Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3050

Appeal PA10-390

Carleton University

February 9, 2012

Summary: The appellant sought records, including emails, held by Carleton University's Department of Law. The appellant questioned the search performed by the university for responsive records. The university took the position that emails deleted by a particular professor were beyond the scope of the appellant's request. This order finds the deleted emails were within the scope of the appellant's request and that, as a result, an adequate search for responsive records had not been performed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 24(1), 24(2).

Orders and Investigation Reports Considered: P-880, MO-1406.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for any and all records pertaining to the appellant held by the Department of Law at Carleton University (the university) from June 1, 2010 to the date of the request, including emails, correspondence, communications, notices, advisories and his student record.

[2] After a time extension, the university issued a decision advising that access was granted without exception to the records. The appellant filed an appeal with this office, as he was of the view that additional records ought to exist. During mediation of the

appeal, and as a result of further searches, the university issued two supplementary decision letters, as it had located further records from a professor and two emails from another individual.

[3] The appellant continued to question the search for emails held by two individuals and the professor. In addition, the appellant questioned why the university had not responded to his repeated inquiry about the possible involvement of the university's computing services in the search.

[4] In turn, the university explained that the emails at issue appear to have been deleted and that it does not normally involve computing services in the search for responsive records, as it relies on the department where the records are located, to conduct the search. The university took the position that the retrieval of deleted emails fell outside the scope of the request, and that the appellant should submit a new access request for the retrieval of any deleted emails.

[5] The matter then moved to the adjudication stage of the process. I sought and received representations from the university and the appellant. Representations were shared in accordance with the IPC's *Practice Direction 7*. I also sought reply representations from the university. The university advised that the first representations were complete and no further representations would be made unless required.

[6] For the reasons that follow, I find that deleted emails are within the scope of the appellant's request. In addition, I do not uphold the university's search as being reasonable, and order them to conduct a search for the deleted emails as detailed in this order.

ISSUES:

A: What is the scope of the request? What records are responsive to the request?

B: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[7] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (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;
>
> . . .
>
> (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).

[8] 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.[1]

[9] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[10] The university submits that the request sought all records held by the Department of Law relating to the appellant within a defined time period. The university states that the request was not complex and that the scope was readily apparent on its face. The university relied on the apparent scope of the request when conducting its search and neither interpreted the request literally nor unilaterally narrowed the request.

[11] The university states:

> Carleton submits that deleted records are outside of the apparent scope of the request. They are not "held by the Department of Law," they are deleted. While copies of deleted records might be retrievable by Communication and Computing Services of Carleton (CCS),... this is a costly and labour intensive process. Carleton's practice is not to conduct these searches unless a request is made which specifically seeks deleted records.

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

[12] The university also submits that a search by CCS is not warranted and would ultimately be fruitless in this case.

[13] Included in the university's representations were a number of emails between the appellant and the university following the original request. In those emails, the appellant raised the issue of the university conducting a search for electronic records through the CCS. The appellant also advised the university that he believed that further records existed, including those of the professor who was on a leave. The university responded to the appellant by advising him that it is their practice to have the individuals conduct the search themselves, and that a collective agreement prevented the university from searching for the records of the professor until he returned from that leave.

[14] The appellant indicates in his representations that his issue has been, and remains with, the records of the professor, and that it was not a mere preference but prudence, which initiated his question as to the possibility of engaging CCS in the search, especially given that the professor was on leave from the university for a number of months.

[15] I have carefully considered the university's representations and all of the circumstances of this appeal and I find that the university interpreted the appellant's request too narrowly by not considering that the request included deleted emails.

[16] As previously noted, the principles set out in Order P-880 mandate that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. In P-880, Inquiry Officer Anita Fineberg provided a useful discussion of "relevance" which I find has direct bearing on the present appeal:

> 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 the 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 am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. *While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.*
>
> [T]he purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the

> Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant. [emphasis added]

[17] Similarly, in Order 134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2), stating, among other things:

> ...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[18] In the appeal under consideration in Order 134, the request was somewhat vague. Hence, the institution had genuine difficulty in interpreting the scope of the request. Even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request.

[19] I find further support for my views in Order MO-1406, in which Adjudicator Laurel Cropley stated:

> With respect to the information that the appellant was seeking, the Police state that his request was "self-explanatory", and to a point, I agree. The appellant was clearly seeking "any and all information" pertaining to himself in the custody of the Police. However, the Police go on to state that a search was not conducted for, and the appellant was not given, the officers' notes because "his request did not specifically request same". In my view, the appellant's request clearly contemplated all records pertaining to himself including police officers' notes. Accordingly, I find that the Police have unilaterally narrowed the scope of the request beyond what a reasonable interpretation would allow.

[20] In this case, the appellant's request clearly stated that he sought "any and all records" pertaining to him, held by the Department of Law, including emails, among other things. For ease of reference, I again refer to the university's representations as follows:

> Carleton submits that deleted records are outside of the apparent scope of the request. They are not "held by the Department of Law," they are deleted. While copies of deleted records might be retrievable by Communication and Computing Services of Carleton (CCS), . . . this is a costly and labour intensive process. Carleton's practice is not to conduct these searches unless a request is made which specifically seeks deleted records.

[21] Adopting the approach taken by the decision makers in Orders 134, P-880 and MO-1406, I find that the university's position that deleted records are not "held by the Department of Law" and, therefore, outside the scope of the request is an unreasonable and narrow interpretation of the request. The university chose to limit the scope of what "any and all records" are by relying on an artificial departmental demarcation. As stated by Inquiry Officer Anita Fineberg in Order P-880, the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. An institution may in no way unilaterally limit the scope of its search for records.

[22] I note that after the appellant received the decision letter, he contacted the university and raised search issues, including the possibility of a search being conducted by the CCS for emails relating to him. At no time did the university advise the appellant that, in its view, deleted emails were outside the scope of his request or that he should make a new request specifically seeking deleted emails.

[23] It is also notable that the primary issue for the appellant became emails sent or received by a specific professor. In relation to this professor, the institution submitted that the professor performed a search of his emails and provided responsive records. However, on being contacted by the appellant regarding the potential existence of additional emails relating to the professor, the university submits that the professor's computer had "crashed" at some point and that, as a result, he had lost all his emails, making it impossible for him to confirm receipt of any additional records. This is a significant event in determining whether the university unreasonably narrowed the scope of the appellant's request.

[24] Deleted emails retained by an institution on backup tapes may be responsive records to an access to information request. A prudent approach for institutions receiving a request that involves emails may be to ask if this includes deleted emails. Of course, if the request includes deleted emails, and this has resource implications for the institution, the institution has the right to issue a fee estimate to the requester pursuant to section 57 of the *Act*.

[25] I agree that, initially, the university may have been permitted to interpret the appellant's request as not including deleted emails, although as mentioned, it would have been prudent to clarify this with the appellant. In general, an access request for emails does not require a routine search of backup tapes for deleted emails unless there is a reason to assume that such a search is required, based on evidence that responsive records may have been deleted or lost. As a result, I reject the appellant's claim that the university was required from the outset to involve CCS in this search.

[26] However, at mediation, when the institution revealed that the subject professor's computer had crashed, raising the possibility that emails had been lost, it was reasonable for the scope of the request to be expanded to include deleted emails. Prior to this, there was no reason for the appellant to think that backup tapes might provide responsive records and that his request should therefore include them.

[27] In my view, the university chose to substitute its view of the proper scope of the request for the appellant's in failing to include deleted emails as part of the request. The university also failed to assist the appellant in reformulating his request. In addition, for the university to continue to assert that the appellant did not include deleted emails in his request and to continue to insist he submit another request is, in my view, untenable.

[28] Consequently, I find that deleted emails relating to the appellant for the time period set out in his request are within the scope of the request.

Issue B: Did the institution conduct a reasonable search for records?

[29] 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.[3] 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.

[30] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.

[31] 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.[6]

[32] 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.[7]

[33] 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.[8]

[34] The university submits that it has taken all reasonable steps to search for responsive records, and that it conducted further searches when the appellant indicated his concern that additional records may exist. With respect to the records of the individuals other than the professor, the university indicates that these individuals responded to the request and provided emails in their possession that were responsive to the appellant's request. These individuals were copied on a few emails and were, at most, peripherally involved in matters relating to the appellant. The university submits that the appellant has offered no evidence that they had further emails in their possession beyond those already located and disclosed. In addition, the university submits that it does not, as a matter of course, have CCS conduct further searches of back up tapes to verify whether there were further emails that were deleted and that, with respect to these individuals, the appellant has not provided sufficient evidence to justify conducting a CCS search for backup records.

[35] The appellant indicates in his representations that his primary concern is with the search of the records of the professor and that the university has focused its representations on the other individuals, who are of no interest to the appellant.

[36] Based on the evidence provided to me by the parties in their representations, particularly that the appellant appears to be solely interested in the professor's emails, and that he has not provided evidence to support further searches relating to the three individuals, I am satisfied that the university's search for records of the three individuals was reasonable.

[37] I will now turn to the search for records of the professor. The university submits that the professor conducted a search and provided all the responsive records he was able to locate. These records were, in turn, provided to the appellant. The university is of the view that it was reasonable for the professor to conduct the search himself, as he

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[6] Orders M-909, PO-2469, PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.

is an experienced employee intimately familiar with the events giving rise to the appellant's request.

[38] After the appellant received the professor's records, he contacted the university to advise that he believed there were further records that exist. The university contacted the professor and asked him to address the appellant's further concerns. The professor advised the university that his computer had "crashed" a few weeks prior and, as a result, he had lost all his emails and was therefore unable to confirm receipt of any additional records.

[39] The university states that the professor's email account is hosted on an older system, which the university is trying to phase out and which is no longer in regular use by most of the university's employees. The practice with this system is for the user to download emails to his/her local computer in order to review them and to reply to them. Emails were regularly deleted by the user from the university's server and kept on local computers only.

[40] Users' accounts on this system are backed up nightly and a tape backup from the time period of the request does exist. However, if the professor regularly downloaded his emails and deleted them from the server, then it is unlikely that the backups would contain any responsive emails, as the emails would not be left at the end of the day on the server to be backed up.

[41] In addition, sent emails on this older system are not stored on the server, solely exist on the user's personal computer and are not recoverable by CCS.

[42] The university states that while there is a possibility that records lost in the professor's computer crash do exist, the university believes that this is unlikely and that a search of the backup tapes is unlikely to result in the identification and production of further records responsive to the request.

[43] In addition, the university states that it would take several hours to search the various backup tapes for any remaining emails sent to or by the professor. As the searches conducted by CCS can be labour intensive and costly, the university conducts searches of backup tapes only when specifically requested to do so.

[44] The university concludes that it has taken all reasonable steps to search for records responsive to the appellant's request.

[45] As previously stated, the university included a number of email communications between the freedom of information coordinator and the appellant. In one email, the appellant advises that the professor had sent an email to the appellant's employer and in that email, according to the appellant, used a sentence that was drawn directly from a previous email between the appellant and the three other individuals. The appellant

questioned how the professor was made privy to the email between the appellant and the other individuals.

[46] The appellant submits that his repeated and direct requests to involve CCS in the search were never responded to until the representations stage of this appeal.

[47] The appellant also states that is was not appropriate for the professor to conduct his own search, as the search was delayed due to the professor's five month leave of absence and given that, in the appellant's view, the professor breached privacy laws.

[48] As noted in the previous discussion regarding the scope of the appellant's request, it may have initially been reasonable for the university to interpret the request as not including backup tapes and therefore not performing a search of those tapes. I also agree that the original search conducted by the university was reasonable to the extent that the university relied on staff to conduct searches for responsive records without the involvement of CCS. For example, it was reasonable to ask the professor to conduct a search for any responsive records in his possession. It would not be reasonable to expect the university to involve CCS in a potentially costly search exercise at the initial stages of this appeal, although that was an option open to them. Until the professor had been asked to search his records, and the issue of his computer crash was raised, there was no apparent reason for the university to involve CCS in the search process.

[49] However, once it was determined that the professor had experienced a computer malfunction, and the possibility of lost emails emerged, a search of backup tapes then became a reasonable option for determining if further responsive records exist. I therefore conclude that, in conducting its search for responsive records, the university should have considered a review of the backup tapes related to the professor's emails. As noted above, to the extent that such a search is labour intensive and costly, the university had the option of providing the appellant with a fee estimate for undertaking this process.

[50] I therefore conclude that the university's search for responsive records was not reasonable.

ORDER:

1. I order the university to conduct a search for the professor's deleted emails relating to the appellant for the time period specified in his request.

2. I order the university to issue a new decision letter to the appellant by **March 12, 2012**.

Original Signed by: February 9, 2012
Brian Beamish
Assistant Commissioner