



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

ORDER PO-2902

Appeal PA09-460

York University



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NATURE OF THE APPEAL:

The requester made an access request to York University (the University) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

...copies of all records, documents, and communications, including electronic, produced, sent, or received by [specified individual], [specified individual], [specified individual] and [specified individual] with regard to the drafting and distribution of the announcement of the appointment of [named individual] published on YFile January 26, 2009.

YFile is the University's online daily bulletin sent to faculty and staff of the University.

The University issued a decision letter to the requester that a search had been conducted and that there were no responsive records.

The requester then revised his request to extend beyond the YFile announcement to include:

...copies of all records, documents and communications, including electronic, produced, sent or received by [specified individual], [specified individual], [specified individual] and [specified individual] with regard to the drafting and distribution of any and all announcements of the appointment of [named individual] (not just the Y-File Announcement).

The University located responsive records and granted partial access to them. The University released Records 1, 3, 4 and 5 in full and Records 2 and 6 in part, citing the personal privacy exemption in section 21 and the exclusion in section 65(6)3 of the *Act* in support of its decision to not disclose all of the responsive records.

The requester, now the appellant, appealed the University's decision. The appellant contended that the University's search was inadequate and that further records should exist within the Office of the President.

During mediation, the University confirmed the following information:

- A news release was issued by the Office of the President on January 21, 2009 regarding the appointment of [named individual] as Dean of the Faculty of Liberal Arts and Professional Studies.
- An article was published in the University's YFile on January 26, 2009 regarding the appointment of [named individual].
- YFile is produced by the University's Marketing and Communications Division.

- The individuals named in the appellant's requests work in the Office of the President, with the exception of [specified individual]:
 - [named individual] – President of University
 - [named individual] – Manager of Communications
 - [named individual] – Executive Assistant to the President
 - [named individual] – Consultant with Janet Wright and Associates

The University indicated that in responding to the appellant's request, the following areas were searched:

- Email Accounts
 - Manager of Communications' account – search conducted by Manager of Communication
 - Executive Assistant's account – search conducted by Executive Assistant.
 - President's accounts – private account searched by executive assistant and public account searched by Front Desk Coordinator
- The University indicated that it did not search [named individual's] account, on the basis that he is an external consultant. However, it stated that it looked for emails to and from [named individual] when it searched the email accounts of the Manager of Communications, the Executive Assistant to the President and the President.
- Operational Records Management System (ORMS)
 - Search conducted by the Coordinator of Information Management and Records

The University indicated to the mediator that there are no further responsive records to the appellant's request. It noted that it did locate 37 records from the Office of the President, when it conducted a search regarding a different request made by the appellant on December 2, 2009. The University granted partial access to these records and the appellant has appealed the University's decision to exclude Record 32 from the *Act* under section 65(6)3 in Appeal PA10-8.

The University further confirmed that no paper files were searched, as the matter had been handled exclusively through the medium of email. In addition, the University submitted that a search had not revealed any responsive paper records were ever created.

The appellant questions why no responsive records were produced from the Manager of Communication's account. The appellant also suggests that records responsive to his December 9, 2009 request leads to a conclusion that additional records should exist. Finally, the appellant confirmed with the mediator that he is not pursuing access to the severed information in Records

2 and 6 which was claimed to be exempt under section 21(1) or excluded from the *Act* under section 65(6). Accordingly, the existence of additional records remains the sole issue on appeal.

As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to both the University and the appellant describing the appeal process for an oral inquiry where the sole issue to be determined is whether the University had conducted a reasonable search for responsive records.

The oral inquiry was scheduled for June 3, 2010. The appellant was in attendance by teleconference. On behalf of the University, also by teleconference, were the Records and Information Management and Coordinator of the Information and Privacy Office (FOIC), the Coordinator of Information Management and Records of the Office of the President and Counsel for the University, a total of 3 individuals.

Prior to the oral inquiry, both the FOIC and the Coordinator of Information Management and Records of the Office of the President provided affidavits concerning the searches undertaken in response to the requests. A copy of the affidavits were also sent to the appellant.

The FOIC and the Coordinator of Information Management and Records answered questions and provided clarification on some issues. Counsel for the University also provided some remarks throughout the hearing.

The appellant did not testify at the inquiry, having withdrawn from the teleconference before the inquiry began. The appellant took issue with the fact that the individuals named in his request were not present as witnesses. Accordingly, the appellant did not provide any representations during the inquiry. Further, the appellant did not provide representations in writing.

The appellant later called this office to request a copy of the taped hearing on memory stick. A copy of the memory stick was provided to the appellant and to the University.

DISCUSSION:

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide 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 [Order MO-2185].

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 MO-2246].

The University was asked to provide a summary of all the steps taken in response to the appellant's request. In particular, it was asked:

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.

At the oral inquiry, the FOIC read her affidavit that she submitted. In her affidavit, the FOIC affirmed that she coordinated the search for responsive records. She stated that because the information sought by the appellant appeared clear and straightforward, she did not clarify the request with him before conducting the search. In conducting the search, the FOIC states:

On October 19, 2009, I sent a memo to [named individual], Senior Executive Officer, Office of the President, asking her to search for the requested records as [named individuals in the request] were all a part of the Office of the President. [Named Senior Executive Officer] is the Information and Privacy Office's contact in the Office of the President for FIPPA requests. I understand that once contacted by the Information and Privacy Office about a FIPPA request, [named Senior Executive Officer] instructs [named Coordinator, Information Management and Records, Office of the President] to coordinate records searches in the Office of the President.

On November 9, 2009, [named] Senior Executive Officer, [named] University Secretary and General Counsel, [named] Records Manger and I met to discuss the records accumulated to respond to the Appellant's request. We reviewed seven (7) records and a draft index of records prepared by [University Secretary and General Counsel]. During the review, it was determined that none of the records was responsive to the request as they were not produced, sent, or received by [named individuals in the request] regarding, "the drafting and distribution of the announcement of the appointment of [named individual] published on YFile January 26, 2009" as requested by the Appellant...

The FOIC goes on to explain that when the appellant broadened his request, she discussed a new search being undertaken at the President's office. The FOIC affirms that a search was not undertaken because the records originally deemed non-responsive were found to be responsive to the appellant's broadened request. Furthermore, as stated above, a number of records had been located for another of the appellant's requests. Consequently, an index consisting of six records was prepared and a supplemental decision letter was sent to the appellant.

The FOIC then explains that she had a further conversation with the appellant who reiterated his belief that further records should exist in the record holdings of the named Manager of Communications regarding the YFile announcement that were not included in the records found responsive to his broadened request. The FOIC then states that she had a conversation with the Senior Executive Officer who explained the process for preparing and approving press releases and Yfile articles. She states:

...the official press release was drafted by [named Communications Manager] and shared with [named Vice-President Academic] and [named incoming Dean] for their approval. Then the President's Office shared the press release with Marketing and Communications so that Marketing and Communications staff could write a story for the YFile. It was [named Senior Executive Officer's] belief that [named Communications Manager] was not contacted by YFile to approve the story before it was published (this turned out to be false as documents

later showed). [Named Senior Executive Officer] informed me that the President's Office does not approve the content of the YFile articles. She told me that she had spoken with [named Communications Manager] and confirmed that he no longer had any emails or other documentation regarding the preparation of the press release.

The FOIC affirms that she spoke to the named Communications Manager and he confirmed that he did not routinely keep drafts and background notes once a press release was issued. The FOIC spoke to the appellant again and then she contacted the Director of Publications, Marketing and Communications to find out whether he had records responsive to the appellant's request. The FOIC states:

...I contacted [named] Director of Publications, Marketing and Communications, by telephone to ask if he had records regarding the drafting of the YFile article, especially correspondence with the President's Office. (Up to this point, our search strategy had focused on searching for records in the President's Office which had seemed like the most logical way to find the records of the President's Office as requested by the Appellant). [Named Director of Publications] informed me that he did have some records and that we would forward them to my office. Before the records arrived in my office, the Appellant made a new request ... asking for communications with Marketing and Communications.

Ultimately, [named Communications Manager's] emails in which he was consulted about the YFile article were found in the email communications of other individuals at the University, and were disclosed to the Appellant...

Finally, the FOIC explains in her affidavit that she believes that the Communications Manager did not find responsive records because of the Office of the President's policy and retention schedule. She states:

I believe that [named Communications Manager] was following normal records management policies and guidelines in handling his email, and the searches conducted relating to [named Communications Manager's] records were reasonable and complete. The President's Office has a records retention schedule which includes an entry for Press Releases (ORMS 5300-30) with a retention schedule of one calendar year plus six years, after which the Press Releases are transferred to the University Archives. The description for this class of records (class 5300 covering Speeches/Press Relations) notes that it applies to, amongst other things, "approved tests for release in newspapers and other publication". The approved text of the press release has been retained in accordance with this retention schedule.

In addition, York University provides guidance to University staff on "transitory records" which "include notes, working papers and preliminary drafts – paper or electronic – created for a temporary purpose." Tip Sheet 1, "FIPPA and Recordkeeping Principles," continues as follows: "Once the final version of a

report or other record is prepared, earlier drafts and working materials should usually be destroyed.” This advice is reiterated and further enhanced in Tip Sheet 3, “Transitory Records.”

The FOIC concludes her affidavit by swearing that the two offices where records could be located were searched and that the responsive records were disclosed to the appellant. She submits that:

Email backup tapes were not searched because there is a 60-day backup cycle on email and at the time of the Appellant’s request, more than 60 days had elapsed since [named Communications Manager] had deleted his own email pertaining to the drafting and distribution of the press release.

The University’s Coordinator of Information Management and Records in the President’s Office also provided an affidavit regarding the search for responsive records in the President’s Office in which he affirms:

On or around October 19, 2009, I coordinated the search in the Office of the President for documents from the Information and Privacy Office related to [the appellant’s request.]...

I directed staff in the President’s Office to search their email accounts for their own email, and also for communications with [named individual in request]. I am informed by [named] (Manager, Communications) that he searched his own email account. I am informed by [named] Executive Assistant to the President, that she searched both her personal account and [the President’s] personal email account. I am informed by [named] Front Desk Coordinator, that she searched the President’s generic account for the Office, as well as the office mail log. Lastly I reviewed ORMS (Operational Records Management Standard), the physical filing system for the office of the President.

During the oral inquiry, the Coordinator testified that he provided the individuals named in the request, including the Front Desk Coordinator with an anonymized copy of the appellant’s request in order for them to conduct their search. He himself conducted a search for paper records in ORMS.

The Coordinator also reiterated that the Office of the President has a retention schedule for press releases. He indicates that while the press release itself was retained; “no other documents relating to press releases including their drafting or distribution” are required to be retained in accordance with the schedule.

As stated above, the appellant did not participate in the oral inquiry except to express his position that the individuals named in his request should have been present at the inquiry. The appellant submitted that it was his belief that certain witnesses should be present at the hearing and available to give evidence as to the searches for responsive records. The appellant also wrote to this office prior to the oral inquiry to ask that these individuals be present at the inquiry.

Before the inquiry, I asked the appellant to address his concerns when it was time to give his evidence. The appellant submits that he did not want to continue with the inquiry if these witnesses were not present. Thus, the appellant did not submit the reasons why he believed that the individuals themselves had to be present at the hearing, nor did he tender any evidence in support of his position that further records ought to exist.

The University responded to the appellant's position about whether the named individuals in the request had to be present. The University submitted that the Coordinator of Information Management and Records in the Office of the President conducted the physical search for responsive records and that he coordinated the searches for responsive records in the email accounts for the named individuals.

Based on the representations received from the University, I find that the University's search for records responsive to the appellant's request is reasonable. I accept the University's evidence that the named individuals in the appellant's request searched their email accounts and that a search for physical records was also conducted. I further accept that the University's retention schedule does not require individuals to keep copies of "draft" documents and that it is the University's policy that these types of records be destroyed after a final draft has been concluded.

I do not have evidence before me from the appellant in support of his contention that further records should exist. In addition, I accept the University's evidence on the email searches conducted and I do not need to hear directly from each of the individuals named in the appellant's request. The appellant has not provided me with evidence to suggest that the University has not acted in good faith in conducting the searches for responsive records.

As stated above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. Rather, the University must provide sufficient evidence to show it has made a reasonable effort to identify and locate the responsive records. I find that the University has provided me with sufficient evidence to show it has made a reasonable effort to identify and locate responsive records and I uphold its search.

ORDER:

I uphold the University's search as reasonable.

Original signed by: _____
Stephanie Haly
Adjudicator

July 21, 2010