

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3425

Appeal PA13-180

York University

November 18, 2014

Summary: The appellant sought access to information relating to an incident that occurred at York University (the university). The university disclosed some information to the appellant, with other information being withheld as exempt under the *Act*. The appellant claimed that additional records ought to exist. After mediation, the reasonableness of the university's search for records became the sole issue in the appeal. After the exchange of representations, the university located additional records that had not been found during the previous searches. This order finds that the university's search for responsive records was reasonable and orders the university to issue an access decision to the appellant with respect to the subsequently located records.

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

BACKGROUND

[1] York University (the university or York) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information relating to a specific incident involving the requester that occurred at the university, as well as other more general records. The incident led to investigations being conducted by the university's Security Services, as well as the Toronto Police Service (the Police).

[2] With the consent of the requester, the university divided the multi-part request into two categories: Personal Information Request and General Information Request. Upon further clarification of the Personal Information Request by the requester, the university issued an access decision. As set out in its access decision, the university defined the Personal Information Request as being a request for access to the following information:

1. Notes of York Security agent at [a specified campus], [named individual], for his meeting with your husband, [named individual], and yourself on [date], and any subsequent follow-up on his part.
2. Notes of [identified former director of university Security at specified campus], following your telephone conversation with her on [date].
3. York Security case file pertaining to any follow-up done after your report to York Security of the [date] incident.
4. [Named York Security Inspector's] findings at the end of his investigations (reports ready on or around [date], and on or around [date]).
5. Communications between York Security and Detective Constable [named individual], 53rd Division, Toronto Police, with respect to the Toronto Police investigation of the [date] incident.
6. Department of Occupational Health and Safety (DOHS) case file on your correspondence with DOHS and follow-up by the Ministry of Labour with DOHS with respect to the incident and your concerns.
7. Email communication between [named university Secretary], and/or the [named President of the university], and/or then [named Chair of the Board of Governors], between the dates of [date] and [date] (i.e., communications between all three or any two of these individuals), pertaining to you, your [identified ex-husband], your [named husband] and/or the incident, and any follow-up with York Security around the incident.

[3] The university located records responsive to items 1, 3, 4 and 7 of the Personal Information Request and granted partial access to them. It relied on section 49(b) (personal privacy) of the *Act* to deny access to the portion it withheld.

[4] The requester (now the appellant) appealed the university's decision.

[5] A number of matters were resolved at mediation, including the application of section 49(b) of the *Act*, leaving the reasonableness of the university's search for responsive records as the sole issue to be addressed in this appeal.

[6] As further mediation was not possible, the appeal was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending the university a Notice of Inquiry setting out the facts and issues in the appeal. The university provided representations in response to the Notice. I then sent a Notice of Inquiry to the appellant accompanied by the university's non-confidential representations. The appellant provided representations in response. I determined that the appellant's representations raised issues to which the university should be provided an opportunity to reply. Accordingly, I sent a letter to the university seeking its reply submissions accompanied by the non-confidential representations of the appellant. The university provided reply representations.

[8] After the representations had been exchanged, the appellant subsequently advised this office that, in a related appeal involving the Police (where the adequacy of the Police's search was also an issue) the Police had recently located records pertaining to the incident, that they had failed to locate previously. The appellant provided the university with a copy of certain notes that the Police had received from a named university Security Inspector, along with additional information pertaining to his role in a police investigation. A number of emails were exchanged on this topic, which are set out in more detail below.

DISCUSSION:

[9] 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 24.¹ 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.

[10] 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.² To be responsive, a record must be "reasonably related" to the request.³

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

[11] 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.⁴

[12] 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.⁵

[13] 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.⁶

The Representations

The university's initial representations

[14] The university's initial representations were accompanied by an affidavit signed by its Director, Records and Information Management and Coordinator, Information and Privacy Office, in support of its position that it conducted a reasonable search for responsive records.

[15] The affidavit sets out in detail the steps taken by the university to locate and identify responsive records, which included searches both before and after mediation. These searches included efforts to locate notebooks that had been in the possession of the named York security agent and the name university Security Inspector which, as stated by the deponent in the affidavit, were not located at that time.

[16] In the final paragraph of her affidavit, the deponent states:

To the best of my information and belief, experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to identify and locate records reasonably related to the request. All responsive records in the custody or control of York University were identified and located and no other unit has any records responsive to this request.

The appellant's initial representations

[17] The appellant provided extensive representations in support of her position that additional responsive records ought to exist. Amongst other things, she asserts that

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

"the search was not conducted by 'experienced employees knowledgeable in the subject matter of the request'".

[18] She explains her position in the following way:

A variety of people were consulted, but these people were either employees who were not in a position to provide relevant information (i.e. they were not at [the university] at the time the records were created and were not cognizant of procedures at [university] Security at that time e.g [named individual, named individual]) or who had shown themselves, in documents, to be negatively pre-disposed against the appellant [named university Secretary, named university Security Official, named university Security agent].

Two key people with first-hand information, [name], director of York security at [specified campus] at the time of the incident in [date] and [named university Security Investigator] at the time, were never contacted.

Finally, responsive documents to this request, not disclosed here, have been identified and disclosed in part or in full through other requests for access to information, thus confirming the inadequacies of the present search by [the university] and suggesting that other responsive records do exist.

[19] The appellant asserts that it is in the university's interest not to conduct a proper search as the results "could not only be very embarrassing for the university but could potentially put officers of the university at risk of criminal proceedings".

[20] The appellant then set out in detail the specific records requested and how, in the appellant's opinion, the search was inadequate. I have set these out in the following categories as defined by the appellant in her representations.

Notes of a named York Security Agent at a specified campus, for his meeting with the appellant's husband and herself on a specified date

[21] The appellant submits in general that the university affidavit demonstrates a disorganized search, avoiding the questioning of individuals with first-hand knowledge.

[22] Amongst other things, the appellant submits that no effort was made to contact the named university Security Agent's supervisor at the time to inquire if this individual was aware of the location of notebooks.

Notes of the identified former Director of Security at the specified campus, following the appellant's telephone conversation with her on a specified date

[23] In response to a statement in the affidavit attributed to an individual who conducted a search for records, that managers, such as the identified former Director of Security at the specified campus, did not keep notebooks, the appellant submits:

- The individual who conducted the search was not in a position to know what the practice was for supervisors at a specified date.
- No attempt was made to reach the identified former Director of Security at the specified campus and no mention is made of her email correspondence or what was done with her records when she left the university. This, although it appeared to the appellant that the identified former Director of Security at the specified campus kept good records.

York Security case file pertaining to any follow-up done after the appellant's report to York Security of the incident

[24] The appellant submits that part of the case file was disclosed, but it is incomplete. The appellant's position is that the following additional records ought to exist:

- Photographs taken by the named university Security Inspector
- This individual's notebooks

Named York Security Inspector's findings at the end of his investigations (reports ready on or around a specified date, and/or around a specified date)

[25] The appellant refers to her comments with respect to the previous item.

Communications between York Security and named Detective Constable, 53rd Division, with respect to the Police investigation of the incident.

[26] The appellant asserted that there should be notes "for a variety of meetings". The appellant found it particularly troubling that:

... the Toronto Police have released no notes from conversations between Toronto Police officers [named police officer] or [named police officer] and York Security agents, although the notebooks of [named police officer] ... cover the period when she spoke with York Security and should normally include such notes.

Similarly, other than a short summary written by York Security agent [named individual] of some telephone conversations with [named police officer], York University has not released the notes [named university Security Inspector] took concerning his substantive conversations with [named police officer] and [named police officer] in [specified date] and [specified date].

Email communication between the named university Secretary and/or the named President of the university, and/or then named Chair of the Board of Governors, between two specified dates (i.e. Communications between all three or any two of these individuals) pertaining to the appellant, the appellant's ex-husband, the appellant's husband, and/or the incident, and any follow-up with York Security around the incident.

[27] Amongst other things, the appellant takes issue with a phrase in the university's affidavit pertaining to its search for records relating to this item, which she asserts undermines her credibility.

[28] The appellant also submits that:

Furthermore, other records relating to the responsive records here related to correspondence between [named university Secretary] and the Board of Governors have been released ..., including an email from [named university Secretary] to Board of Governor members suggesting that other responsive records may exist.

[29] The appellant concludes her representations with the following observations:

- The request for information "relates to safety issues at a public educational institution which is open to public scrutiny and should adhere to a culture of openness".
- The university has itself acknowledged significant safety problems as outlined in a safety audit the university commissioned in 2008.
- The appellant herself produced a report on system failures which was included in the above-noted safety audit.
- The university response to the appellant's concerns and to the concerns of her husband has been "very negative and dismissive".
- This relates to the response of an institution of higher learning to ex-spousal violence.

- Several people consulted during the search for responsive records were not at university Security at the time of the incident. Public statements have been made that the university restructured its security operations so “it is not clear that the information provided by current employees is relevant to the search”.
- The records “withheld” are “key documents in clarifying the nature of the York security investigation and the nature of the relationship between York security and [the Police] with respect to the investigation”.

The university’s reply representations

[30] With respect to the individuals who conducted the search, the university submits in reply that:

... experienced people knowledgeable in the subject matter of the request were engaged in the search for records. Although [named individual] and [named individual] were not involved in the investigation into the alleged incident at [a specified campus), both have been employed in Security Services According, they both have knowledge of Security Services’ records and procedures. It is not reasonable for institutions to ask individuals who are no longer employed by the institution ... to search for records. Institutions must rely on existing employees to conduct searches. A substantial number of records that were disclosed to the appellant are emails between [the identified former Director of Security at the [specified campus] and the [named York Security Inspector], or between the [named York Security Inspector] and other individuals, demonstrating that records of these former employees were searched for and produced.

Other employees, such as [named university Security Official], [named university Secretary] and [named university Security agent], were consulted in the search and provided responses in a timely and professional manner.

[31] The university denies the appellant’s allegation that its search was disorganized and submits in reply:

...Normally when a *FIPPA* request is made, a memo is hand-delivered to designated contacts within the university, asking them to instruct the appropriate individuals within their areas to search for responsive records. The Information and Privacy Office (IPO) staff deal with these designated contacts because IPO staff cannot be expected to know which employees are most likely to have responsive records across the entire university. In

this case, with regards to the Security Services records, a memo was hand-delivered to the Senior Executive Officer in the Office of the Vice-President, Finance and Administration, who then directed the appropriate individuals to conduct the search. [The university described this process in detail at paragraph 4 of the affidavit it filed in support].

Sometimes the IPO Coordinator will contact units directly to follow up when there are questions about the search, or about records provided in response to a search. As the appellant had requested Security notebooks and no such records were provided to the IPO, the Coordinator contacted Security Services directly to ask about them. These actions are described in the affidavit [filed in support].

Normally, no further searches would have been conducted; however, because the request was appealed, and the appellant, through the IPC Mediator, questioned the adequacy of the search, the Coordinator made further efforts to ascertain whether all responsive records had been located. The Coordinator made further calls to Security Services, and went to the extent of contacting [named university Security agent] himself. She also made special efforts to locate the notebooks of [the named university Security Inspector] by obtaining permission to unseal and search through boxes that had been sealed for an unrelated investigation. These actions are outlined in the affidavit [filed in support].

[32] With respect to the appellant's assertion that records she obtained through other access to information requests suggest that other responsive records exist, the university submits:

As stated in the affidavit, York University acknowledges that records did or may have existed but are no longer in existence. The appellant seems to be of the opinion that all records ever created should be retained; however, York University's business practice is to encourage employees to dispose of transitory records, such as messages with no ongoing operational value, or drafts. Such advice is standard records management best practice. [The named university Secretary] considered [the then Chair of the Board of Governor's] communication to be transitory and did not retain it. From subsequent correspondence disclosed to the Appellant, it is clear that [the named university Secretary] carried out the task as requested by [the then Chair of the Board of Governor's], by writing back to the appellant's husband.

[33] Furthermore, the university submits in reply that:

... the Coordinator ([named individual]) did not undermine the appellant's credibility by using [a particular phrase]. On July 8, 2013, the Coordinator asked [the university Secretary] to search again for any responsive records that may have been missed in the initial search; it was only on August 16, 2013 that the IPC Mediator forwarded copies of the requested records to York University's Coordinator. In other words, the appellant's claim to have such proof was not substantiated until more than one month after the Coordinator asked [the university Secretary] to conduct a subsequent search. ...

[34] With respect to the appellant's assertion that the incident report (Record 35), which was disclosed to the appellant in a severed version, substantiates her claim that further records should exist, the university submits:

...Record 35 is the official Incident Report created by Security Services to document the incident reported by the Appellant in [specified date]. These types of reports are created and updated as information is compiled during the course of an investigation. They may include copies of email threads, notes regarding telephone conversations, and other documentation compiled throughout the investigation. The incident report is considered to be the official record, encapsulating and consolidating the documentary evidence. Thus the original notebook entries and emails are considered to have less importance because all necessary information has been compiled into the report.

Record 35, which was disclosed to the appellant with minor severances, includes [the named university Security Inspector]'s detailed notes about his investigation, copies of emails with the appellant and with individuals with whom he followed-up during his investigation, including an email from [the named university Security Agent] describing what he wrote in his notebook on [specified date] when the appellant asked him to accompany her to the [specified campus] loading dock. Record 35 also includes detailed notes of [named individual], another Security official in the Investigations unit who took over the case while [the named university Security Inspector] was on vacation. [Named individual's] notes include numerous references to discussions with Toronto Police Service and the nature of those discussions....

[35] With respect to the timing and implementation of its records retention schedule, governing the retention and disposition of Security notebooks, the university submits:

... that the timing is simply coincidental with the time of the alleged incident at [specified campus]. Work on the Common Records Schedule began in 2004 and it was completed and released in June 2008, covering all of the University's functions (with the exception of Human Resources, which was completed a few months later). Once implemented, it took some time to raise awareness of the schedule through various information sessions and other kinds of communications.

[36] The university submits that it expended a reasonable effort to search for responsive records, both before and after mediation. It states that the searches were conducted by experienced employees knowledgeable in the subject matter of the request. However, no further responsive records were found.

[37] Finally, the university submits that:

It is the [university's] position that records that may have once existed but no longer do were either transitory, or, in the case of records documenting the investigation itself, have been encapsulated within the Incident Report which is the official record of the investigation.

It is the [university's] position that its records management practices have not been determined in any way by the appellant, her *FIPPA* request, or her allegations against [the university] or any of its employees.

[38] In summary, it was the position of the university that it satisfied the requirements of section 24 of the *Act* in making a reasonable effort to search for responsive records, but no additional records were found.

Post-Representation Communications

[39] As set out above, after the representations had been exchanged, the appellant advised this office that, in a related appeal involving the Police (where the adequacy of the Police's search was also an issue) they had recently located records pertaining to the incident that they had failed to locate previously. The appellant provided the university with a copy of certain notes that the Police had received from the named university Security Inspector, along with additional information pertaining to his role in a police investigation.

[40] In response, the university advised the appellant that the information she provided had "jogged someone's memory" and certain additional responsive records, namely the named York Security Inspector's notebooks, had now been located. Portions

of the notebooks were then disclosed to the appellant. The university further advised that the notebooks would be further reviewed for "further documentation of the investigation".

[41] Subsequently, the university sent an email to the appellant advising that:

Please find attached to this email two sets of security notebook entries pertaining to the [specified campus] incident reported by you in [specified date]. As indicated in my last email to you dated June 20, 2014, [named individual], Manager, Investigations, made a further search through [the named university Security Inspector's] notebooks and has found responsive information. In addition, we searched through the notebooks for [named university Security Official] who was also involved in the investigation, as documented in the security report (disclosed to you as Record #35 in your *FIPPA* Request ...). These records are disclosed to you with this email as well. Note that the blacked out entries are entries pertaining to other matters and not relevant to your case. We have also severed some information pursuant to *FIPPA*'s personal privacy exemption and/or the employment information exclusion; these are marked as "21(1); 49(b)" and "65(6)(3)" respectively.

To the best of our knowledge, there are no further records pertaining to your case. We have been unable to locate any photographs over and above those already disclosed to you with our original decision letter dated April 2, 2013.

[42] The appellant maintained her position that the search was not adequate. She submitted that:

In your email, you indicate that [named individual] 'made a further search through [the named university Security Inspector's] notebooks,' implying that further notebooks had been located after the one notebook found in the 'evidence locker.' It would appear, in fact, that in total three notebooks have now been located, covering the period [specified date] – [specified date].

- No explanation has been given as to why these two other notebooks have only just been located.
- Furthermore, while some additional information from [specified date] has been released, the notes have been heavily redacted and no code has been indicated for each redaction. In some cases there doesn't seem to be a reason for the redaction. For example, for the entry on

[specified date], which was the day [the named university Security Inspector] took photographs of the recycling container. One would normally expect to see some indication that photos had been taken.

- The information released by York Security to the Toronto Police, and recently released to me, show that other actions were taken by [the named university Security Inspector] during the timeframe of the three notebooks, to interview other people at York, for which no notes have been released, even on a partial basis.
- Information released to me by the Toronto Police shows that [named police officer] was briefed by [the named university Security Inspector] in [specified date], but no notes from [the named university Security Inspector] have been released with respect to this conversation, although this would be in the timeframe of the notebooks now located.

Information from the Toronto Police shows that [named police officer] was in communication with [the named university Security Inspector] again in [specified date]. Information concerning [the named university Security Inspector's] further meetings with [named police officer] would necessarily be in later notebooks, which have still not been located.

Just to clarify, with respect to the photos of the recycling container, the photos which you indicate have been released to me are the photos of the recycling container that my husband and I took and supplied to [university] Security and the [Police].

- The notes just released by the Toronto Police confirm that [the named university Security Inspector] took photos of the recycling container on April 14, but [the named university Security Inspector's] photos have still not been located, although there is an indication they were attached to the information provided to the Police.

References in the documents released indicate that reports were made to [named individual], Associate Vice-President, responsible for York Security. Given my communications with the President's Office and the Office of the University Secretary, it would be normal that a report would have been made by [named individual] to these offices.

- In my request for information, I asked for all responsive documents including notes from meetings or conversations between York Security and the York administration (Office of the President and Vice-Presidents, and University Secretary) about my file. To date, other than one or two transmittal documents, none has been produced.

Analysis and finding

[43] Part of the appellant's concern over the adequacy of the university's search for responsive records related to the university's failure to locate the notebooks of the named university Security Inspector, initially. The university has now located security notebook entries, including those of the named university Security Inspector, and identified them as responsive records. The university also explained what led to them being found. It is unfortunate that they were not located during the previous searches, however, that does not lead to an inescapable conclusion that the university's prior search efforts were not reasonable. A search that does not locate records that are then located, considering all the circumstances, may still be a search that is reasonable and satisfies the requirements of section 24 of the *Act*.

[44] That said, it is not clear to me whether the university issued an access decision, in compliance with the *Act* with respect to the notebook entries, and in particular, with respect to the portions that were withheld. Accordingly, I will order the university to provide a decision letter in accordance with section 26 of the *Act* to the appellant with respect to the notebook entries.

[45] I now turn to the remaining responsive records that the appellant asserted ought to exist.

[46] Although the appellant takes issue with their suitability of the individuals who conducted the search for responsive records, I am satisfied on the evidence before me that appropriate individuals were contacted and engaged with respect to the search. Furthermore, I am satisfied that appropriate steps were taken to locate responsive records. In saying this, I am satisfied that the university's records management practices and its search efforts were not influenced or affected by any allegations made by the appellant against the university or its employees or staff.

[47] As set out above, the *Act* does not require the university to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the individuals who conducted the

search for responsive records are such experienced employees knowledgeable in the subject matter of the request. Based on the evidence before me, I am also satisfied that they conducted a reasonable search for any responsive record pertaining to the appellant's request.

[48] Accordingly, I find that the university has provided me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records within its custody and control. I find that the searches were conducted by experienced employees who were knowledgeable in the subject matter of the request and that they expended a reasonable effort to locate any additional responsive records. However, no additional responsive records were found.

[49] Accordingly, I am satisfied that the university's search for records that are responsive to the appellant's request is in compliance with its obligations under the *Act*.

ORDER:

1. I order the university to issue an access decision to the appellant with respect to the subsequently located notebook entries, treating the date of this order as the date of the request, all in accordance with sections 26, 28 and 29 of the *Act*.
2. I uphold the reasonableness of the university's search for responsive records.

Original Signed By:
Steven Faughnan
Adjudicator

November 18, 2014