Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3492

Appeal PA14-67

Ministry of Health and Long-Term Care

May 21, 2015

Summary: The appellant made a request to the Ministry of Health and Long-Term Care (the ministry) for records relating to Therapeutic Abortion Committees. After consulting with the ministry, the appellant clarified his request to include records related to regulations governing the operation of Therapeutic Abortion Committees during a specified time period. In response, the ministry issued a decision to the requester denying access to the records it deemed responsive, claiming the application of section 22(a) (information published or available) of the *Act*. During the mediation of the appeal, the appellant advised that section 22(a) was no longer at issue, but that the scope of his request was. In particular, the appellant claimed that his clarified request included OHIP policy records and correspondence of the Minister for a specified time period. In this order, the adjudicator finds that OHIP policy records and correspondence of the Minister are not included in the scope of the request. The ministry's decision respecting the scope of the request is upheld and the appeal is dismissed.

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

OVERVIEW:

[1] This order disposes of the only issue remaining as a result of a decision made by the Ministry of Health and Long-Term Care (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to information for a specified time period described as follows:

> I'm requesting an investigation into the legal and medical records, circa the 1988 Supreme Court decision, to determine what took place in the period of transition after the dissolution of Therapeutic Abortion Committees (TACs). How were the regulations associated with TAC side-stepped? I suspect that OHIP only covered abortion services when approved by a TAC; hence, after the dissolution of TACs, how was the paper work approved for an abortion performed by a doctor to obtain coverage from OHIP? In other words, what legal measures were taken at that time which permitted payments to be issued by the Ontario government for abortion services under the province's health care coverage in the absences of TACs?

[2] Upon receipt of the request, the ministry wrote to the requester seeking to clarify the request. The ministry stated:

> …please be advised that your request does not provide sufficient detail to search for the records. Kindly advise as to exactly what kinds of records you are requesting.
>
> Please note that effective January 1, 2012, section 65 of the *Act* (Application of the Act) was amended to exclude records relating to the provision of abortion services. . .

[3] The requester subsequently emailed the ministry and explained the following:

> . . . I point out the distinction that my inquiry involves a search of records related to regulations governing the operation of Therapeutic Abortion Committees . . .
>
> To be more specific about my inquiry, I would like to be informed of the regulations – as they were on record prior to the January 28, 1988 Supreme Court of Canada decision in Morgentaler – which governed the operation of Therapeutic Abortion Committees (TACs) and permitted payments to be issued by OHIP for abortion services that were approved by the said TACs. Additionally, and primarily, I would like to be informed of the changes to the regulations which permitted payments for abortion services to be issued by OHIP after the dissolution of the Therapeutic Abortion Committees.

[4] In response, the ministry issued a decision to the requester denying access to the records it deemed responsive, claiming the application of section 22(a) of the *Act*. In its decision, the ministry also stated:

> Please be advised that the regulations or statutes you are seeking are available to the public in hard copy at the Archives of Ontario, which also has a website to assist the public in conducting research: http://www.archives.gov.on.ca. You may also contact customer service at Archives of Ontario to obtain assistance with your particular request at 416-327-1600.
>
> You may also wish to consult the following Acts and regulations made under these Acts for the years that are of interest to you:
>
> Public Hospitals Act
> Health Insurance Act; and
> The OHIP Schedule of Benefits.

[5] The requester, now the appellant, appealed the ministry's decision to this office.

[6] During the mediation of the appeal, the appellant indicated that he was not satisfied with the ministry's decision because he believes that the ministry should provide him with a copy of the responsive records, and that he should not have to contact another institution to obtain access to them.

[7] In discussing the appeal with the mediator, the ministry took the position that the responsive records consist of publicly available regulations. The ministry subsequently sent a letter to the appellant further explaining its decision and providing – as examples of responsive regulations – copies of regulations made under the *Health Insurance Act* and the *Public Hospitals Act* that refer to abortion services and Therapeutic Abortion Committees, respectively.

[8] Also during the mediation of the appeal, the appellant consulted the Archives of Ontario and discovered that additional records exist that he considers to be responsive. He also determined that these records are not publicly available and are governed by the *Act*. They consist of two series of records, OHIP policy files and correspondence of the Minister of Health covering the specified time period. The appellant advised the mediator that he is pursuing access to these records, in addition to those identified by the ministry as responsive.

[9] When informed of the appellant's position, the ministry responded that OHIP policy files and Minister of Health correspondence fall outside the scope of the request since, in its view, the request was for regulations relating to Therapeutic Abortion Committees and abortion services. The ministry's position was that the appellant should submit a new request for this information because it falls outside the scope of the original request, as framed.

[10] The appellant advised the mediator that, in his view, the ministry was being overly restrictive in its interpretation of the request. The appellant indicated that the request was never intended to be limited to regulations only, but that he also sought access to information regarding that reasons behind the changes to the regulations. Accordingly, scope of the request was added as an issue in this appeal. The appellant also advised the mediator that he was not disputing the fact that regulations are publicly available. Consequently, section 22(a) of the *Act* is no longer at issue in this appeal.

[11] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations on two issues. First, she sought representations on the issue of the scope of the request, since the appellant disputes the ministry's interpretation of it. Second, because records that would be responsive to the request (given a broader interpretation) apparently exist in the custody or control of the Archives of Ontario, she also sought representations from the parties on the issue of its transfer obligations under section 25(1) of the *Act*. Both parties provided representations, which were shared in accordance with this office's *Practice Direction 7*.

[12] The appeal was then transferred to me for final disposition. For the reasons that follow, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[13] The records that the appellant claims are responsive to his request are OHIP policy records and correspondence of the Minister of Health during a specified time period. These records are located at the Archives of Ontario.

DISCUSSION:

[14] The sole issue in this appeal is the scope of the appellant's request and what records are responsive to his request. 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).

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

[16] The ministry submits that when it sought clarification of the request from the appellant, it did not pre-judge the request or assume that the appellant was seeking any particular type of records. It states that the request for clarification of the request was completely open-ended, as it asked the appellant "[k]indly advise as to exactly what kinds of records you are requesting."

[17] The ministry goes on to submit that a reasonable reading of the appellant's request (the appellant's response to the request for clarification[3]) leads to the conclusion that the appellant is seeking copies of regulations relevant to the legal issue described in the request. Further, the ministry submits that even the most liberal interpretation of the wording of the request would not suggest that the appellant is seeking OHIP policy records and correspondence of the Minister of Health.[4] The ministry argues that the appellant was very precise about his request, and that he provided sufficient detail to identify that the type of records he seeks are the specified regulatory amendments.

[18] Moreover, the ministry submits that during the mediation of the appeal, the appellant did not suggest that it had misread the scope of the request. The issue during mediation, the ministry submits, was the possible application of section 22(a) of the *Act*. The ministry goes on to state that it was only after the appellant consulted with the Archives of Ontario and "discovered" additional records that were not publicly available, that he decided to add these additional records to the scope of the request. The ministry advises that it does not dispute that the appellant has a right to make a request for these additional records and has indicated that he should make a new request for them.

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.
[3] See page 2 of this order.
[4] See page 3 of this order.

[19] The ministry states:

> The Ministry submits that the appellant has effectively changed the nature and content of his request; he is now asking for two specific files that may or may not even contain responsive records (ie. information about the dissolution of the TACs). The "two series of records" described as "OHIP policy files and correspondence of the Minister" do not, on their face, reveal whether they are responsive to the appellant's original request; they do not refer specifically to TACs, the "changes to the regulations" regarding TACs, or to payment for abortion services. In other words, although the appellant considers these records to be responsive to his request, the description of the records is not detailed enough for the Ministry to gauge whether their contents are responsive, or even "reasonably related" to the appellant's original request.

[20] The appellant submits that it is unacceptable for the ministry to suggest that he submit an additional access request to another institution that stores its records. He submits that in his original request, he was careful with his choice of words, and his objective was to convey an adequate understanding of the information which he was seeking, while at the same time avoiding limitations that might exclude any relevant information. He goes on to state that, not having any knowledge of the pertinent files which were available at the time, he made a general reference to legal and medical records. These records, the appellant argues, were directly linked with records that pertained to the dissolution of the TACs and how payments were issued by the Ontario government for abortion services under the province's health care coverage in the absence of TACs.

[21] The appellant then submits that when asked by the ministry to be more specific about his request, he was at a loss to know what relevant information might be available in the medical records and, therefore, could not be more specific in this regard. The appellant states:

> . . . Despite having provided what I believe to be a reasonably clear description of the information being sought, I'm asked to be more specific. Having cooperated with this request, what was the result: the Ministry focuses on the specific description while disregarding everything else to conclude that it can't provide any information for me because the information related to my detailed explanation is public knowledge; at the same time implying that there is no other information that it can provide . . .

[22] Further, the appellant states that when he inquired about records available at the Archives of Ontario (at the ministry's suggestion), he was informed about the OHIP policy files and the Minister's correspondence. The appellant argues that the ministry should have looked into these medical records as a matter of course to determine if there is any information relevant to his inquiry.

[23] Lastly, the appellant submits that the ministry failed to apply a liberal interpretation to his request, but instead decided to "play semantics."

[24] In reply, the ministry states that the appellant may be suggesting that its initial request to him for clarification of his request resulted in an inappropriate narrowing of his request. The ministry submits that under section 24(2) of the *Act*, it is entitled to ask a requester to clarify a request "if the request does not sufficiently describe the record sought." The ministry argues that clarification is not synonymous with "narrowing," and that the purpose of clarification is to enable an institution to identify the records sought and to determine if it even has responsive records. The ministry states that it did not ask the appellant to narrow the scope of his request, but simply asked him to be more precise about what records he was seeking, since the original request consisted mainly of questions. The ministry adds that the appellant did not object to the clarified version of the test of his request that he provided. Lastly, the ministry reiterates that even the most liberal interpretation of the wording of the appellant's request would not suggest that he is seeking OHIP policy records and correspondence of the Minister, and that the appellant's use of the phrase "medical records" did not suggest that he was seeking OHIP policy records.

[25] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... 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. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[26] In Order P-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.

[27] In Order PO-1897-I, commenting on the above orders, Assistant Commissioner Sherry Liang noted that in the appeal under consideration in Order P-134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting its scope. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request".

[28] In this instance, I do not accept the appellant's position that OHIP policy records and correspondence of the Minister are caught within the scope of the request. In my view, the appellant's original request was not clear. Accordingly, the ministry sought to clarify the scope of the request with the appellant. In communications with ministry staff, the appellant clarified the scope of his request to include only the specific records set out in the request; records related to regulations governing the operation of Therapeutic Abortion Committees. In addition, the ministry subsequently assisted the appellant by suggesting he contact the Archives of Ontario to assist him in accessing the publicly available regulations that were the subject matter of the request. After the appellant discovered that there were additional records other than regulations, he could have submitted a new request for those records, but did not. Instead, the appellant took the position during the mediation of this appeal that the additional records should form part of his clarified request.

[29] I disagree with the appellant and uphold the ministry's decision that OHIP policy records and correspondence of the Minister do not fall within the scope of his clarified request. Given my finding, it is not necessary to consider the issue of transfer obligations under section 25(1) of the *Act*.

[30] I make this finding in light of the fact that the appellant specifically turned his mind to clarifying his request. He could have either made a request for OHIP policy records and correspondence of the Minister at that time, or more generally requested records above and beyond the regulations that he described in his clarified request. I find that the ministry's interpretation of the clarified request was reasonable and that OHIP policy records and correspondence of the Minister are not responsive to this particular request as clarified by the appellant. The appellant is free, of course, to make a new request for those records to the Archives of Ontario, given that is where he has indicated the records are housed.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: May 21, 2015
Cathy Hamilton
Adjudicator