

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3061-F

Appeal PA10-292

Ministry of Consumer Services

March 13, 2012

Summary: In response to a request for records relating to identified meetings and correspondence between the Minister's Office and two named individuals, the Ministry of Consumer Services issued a decision stating that no responsive records exist. After the decision was appealed, two records were located and disclosed to the appellant, who maintained that additional records ought to exist. In Interim Order PO-2964-I, the ministry was ordered to conduct further searches and provide evidence of the searches conducted. The ministry provided representations describing the further searches and stating that no additional responsive records were located. This order finds that the ministry's search for additional records was reasonable, and dismisses the appeal.

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

Orders and Investigation Reports Considered: Interim Order PO-2964-I, Order M-909.

NATURE OF THE APPEAL:

[1] This Final Order disposes of the remaining issues in Appeal PA10-292. It follows from Interim Order PO-2964-I in this same appeal, issued on April 28, 2011.

[2] This appeal arises from a request to the Ministry of Consumer Services (the ministry) 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.

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

[4] 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 to this office on the basis that records responsive to his request should exist.

[5] 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.

[6] 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.

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

[8] 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.

[9] 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. In the Notice of Inquiry, I specifically asked the ministry to address the following:

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.

[10] The ministry provided me with a response to the Notice of Inquiry in which it indicated, among other things, that it was not in a position to provide detailed representations on this matter.

[11] After reviewing the ministry's response, I issued Interim Order PO-2964-I. In that interim order, I found that, by not submitting specific representations on the nature of the searches conducted for responsive records, I was unable to determine that its search for responsive records was reasonable, and I ordered the ministry to conduct further searches. The order provisions in Interim Order PO-2964-I read as follows:

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 [in the Notice of Inquiry, set out above] and provide 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.

[12] The ministry provided representations, including affidavit and other evidence, in response to Interim Order PO-2964-I. The ministry's representations, including the supporting material, were provided to the appellant, who chose not to provide representations in response.

DISCUSSION:

Search for responsive records

Introduction

[13] 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.

[14] 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].

[15] 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].

[16] 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].

Representations

[17] In its representations, the ministry states that between April 28 and May 25, 2011, it carried out additional searches for responsive records in accordance with the instructions contained in Interim Order 2964-I. It takes the position that the searches for further records, conducted in accordance with the Interim Order, were reasonable. It then indicates that, during the period of time covered by the request, there were two

different ministers, neither of whom is the current Minister. It also indicates the current positions of the previous ministers, and that one of these individuals is with the Ministry of Training, Colleges and Universities (MTCU), and the other is with the Ministry of Revenue.

[18] The ministry then reviews the additional searches it conducted for further responsive records. It states that the search was coordinated by the Freedom of Information and Privacy Coordinator for the Ministry of Consumer Services (the Coordinator), who has extensive knowledge of and experience in access requests and the access request process. It also states that this individual's office coordinated with senior staff in several offices who have knowledge of the operations and recordkeeping of their respective offices. These offices include the Deputy Minister's Office at the ministry, the Freedom of Information Office at the Ministry of Revenue, the Freedom of Information Office at the MTCU, as well as other offices across government.

[19] With respect to the Deputy Minister's Office, the ministry indicates that the Senior Liaison Advisor in that office was responsible for coordinating searches within the ministry. It reviews the three requested searches that this individual coordinated, and the results of these searches, which are summarized as follows:

- 1) a search of the Ministry's Ontario Correspondence Management System (OCMS), which was conducted by the Correspondence Coordinator, Communications Branch. This individual conducted an electronic search of the OCMS and the ministry e-mail account. All correspondence for the Minister's signature is logged in OCMS, and only the two responsive records already identified were located. No further records were located, and no paper search was conducted because it would simply duplicate the electronic search.

- 2) a search of the electronic and paper records of the current Minister's Office. The Minister's Office advised that it had no records from the request period and, as a result, no responsive records were located.

- 3) a search of email and calendar entries by a former Minister's office staff member (who worked for both former ministers) and who currently works within the ministry. This former staff member informed the Senior Liaison Advisor that he had no records from the request period.

[20] The ministry also states that the Freedom of Information Coordinator at the Ministry of Revenue was contacted, and the Minister of Revenue's Office was asked to conduct a search of e-mail and calendar entries of the former minister and individual staff of the office. This search was coordinated by the Legislative Assistant/Issues Coordinator in that Minister's office. The ministry states that individual staff members

with knowledge of the file searched the Minister's schedule and e-mails, as well as their own respective schedules and e-mails, and that no responsive records were found.

[21] In addition, the ministry states that the Freedom of Information Office at the MTCU was contacted and asked for a staff list for the former minister from the time that the former minister (now at the MTCU) was Minister of Consumer Services. As well, a search was requested of the e-mails and calendar entries for this former minister and available staff and, as a result of this search, no responsive records were found.

[22] The ministry then states that the staff list for the former minister provided by the MTCU Freedom of Information Office included individuals currently employed either in the Ontario Public Service or as political staff in a minister's office. The ministry identified that these individuals were subsequently contacted and asked to search emails and calendar entries for responsive records, using identified keywords and terms. The ministry provides affidavit evidence of the results of these searches, identifying by name who was contacted, where they now work, the fact that they searched in accordance with the requirements, and that no responsive records were found as a result of these further searches by individuals who used to work with the former minister.

[23] The ministry then directly responds to the six questions set out in Interim Order PO-2964-I.

[24] The ministry indicates that, because the request was clear regarding the time period to be searched, the types of records to be searched and the specific records to be searched, the ministry did not seek clarification from the requester. It also states that, because of the clarity of the request, it responded literally to the request, and did not narrow the scope of the request.

[25] Regarding the details of any searches carried out, the ministry indicates that the steps taken by the Freedom of Information Coordinator in conducting the search for responsive records, including details about who was contacted outside the ministry, are provided in an affidavit sworn by the Coordinator. These steps are summarized as follows:

- The search for responsive records in the ministry was directed by a senior staff member of the Deputy Minister's office. This included a number of steps, as set out in some detail above;
- The search for responsive records outside the ministry was coordinated by the Coordinator and a named staff member. The steps taken to determine who to contact and where to contact them is set out in some detail above, and includes contacting both ministries where the former ministers are now engaged, and determining whether responsive records

exist. It also includes identifying the former staff members of the former ministers, locating and contacting them, and asking them to conduct searches for responsive records. These individuals were also asked to answer questions regarding the possibility that records which may have existed no longer exist. These searches included searches of their respective schedules and e-mails. No responsive records were found.

- The coordinator summarizes the steps taken to identify and locate "point-in-time" staff lists for the former ministers, and the subsequent contacts with these individuals, who are now working in a wide variety of positions including positions with the MTCU, the Premier's Office, the Ministry of Economic Development and Trade, the Ministry of Tourism and Culture, the Ministry of Consumer Services Communications Branch, and the Minister of Agriculture, Food, and Rural Affairs. The ministry also indicates that these individuals were located and asked to conduct searches and answer questions regarding possible responsive records, and that these searches did not locate or identify any additional responsive records.

[26] The specific steps taken by the Coordinator are set out in considerable detail in her sworn affidavit, as well as her subsequent affidavit (including attachments), all of which were also shared with the appellant.

[27] Regarding the issue of why two records responsive to the first part of the request were only located later in the process, the ministry identifies that, during mediation, additional search terms were suggested, and that the two records were subsequently located.

[28] With respect to the question of whether responsive electronic records exist, the ministry identifies that the OCMS (the electronic database of correspondence for the Minister's signature) was searched, and identifies who conducted that search. The ministry also states that the former Minister's Office staff who conducted the searches (as outlined above) also searched e-mail accounts and electronic calendar entries using the search terms provided by the Coordinator's office, and that no responsive records were located. The ministry also provides affidavit evidence in support of its position.

[29] In response to the question of whether it is possible that such records existed but no longer exist, the ministry states that ministry staff and former Minister's Office staff who conducted the searches (as identified above) were asked whether such records existed but no longer exist. The ministry states that all staff responded that no such records existed, and provides evidence in support of that position.

[30] The ministry summarizes its position by stating that, based on the evidence provided, it conducted a reasonable search for records responsive to the request.

[31] As indicated above, the ministry's representations, including the affidavits and attachments, were shared with the appellant, who chose not to provide representations.

Analysis and Findings

[32] As set out above, in appeals involving a claim that additional 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 additional 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.

[33] 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.

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

[35] The ministry has provided a significant amount of evidence regarding the nature of the searches conducted for responsive records. This evidence is contained in its representations and the supporting affidavits, which review the searches conducted, and identify the individuals who conducted the searches and the results of their searches. I note that some of the searches conducted were restricted to electronic searches for records; however, the ministry has explained why these searches were conducted and why they were appropriate searches in the circumstances. The ministry has also clearly taken considerable measures to identify the former staff members who would have knowledge of the circumstances relating to the requested records, and has located these individuals and asked them to conduct searches.

[36] Although provided with the ministry's representations, the appellant did not provide representations on the issue of whether the further searches conducted for responsive records were reasonable. I note that the ministry's initial decision in response to the request was that no responsive records existed. In the earlier stages of

this appeal the appellant provided evidence that responsive records ought to exist and, after conducting further searches, the ministry did locate two responsive records (which were disclosed to the appellant). In continuing this appeal the appellant took the position that additional responsive records, including calendar entries, ought to exist.

[37] On my review of the representations provided by the parties, I am satisfied that the ministry has conducted reasonable searches for additional responsive records, taking into account all of the circumstances of this appeal.

[38] I appreciate the appellant's concerns, raised by him in the early stages of this appeal, about the possible existence of responsive calendar entries. However, as identified above, the issue I must address in this appeal is whether the searches that have been conducted by the ministry were reasonable. A reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request (see Order M-909). The ministry has provided extensive representations explaining the nature and extent of the searches conducted for responsive records. This includes representations addressing the specific search requirements set out in Interim Order PO-2964-I. These searches included searches for responsive records, including calendar entries and emails, by a number of individuals familiar with the record-keeping practices of the ministry and other bodies, as well as searches by those who were involved in the circumstances surrounding the issues identified in the request. Although the searches did not uncover any additional records (besides the two records located earlier), I am satisfied that these searches were reasonable in the circumstances.

[39] Accordingly, based on the information provided by the ministry describing the nature of the searches conducted by it for additional responsive records, and because the appellant has not provided me with sufficient evidence to support a finding that additional searches ought to be conducted, I am satisfied that the ministry's search for additional records responsive to the request was reasonable.

ORDER:

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

Original Signed by: _____
Frank DeVries
Adjudicator

_____ March 13, 2012