

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3102-I

Appeal PA11-295

University of Toronto

July 27, 2012

Summary: The appellant made a request to the university for records relating to her application and for the reason why her offer of admission was later rescinded. The university located the appellant's application records but did not locate records relating to why the appellant's offer of admission was rescinded. The appellant appealed the reasonableness of the university's search. The university's search is found to be unreasonable and further searches are ordered.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended], section 24.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Toronto (the university) for access to:

...the records of my application at the Postgraduate Education in the department of [specified field] at the University of Toronto. I want to know the main reason behind rescinding the letter of offer after I got initial acceptance. Additionally, I need also to know the reason that undermine their first decision and consider me as [in]capable to succeed over five years of demanding training.

[2] The university located 33 pages of responsive records granting full access to 25 pages and partial access to 2 pages. The university denied access in full to six pages which it states was personal information that was supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of determining the appellant's suitability, eligibility or qualifications for admission to the Residency Training in [the specialized field] and is exempt from disclosure under section 49(c.1)(ii).

[3] The university notes that portions of two other pages were withheld pursuant to the discretionary personal privacy exemption in section 49(b) and the mandatory personal privacy exemption in section 21(1) as the information is the personal information of another individual and disclosure would constitute an unjustified invasion of personal privacy.

[4] During mediation of this appeal, the appellant advised the mediator that she was interested in obtaining information as to why the university rescinded its residency offer position. She referred to a letter from the Director of Postgraduate Medical Education in which he noted the following:

...additional information came to the attention of our Residency Program Committee which made it necessary for the committee to review its initial decision. After careful consideration, the committee determined that the [dated] offer would have to be withdrawn.

[5] Accordingly, the appellant's request is for the "additional information" which she believes must be contained in the withheld records. The mediator reviewed the responsive records and determined that the records did not appear to be responsive to this particular part of the appellant's request. As the university had not responded to the second and third sentence of the appellant's request, the mediator requested that the university issue a revised decision to address these portions of the request.

[6] The university issued a revised decision in which it advised that after a search it did not locate any records responsive to the second and third sentence of the appellant's request.¹

[7] The appellant advised the mediator that she does not wish to pursue access to the withheld records or portions of records. Accordingly, the application of sections 49(c.1)(ii) and 49(b) are no longer at issue.

[8] The appellant confirms that she believes there should be records responsive to the second and third sentences of her request, and accordingly, the reasonableness of the university's search was raised as an issue. The appellant also informed the

¹ The university also revised its decision to grant access to information previously withheld although I have not included this part of the decision as it is not germane to this appeal.

mediator that she had spoken with an individual from the [specified] Cultural Bureau in Ottawa about her case and was advised that the university had received something from her place of work which was the reason for rescinding her offer. She is relying on this information as a reason to support her position that records should exist in relation to the second and third sentences in her request.

[9] During my inquiry into this appeal I sought and received representations from the university and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In this order, I find the university's search to be unreasonable.

DISCUSSION:

[11] The sole issue to be determined in this appeal was the reasonableness of the university's search.

[12] 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.

[13] 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].

[14] 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].

[15] 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].

[16] 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].

[17] The university was asked to provide a summary of steps taken in response to the request, including the following information:

- Whether the institution contacted the appellant for additional clarification;
- If the institution did not contact the appellant whether it responded to the request literally or whether it unilaterally defined the scope of the request;
- Provide details of any searches carried out; and
- And the possibility that records existed but no longer exist or were destroyed.

[18] The university submitted that its search at the request stage and subsequently during the appeal, included focused conversations with two individuals. The university provided affidavits from these two individuals, a summary of which is set out below.

[19] The first affidavit was from the Director of Postgraduate Medical Education at the university. He is responsible for the resident selection and transfers to the program and he affirmed the following:

- He is an experienced employee knowledgeable in the subject matter of the request.
- He has access to admission records and all documents having to do with the acceptance or rejection of the candidate and is familiar with the files where the responsive record would be located.
- He searched for a hard copy file of the record in the Medical Education office on the 8th floor of CAMH.
- He conducted a two-hour search of his emails for an electronic copy of the responsive record.
- He spoke to other individuals who interviewed the appellant about responsive records.
- He did not locate any responsive records to the second and third sentence of the appellant's request.

[20] The second affidavit was provided by the Vice Dean of the Postgraduate Medical Education, Faculty of Medicine at the university. He is responsible for the 74 medical residency programs at the university and he affirmed the following:

- He is an experienced senior officer in the university and is knowledgeable in the subject matter of the request.
- He has access to admission records and all documents to do with the acceptance or rejection of the candidate and is familiar with the files where the responsive record would be located.
- He searched for the hard and electronic copies of records in the Postgraduate Medical Education office and asked others in the office to search their files.
- He did not locate any responsive records to the second and third sentence of the appellant's request.

[21] Both of the affiants noted that they were aware that the appellant was seeking information relating to the second and third sentence of her request.

[22] In response to the university's representations, the appellant submits that the description of the searches conducted by the university's affidavits are lacking in detail and do not adequately explain how the affiants focused their searches to find information responsive to the second and third sentences of her request.

[23] Further, the appellant provides her reasonable basis for the existence of an additional responsive record. She states:

In September 2011, the appellant had a telephone conversation with a [named individual] of the Cultural Bureau. [The named individual] told the appellant that ***the University had received a negative letter about her from someone at her current place of work,..., and that this was the reason why the PRPC² had decided to rescind the offer that it had made to her for a position in the PRP.***

...

This basis is corroborated by the language used in the letter from [the Director of the Postgraduate Medical Program] to the appellant dated January 7, 2011 to describe the form of the "additional information," or the "unsolicited pertinent information," that was received by the PRPC about the appellant as "the documentation".

It is reasonable to expect that the letter (or similar correspondence) or "documentation" described above either still exists or did exist in the possession of the university and/or the PRPC and/or [the Director or Vice Dean] and/or other parties at the University (collectively, the "University").

[emphasis in original]

[24] The appellant also puts forward the position that the responsive record would most likely be an email or electronic record as the information would have been coming from the appellant's place of work and most of the correspondence between the university to the appellant has been through email. The appellant notes that formal letters were delivered by email and enclosed as PDF attachments to the email messages.

[25] Finally, the appellant submits that the university has not addressed the issue of the possibility that the responsive records may have been deleted or destroyed.

² PRPC – Psychiatry Residency Program Committee.

[26] In response to the appellant's representations, the university argued that its searches for the responsive records was reasonable and that the issues raised by the appellant broadened the scope of her request and required the university to conduct further searches. The university argued that the email records and incidental communications were not originally searched as these records were "not responsive" as they did not relate to the appellant's application, nor did these records contain information which would have impacted on the appellant's application, its outcome or subsequent events. The university argues that these records would have been located in a general request for records about the appellant but were not responsive to the appellant's request as worded.

[27] However, the university was able to locate additional information about the "unsolicited pertinent information" and provided the following explanation which was also set out in another affidavit from the Director of Postgraduate Medical Program. The university states:

As explained below, "Unsolicited pertinent information" was received by the university. This information resulted in [the appellant's] non-admission and would have been responsive to sentences two and three of the request if it had existed in recorded form. However, this information was received orally by [the Director] and was only shared orally in the context of [the appellant's] application. The information was not recorded and no record of it exists at the university, as explained in the attached affidavit of [the Director].

[28] The Director, in his affidavit provided with the university's reply representations, submits that the "unsolicited pertinent information" that the appellant is requesting does not relate to the issue of reasonable search as that information was not contained in a record. The Director affirms:

On or about November 30, 2010, I received an email communication, which I subsequently deleted in accordance with my normal practice, since I viewed it as an invitation to follow up (which I proceeded to do) but not as information useful for the individual's file. To the best of my knowledge, the contents of the email were as follows (these may not have been the exact words, but they are accurate as to the general import of the message):

I just want patients to be safe with [the appellant]. You can call me.

I spoke to the individual who had sent me the email referenced in [the above paragraph]. In that conversation I received information about [the appellant] which I later related to the Psychiatry Residency Program

Committee, and which resulted in the decision to not admit [the appellant]. I believe that this is the "unsolicited pertinent information".

At no time did I commit the "unsolicited pertinent information" to writing, nor record it in any way.

I have asked the Psychiatry Residency Program Committee members and am advised, and believe, that none of them has recorded the "unsolicited pertinent information" that I related to them.

I believe that the University does not have a record of the "unsolicited pertinent information" that I related to them.

[29] The Director's affidavit also addresses the deleted or destroyed records in the following manner:

To address the issue of deleted or destroyed records, I spoke with my staff and they confirm that they have not deleted any records associated with the appellant's application.

[30] The university emphasized that the additional record identified by the Director was a request for follow-up, but not a record of the appellant's application, nor a reason for her non-admission. The university states:

While this record prompted the oral communication about the appellant, it was in no way the reason for her non-admission, but merely an invitation to communicate about her.

[31] The appellant was given an opportunity to respond to the university's reply representations. The appellant submits that the university was unreasonable in the manner which it chose to interpret and respond to her request. The appellant states:

...the university has unilaterally and arbitrarily interpreted the wording of her Request in an unreasonably restrictive manner so that the records which it considers to be "responsive" are limited to a very narrow scope (i.e., presumably the documents stored in, or directly associated with, the appellant's application file, although the university has not been entirely clear about what it considers to be the actual parameters). This allows the university to report that "no responsive record exists in any form"...

[32] The appellant also argues that given the "oral" nature of the "unsolicited pertinent information", the existence of written records is not precluded, nor is the university precluded from, "...otherwise providing the basis, rationale, process, or reasons involved in the PRPC's decision to rescind the appellant's offer." The appellant

describes the significance of the events set out the university's reply representations as follows:

The implications of the foregoing statements by [the Director] and the university is that the decision to rescind the offer (which had already be made to the appellant and accepted) was based upon a single oral communication by telephone of "unsolicited pertinent information," upon which [the Director] and the PRPC acted without further investigation, confirmation, or due process and without receiving or making any written record or leaving any 'paper trail' of any kind in relation to the basis, the rationale, the process, or reasons for their decision.

[33] Finally, the appellant submits that I should order additional searches as a result of the university's narrow interpretation of her request. She states:

It is therefore reasonable for the appellant to expect and believe, under all of the circumstances surrounding her Request and the present Appeal, that (1) the university has within its control existing written records, and/or back-up archives of deleted or destroyed written records, that are related to the "unsolicited pertinent information" about her and/or the decision of the PRPC to rescind her offer, but that (2) these records are being withheld by the university on the basis that it does not consider them to be "responsive" to its narrow and arbitrary interpretation of the wording of her Request.

Finding

[34] Based on my review of the parties' representations, I find that the university's search for responsive records was not reasonable. Before I proceed to consider the appellant's representations on the institution's search, I wish to address the institution's position that the appellant's request only relates to records about her application. While the scope of the appellant's request was not a separate issue in this appeal, the university's definition of the scope of the request relates to the search it conducted. I find that the university's determination that responsive records only relate to the appellant's application to be unreasonable in the circumstances. In my view, it was very clear from the appellant's request that she was looking for an explanation as to why her offer of acceptance was rescinded whether or not this information was to be found in her application records.

[35] As an institution under the *Act*, I would expect the university to act in an open and transparent manner, keeping in mind the purposes of the *Act* that information should be available to the public and that individuals have a right of access to their information held by the institution. It is not unreasonable for the appellant to expect

that the university would have records about its decision to rescind an offer of acceptance to her to its residency program.

[36] The university, in responding to the appellant's request, apparently chose to unilaterally define the scope of the request. I would remind the university 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]. The appellant's request says, in part:

I want to know the main reason behind rescinding the letter of offer after I got initial acceptance.

[37] While the university chose to interpret this part of the appellant's request as information in her application records that contains the reason behind the offer of acceptance being rescinded, I think it is reasonable to interpret the appellant's request as any records which would reveal the reason why her offer of acceptance was rescinded as she was looking for that explanation from the university. Further, the university could have clarified this with the appellant during the search. In defining the scope in the manner that it did, the university foreclosed the possibility of searching for and locating additional responsive records that would have included electronic records i.e., emailed documents. Accordingly, I find the university's search on this basis to be unreasonable.

[38] The appellant has also raised two key points establishing the university's search for records was unreasonable. The university failed to address the destruction of the email received by the Director which resulted in the subsequent telephone call to the informant. I do not accept the university's explanation that the email was an invitation for a discussion about the appellant which in no way was the reason for her non-admission. Based on the circumstances set out in the Director's affidavit it is clear to me that if the Director had not received the email he would not have been prompted to go to the PRPC regarding the appellant's offer of admission.

[39] While the Director did not remember the exact contents of the email, he affirms that he knew the email related to the appellant and there was the invitation to call an individual. This email, which contained the appellant's name and information about her was her personal information and would have been a responsive record to her request. The university's representations do not address its retention policy, the destruction of records nor does it discuss whether the record could be retrieved.

[40] Secondly, the university failed to conduct searches with the PRPC for responsive records. The Director's submits that he shared "orally" the "unsolicited pertinent information" with the PRPC and on the basis of this oral conversation the appellant's offer of admission to the program was rescinded. The Director then affirms that he asked the PRPC members if they had notes of that discussion but they told him (and he

believed) that no notes were taken. In the circumstances, I find that relying on this information alone is insufficient and I will require the university to provide me with an affidavit of these individuals about their knowledge of the request and their search for responsive records.

[41] Accordingly, as I have found that the university's search was unreasonable I will order additional searches to be conducted. The appellant's request that I appoint a neutral third party to conduct any additional searches is not within my jurisdiction and more importantly, I do not have any reason to believe that the university will not carry out the searches in good faith.

ORDER:

1. I order the university to conduct a further search for responsive records, whether in printed form, by electronic means or otherwise, treating the appellant's request as a request for all records that contain information as to why her offer of admittance into the psychiatry residency program at the university was rescinded and any ambiguity in this request should be resolved in favour of the appellant.

With regard to this provision, I order the university to provide me with sworn affidavits from the members of the Psychiatry Residency Program Committee within 30 days of this interim order. At a minimum, each affidavit should include information relating to the following:

- (a) Information about the committee member swearing the affidavit describing his or her qualifications, position and responsibilities;
 - (b) A statement describing the committee member's knowledge and understanding of the subject matter of the request;
 - (c) The date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (d) Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - (e) The results of the search.
2. If as a result of the further search it appears that responsive records existed but no longer exist, details of when such record were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

3. If responsive records are located as a result of the searches referred to in Provision 1, I order the university to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
4. The affidavits referred to in Provision 1 should be forward to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing of representations is set out in IPC *Practice Direction 7*, which is available on our website.
5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original Signed by: _____
Stephanie Haly
Adjudicator

July 27, 2012