where responsive records might be located, and states:

> I am advised by [a named counsel] with the Crown Law Office–Civil of the Ministry of the Attorney General, and I believe that on October 21, 2009 she spoke with [the named crown attorney], counsel with the Legal Services Branch of the Ministry of Transportation, and he advised her that the file with respect to the requester's action … is with the Ministry of Transportation, and that he did not send any records to the Ministry of the Attorney General in connection with the matter.

The appellant's representations

The appellant takes issue with the Ministry's position that the searches were reasonable for the following reasons:

- the appellant suggests that the named crown attorney with the Ministry of Transportation is, in fact, seconded to that Ministry by the Ministry of the Attorney General;
- the appellant provides a copy of the "Notice of Intent to Defend" and the cover letter, referenced above, and argues that these should be responsive records with the Ministry of the Attorney General because, on its letterhead, the Ministry of Transportation is written in regular type, but the Ministry of the Attorney General is written in bold type, and states that the bold lettering on the letterhead supports the position that the Ministry of the Attorney General ought to have the record;
- the appellant states that the files ought to be retrievable through the Ministry of the Attorney General, and refers to the Ontario Directory of Records in support of this position;
- the appellant suggests that the named crown attorney's statements that the files are located with the Ministry of Transportation ought not to be considered, because the named crown attorney is not an expert in record searching;
- the appellant disputes that a request under the *Act* was made to the Ministry of Transportation;
- the appellant suggests that the affidavit evidence provided in support of the Ministry's position is inadmissible, as the affiant is not qualified as an expert, and because he refers to statements made to him by another;
- the appellant argues that the record does, in fact, exist (though in the custody or control of that other Ministry) because the Ministry initially transferred the request to the Ministry of Transportation.

The appellant also takes the position that, because the affidavit evidence is inadmissible and ought not to be considered, there is no evidence in support of the Ministry's position that a reasonable search was conducted. Based on the above, the appellant takes the position that the Ministry has not provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

Analysis and Findings

I have carefully reviewed the representations of the parties in this appeal, in light of my findings regarding the scope of the appeal set out above.

As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the Ministry's search for responsive records was reasonable in the circumstances, the Ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

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]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

The Ministry has provided evidence regarding the nature of the searches conducted for responsive records. This evidence is contained in its representations and the supporting affidavit. The evidence reviews the searches conducted for responsive records and the results of the searches. I note that the searches conducted were restricted to electronic searches for records; however, the Ministry has carefully explained why these searches were conducted and why they were appropriate searches in the circumstances. The Ministry has also provided an explanation regarding why certain records were not located with the Ministry, and where responsive records would and do exist (with the Ministry of Transportation).

The appellant has provided some evidence in support of his position that records exist with the Ministry; however, I do not find that this evidence is sufficient to support a finding that the searches conducted by the Ministry were not reasonable. One of the points made by the appellant is his reference to the letterhead of the cover letter to the Notice of Intent to Defend, and his identification that it specifically refers to the Ministry. On my review of the letterhead, however, I note that although both Ministries are named in the letterhead, the address on the letterhead is of the Ministry of Transportation.

With respect to the appellant's reference to the Ontario Directory of Records in support of his position that the records exist with the Ministry, I have carefully reviewed the appellant's argument, and followed the links in the on-line Directory of Records as he suggests. While it is true that "Seconded Legal Services Branches" is a category under the heading "Attorney General" in the Directory, I note that the Directory of Records states as follows when describing this category:

> Seconded Legal Services Branches provide in-house legal advice and services to Ontario Government ministries and certain agencies, boards and commissions. These legal branches are located on-site with individual client ministries ….

In my view, this supports the Ministry's position that any responsive records would reside with the Ministry of Transportation (a position that the appellant seems to accept, in light of the last bullet point in his representations set out above).

The bulk of the appellant's representations focus on questioning the validity or the admissibility of the evidence provided by the Ministry and, generally speaking, I do not accept many of the arguments made by the appellant. In this appeal, the Ministry was asked to provide representations regarding the nature of the searches conducted for responsive records, and it did provide such evidence from the individuals who conducted the searches, as well as from the individuals who are familiar with the files. I am satisfied that the Ministry's representations and supporting affidavit provide sufficient evidence to support the finding that a reasonable search for responsive records was conducted. Whether these individuals are "experts" in records management processes does not affect this finding. This is particularly the case in this appeal, where the appellant has provided little evidence to suggest that records do exist with the Ministry.

Based on the information provided by the Ministry evidencing the nature of the searches conducted by it for responsive records, I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances.

ORDER:

I uphold the Ministry's search for responsive records, and dismiss the appeal.

Original signed by: May 18, 2010
Frank DeVries
Adjudicator