



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

INTERIM ORDER PO-2964-I

Appeal PA10-292

Ministry of Consumer Services



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NATURE OF THE APPEAL:

The Ministry of Consumer Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- All correspondence (including letters, e-mails, and records of telephone conversations) between the Minister's Office (including Minister) and [two named individuals].
- The Minister's calendar entry for any dates in which the Minister met with [the two named individuals].
- The Minister's calendar entry for any dates in which the Minister had a meeting with external stakeholders concerning mixed martial arts.

The request also specified that the search should be carried out for records between September 1, 2009 and August 15, 2010.

In response to the request, the Ministry issued a decision stating that access could not be provided because the requested records did not exist.

The appellant appealed the Ministry's decision on the basis that records responsive to his request should exist.

During mediation, the Ministry agreed to conduct a further search for any additional records. Following that search, the Ministry advised that it had located two records responsive to the first part of the appellant's request. The Ministry indicated that it would review these two records in order to issue an access decision on them.

Also during mediation, the appellant indicated that, although he had not yet received an access decision relating to the two newly-located records, he believed that additional responsive records exist. In addition, with respect to the requested calendar entries, there was a discussion of whether responsive records could exist in either hard-copy or electronic format.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process.

During the inquiry stage of the appeal, the Ministry provided the appellant with the two records it had identified as responsive to the request. Copies of those two records were also provided to me.

I sent a Notice of Inquiry identifying the facts and issues in this appeal to the Ministry, initially. The sole issue in this appeal is whether the searches conducted by the Ministry were reasonable in the circumstances of this appeal.

The Ministry provided me with a response to the Notice of Inquiry, which is discussed below. In view of the position taken by the Ministry, I decided not to seek representations from the appellant at this time. In this interim order, I will require the Ministry to conduct further

searches for records and to provide me with representations on the steps taken, as outlined below.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Introduction

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 of the *Act* [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].

This issue was set out in the Notice of Inquiry that was sent to the Ministry, as follows:

The institution is required to provide a written summary of all steps taken in response to the request. In particular:

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, were any individuals directly involved in the subject-matter of the request contacted and asked whether responsive records exist, 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. It appears that two records responsive to the first part of the request were located after additional searches were conducted during the mediation stage of the appeal process. Please include details of the nature of these additional searches as well.
5. One of the issues raised during the processing of this appeal is whether responsive electronic records exist. Please include details of the nature of any searches conducted for electronic records as well.
6. 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 Ministry chooses to provide the information in affidavit form, the affidavit should be signed by 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.

The Ministry's response

In response to the Notice of Inquiry, I received a letter from legal counsel for the Ministry in which the Ministry states that it is not in a position to provide detailed representations on this matter. The letter also states:

In addition, I note that the Ministry has provided two responsive records to the requester ... which were found as part of the Ministry's mediation efforts with the requester.

In terms of the areas of the Ministry that may contain responsive records, it is noted that the request is restricted to the Minister's Office for the period of September 1, 2009 to August 15, 2010. In this regard you may want to consider that there were two Ministers during the request period for the Ministry ...

The Ministry then identifies the two individuals who were Ministers during the request period, and the dates that they were Ministers. The Ministry also identifies that the present Minister's tenure in that office does not appear to fall within the time period set out in the request.

Findings

By not submitting specific representations on the nature of the searches conducted for responsive records, the Ministry has not answered any of the above questions. In the absence of any information from the Ministry on this issue, I am unable to determine that its search for responsive records was reasonable. In fact, there is some evidence that suggests that additional records, such as certain calendar entries, do or did exist, and have not been located.

Accordingly, I have decided to issue this interim order in which I require the Ministry to conduct further searches for records responsive to the request and provide evidence of its searches. These searches should include contacting current Ministry staff in the Minister's Office as well as the two former Ministers and the Ministry or political staff who were involved in these matters, to determine whether any additional responsive records exist. I will also require the Ministry to provide me with representations in which it responds to the six questions posed above and provides any other information, as necessary, to assist in determining whether the search for responsive records was reasonable. These representations should also include information about the format of the requested calendar entries.

ORDER:

1. I order the Ministry to conduct further searches for records responsive to the request. These searches should include contacting current Ministry staff in the Minister's Office as well as the two former Ministers and the Ministry or political staff who were involved in these matters, to determine whether any additional responsive records exist. I also order the Ministry to provide me with representations in which it responds to the six questions posed above and provides any other information, as necessary, to assist in determining whether the search for responsive records was reasonable. These representations should also include information about the format of the requested calendar entries.
2. If, as a result of these searches, the Ministry locates additional records, I order it to provide the appellant with an access decision, pursuant to the requirements of the *Act*, using the date of this order as the request date.
3. I order the Ministry to provide its representations on the steps taken to search for responsive records in accordance with the above instructions, no later than **May 26, 2011**. These representations may be shared with the appellant unless they meet the confidentiality criteria identified in *Practice Direction Number 7* of this office.

4. I remain seized of the issues in this appeal.

Original Signed By: _____ April 28, 2011 _____
Frank DeVries
Adjudicator