

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER PO-3945-I

Appeal PA16-231

Health Professions Appeal and Review Board

April 29, 2019

**Summary:** Interim Order PO-3869-I arose from a request for records held by the Health Professions Appeal and Review Board (the board). The appellant appealed the board's search for records, taking the position that it was not reasonable and more responsive records should exist. At adjudication, reasonable search was the sole issue in dispute. The adjudicator ordered the board to conduct a further search for certain records. Following the issuance of the interim order, the parties provided further representations concerning the board's subsequent search. The appellant takes the view that the board's subsequent search was not reasonable and further records should exist. In this order, the adjudicator finds that the board's subsequent search was reasonable; however, in order to correct an accidental omission in the interim order, the adjudicator orders the board to conduct a search relating to certain parts of the appellant's request.

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

**Cases Considered:** *Toronto Star Newspapers Ltd. v. Attorney General of Ontario and Human Rights Tribunal of Ontario (Re)*, 2018 CanLII 74211 (ON IPC).

### OVERVIEW:

[1] In Interim Order PO-3869-I, I found that the Health Professions Appeal and Review Board's (the board) search with respect to certain requested records was reasonable while I ordered the board to conduct a further search for other records. The appellant initially submitted a 30-part request to the board pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for documents pertaining to her

case file with the board. The appellant asked that the records be provided to her unaltered on a CD in their original archived digital format.

[2] The board issued a decision and index of records granting full access to some of the information requested, and found the balance of the request to be frivolous and vexatious within the meaning of section 10(1)(b) and 27.1 of the *Act*. The board also advised that it would not be providing access to source code information and "unaltered" documents on a CD/DVD in its original archived digital file format because in so doing it may reveal third party and/or personal information, within the meaning of sections 17(1) and/or 21 of the *Act*.

[3] The appellant appealed the board's decision to this office. During mediation, the board issued a revised decision providing additional records to the appellant. The board explained in the revised decision that for the records that were not disclosed, one was not retrievable and the other not retained. The board clarified that it was no longer relying upon the application of the frivolous and vexatious provisions of the *Act*. The board also confirmed that it was not relying upon any exemptions under the *Act*.

[4] The appellant confirmed receipt of the board's revised decision and additional disclosure but maintained her position that additional records should exist. The sole issue before me, therefore, was whether the board had conducted a reasonable search for records.

[5] After conducting an inquiry, I issued Interim Order PO-3869-I where I found that the board had not provided sufficient evidence to show that its search for certain records was reasonable. In Interim Order PO-3869-I, I ordered the board to conduct a new search by making the following order:

1. The board is ordered to conduct a further search in response to the appellant's request relating to this appeal, in particular it should search for the records relating to part 6 and parts 30(a) to 30(i) of the request, except for part 30(b) of the request.

2. I order the board to provide me with an affidavit sworn by the individual(s) who conducts the search(es), by **August 29, 2018** deposing its search efforts. At a minimum, the affidavit(s) should include information relating to the following:

- a. The names and positions of the individuals who conducted the searches

- b. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search, and

- c. The results of the search.

3. If the board locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from item 1 of this order.

[6] I ordered the board to search for a record relating to part 6 of the appellant's request (email source code confirming email with attached PDF file of application sent to the board on August 1, 2014) because the board's representations only supported that it could not obtain source code for *outgoing* email.

[7] The remainder of the records for which the board was ordered to conduct another search were records that it indicated it found during a subsequent search that was conducted after reviewing the appellant's representations (parts 30(a) to (i) except for 30(b)). However, after providing these records to the appellant, she made clear that she was of the view that they were not the records she referred to in her representations and were not responsive to her request. On that basis only, I ordered the board to conduct a further search for the records identified by the appellant.

[8] After conducting its search, the board provided an affidavit along with records it submits are responsive to the appellant's request. The appellant was provided with an opportunity to make representations which were, in turn, shared with the board who also provided further representations. The appellant continues to be of the view that further responsive records should exist and that the records provided by the board are not responsive to her request.

[9] In this order, I find that the board's subsequent search was reasonable.

## **DISCUSSION:**

### **Preliminary Issues**

#### ***a. Impact of Toronto Star Newspapers Ltd. v. Attorney General of Ontario and Human Rights Tribunal of Ontario***

[10] After receiving the appellant's representations concerning the board's subsequent search and her reconsideration request<sup>1</sup>, a copy of each was forwarded to the board for comment and the board provided representations. In its representations, the board

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<sup>1</sup> The appellant's reconsideration request will be dealt with in a separate order, to be issued.

submits that its adjudicative records<sup>2</sup> do not fall within the purview of the *Act* and refers to the Superior Court of Justice decision in *Toronto Star Newspapers Ltd. v. Attorney General of Ontario and Human Rights Tribunal of Ontario (Re)*.<sup>3</sup>

[11] In that decision, the Superior Court found that the presumption of non-disclosure of personal information, or reverse onus in sections 21(1) to (3) of the *Act* and related section is unconstitutional insofar as it applies to requests for production of adjudicative records. The Court suspended the declaration of invalidity for 12 months from the date of the judgement, April 27, 2018.

[12] The issue in this appeal is whether the board conducted a reasonable search for records, not the application of section 21 (or indeed any other exemptions) to the records. As such, I find that the *Toronto Star* decision is not relevant here.<sup>4</sup>

***b. Missing order provision in Interim Order PO-3869-I***

[13] The appellant also submits that I neglected to include an intended order provision in my interim order, ordering the board to search for records mentioned in parts 16, 24, 30(b) and the two remaining records under part 30(ii) of the request.<sup>5</sup> She made this submission in both her representations concerning the board's subsequent search and in her reconsideration request.

[14] After receiving the appellant's representations regarding both her reconsideration request and her submissions on the board's ordered search, they were shared with the board who was invited to reply. The board provided further representations, however, it did not address parts 16, 24, 30(b) and 30(ii) and the appellant's submission that I neglected to make an intended order.

[15] As noted, I included an order provision in Interim Order PO-3869-I that the board conduct a further search for records relating to parts 6, and 30(a) to 30(i), except for part 30(b) of the request. In reviewing that order, it is clear that I intended to also order the board to conduct a search for records relating to parts 16, 24, 30(b) and 30(ii).<sup>6</sup> I note that in paragraph 54 of the interim order I addressed these parts of the request by noting that the board was of the view that it has provided these records to the appellant yet the appellant was of the view that none of the provided records

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<sup>2</sup> Although I make no finding in this regard at this time, it is not clear to me that all the records at issue are in fact adjudicative records.

<sup>3</sup> 2018 CanLII 74211 (ON IPC).

<sup>4</sup> I also note that the declaration of invalidity does not take effect until April 27, 2019.

<sup>5</sup> The remaining records under part 30(ii) include fax cover sheets dated August 28 and September 18, 2014 addressed to the College of Veterinarians.

<sup>6</sup> With regard to part 30(ii), I did not intend to order the board to search for a fax cover sheet dated August 21, 2014 as indicated in the interim order.

was responsive to these parts of her request. I noted that I would order the board to search for these parts of the request or to provide an explanation of its attempts to locate these records.<sup>7</sup> However, the order provision itself does not include this.

[16] Since I did not include parts 16, 24, 30(b) and 30(ii)<sup>8</sup> in the order provision in Interim Order PO-3869-I, I agree that this was an accidental omission in my interim order and I will order the board to conduct a further search for these parts of the request.<sup>9</sup>

### **Reasonable Search**

[17] The sole issue in this appeal continues to be whether the board's search for responsive records is reasonable. In Interim Order PO-3869-I, I ordered the board to search again for parts 6 and 30(a) to (i) (with the exception of 30(b)) relating to the appellant's request. I will now discuss whether the board's search for these records subsequent to the issuance of the interim order was reasonable.

[18] As stated in Interim Order PO-3869-I, where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24 of the *Act*.<sup>10</sup> If, after conducting an inquiry, the adjudicator is satisfied that the institution carried out a reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the adjudicator may order further searches.

[19] The *Act* does not require the board to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it made a reasonable efforts to identify and locate responsive records.<sup>11</sup> To be responsive, a record must be reasonably related to the request.<sup>12</sup>

[20] 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 that are

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<sup>7</sup> With regard to part 30(ii) of the request, I noted in paragraph 55 of the interim order, that the board was unable to locate a fax cover sheet dated August 21, 2014, relating to this part of the request after conducting its subsequent search. I confirmed that the board did not have to prove with absolute certainty that this record does not exist and found that it had provided sufficient evidence to show that its search for this record was reasonable. I did not intend to order the board to search again for this fax cover sheet.

<sup>8</sup> Except for the fax cover sheet dated August 21, 2014.

<sup>9</sup> Section 18.01(c) of the IPC's *Code of Procedure*.

<sup>10</sup> Orders P-85, P-221 and PO-1954-I.

<sup>11</sup> Orders P-624 and PO-2559.

<sup>12</sup> Order PO-2554.

reasonably related to the request.<sup>13</sup> An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>14</sup>

[21] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.<sup>15</sup>

[22] In compliance with the interim order, the deputy registrar and manager of the Health Boards Secretariat (the boards secretariat), who conducted the subsequent search, provided an affidavit. The affiant confirmed that she conducted a further search for records relating to part 6 and parts 30(a) to 30(i), except for 30(b), of the appellant's request. The affiant searched and reviewed the board's records, her own records and made inquiries of board staff relating to the records. The affiant confirms that she searched the board's entire file relating to the appellant's request, including the board's case management system as well as her office notebook. The affiant submits she was able to locate all of the requested records except for the record related to part 30(a), a follow-up email sent to the appellant by an employee of the board on August 1, 2014.

[23] The appellant takes issue with the board's subsequent search. She continues to submit that the board's subsequent search for parts 6 and 30(a), and 30(d) to (h) of the request was not reasonable and that the records provided by the board in relation to these parts are not responsive to the actual request.

### ***Search for part 6 of the request***

[24] Part 6 of the appellant's request was for the email source code confirming email with attached PDF file of application which was sent to the board on August 1, 2014 by her lawyer.

[25] The appellant submits that the records provided to her by the board were not responsive to part 6 of her request. The appellant submits that because the board effectively provided source code piecemeal (i.e. it copied and pasted email header source code into a Word document, and then indirectly sent other portions of source code pertaining to email body content and PDF attachment content separately via an Outlook email) it is impossible to confirm that all of these separate source code elements are from the same original entity. The appellant submits that the source code for the email content and the PDF attachment content are not segregated entities; they

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<sup>13</sup> Orders M-909, PO-2469 and PO-2592.

<sup>14</sup> Order MO-2185.

<sup>15</sup> Order MO-2246.

comprise a single cohesive entity. The appellant submits that in order to confirm that all of the separate source code elements provided are from the same original entity, the board needs to provide the requested source code on CD as a continuous *in situ* desktop screen recording and highlight the PDF attachment base64 encoding. The appellant submits that this can easily be done using free and readily accessible desktop recording applications such as QuickTime. The appellant submits that this is the only acceptable way to fulfill this record request.

[26] The appellant further submits that the affidavit does not state that the board searched for records under an alternate spelling of the appellant's name which, she submits, the board misspelled, or that it sought permission from the assistant deputy minister for it to search the digital archives.

### *Finding*

[27] The board has now conducted three separate searches for records relating to part 6 of the appellant's request. Based on its most recent search and the information disclosed to the appellant, I find that its search for the source code is reasonable. I do not accept the appellant's position that the board's search is unreasonable because it did not provide the information in the manner she dictates in her representations. I find the board has provided the source code information to the appellant and I uphold the board's search for this information.

[28] The appellant also argues that the board failed to search for records using variations of her name which was at one point misspelled. The appellant raised this issue for the first time after my interim decision. I do not accept that the board's search for source code information was unreasonable because it did not search for variations of her name. I note that the appellant's representations, prior to the release of my interim order, did not set out the information that an employee at the board misspelled her name on various occasions. In my view, the appellant had ample opportunity prior to the release of the interim order to suggest that the board search a different spelling of her sur-name.

[29] As noted the appellant submits that the board should seek permission from the assistant deputy minister so that it can search for this part of her request in the digital archives. However, as the board has searched for and provided the source code information, I find that its search for this part of the request is reasonable and it is not required to also seek permission in order to search the digital archives.

[30] Accordingly, I uphold the board's search for part 6 of the appellant's request.

### ***Search for part 30(a) of the request***

[31] Part 30(a) of the request was for an email from an employee of the board to the appellant's lawyer dated August 1, 2014. The board states that the board employee is no longer employed with the boards secretariat and it was unable to locate the email in

its record holdings. The deputy registrar confirmed that in searching for the email she:

- inquired with the boards secretariat's IT specialists to determine whether a copy of the email was available in the boards secretariat's archives and no copy was available
- searched the boards secretariat's records for a saved digital copy of the email and no copy was located
- searched the boards secretariat's records for a saved paper copy of the email and no copy was located.

[32] The deputy registrar notes that the record may have been deleted and the only other copy may be in the board's digital archival record. The deputy registrar notes that the digital archival record can only be accessed in rare and extenuating circumstances with the approval of the assistant deputy ministry responsible for the boards secretariat.

[33] The appellant submits that the board should be required to do the following:

- provide a precise cost estimate for the search of this record in the digital archives
- seek the approval of the assistant deputy minister to conduct a search in the digital archives
- incur the full cost for the search given that it is responsible for displacing the record
- notify and invite representations from the employee who sent the email regarding this record.

### *Finding*

[34] Based on my review of the parties' representations, I find that the board's search for the email responsive to this part of the appellant's request is reasonable. I find that the board searched its record holdings for the responsive record. I find that a reasonable search does not require the board to look into its digital archival records.

### ***Search for part 30(c) of the request***

[35] Part 30(c) of the appellant's request was for a memo or other documentation chronicling the appellant's informal in-person access request, including the provision of her telephone contact information on October 30, 2014. The board was ordered to conduct a further search for this part of the request. As noted, the board's affidavit confirmed that it conducted a further search for a record relating to this part of the request, and after locating a responsive record provided same to the appellant.



[36] In her representations, the appellant does not address part 30(c) of her request.

*Finding*

[37] The board was ordered to conduct a further search with regard to this part of the appellant's request and according to its evidence it located and provided same to the appellant. The board has now conducted three separate searches for this part of the request and provided what it located to the appellant. Therefore, I find that its search for this part of the appellant's request is reasonable.

***Search for part 30(d) of the request***

[38] Part 30(d) of the appellant's request was for a memo by a board employee or other documentation chronicling telephone calls made to the appellant on October 30, 2014, and the following week. The appellant submits that although the board indicated that it located this record, she was never given a copy of it. She submits that the only record she was provided with was her informal in-person request on October 30, 2014. She also refers to the misspelling of her name submitting that the search was not reasonable because there is no evidence that the misspelled version of her name was used when searching for this record.

*Finding*

[39] According to the representations, the board conducted a further search for a record relating to this part of the request and provided to the appellant what it located. In my view, the appellant has not provided a reasonable basis for concluding that further records should exist. The board is not required to prove with absolute certainty that further records do not exist and I find that it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The board has now conducted at least three separate searches for responsive records and I find that its search for part 30(d) of the request is reasonable. I have already addressed the issue of the misspelled name when I addressed part 6 and I repeat and rely on that finding for this part of the request and for parts 30(e), 30(f) and 30(g) where the appellant makes similar arguments.

***Search for part 30(e) of the request***

[40] Part 30(e) of the appellant's request is for a memo or other documentation identifying dates and times a specified employee attempted to contact the appellant between November 21 and December 22, 2014. The appellant submits that none of the documents provided by the board after its ordered search detail any telephone calls (or other forms of contact) and that only her telephone call to the specified employee on November 21, 2014 is listed in the pages from the specified employee's notebook.

*Finding*

[41] The board was ordered to conduct a further search for this part of the request and located one responsive record. The appellant alleges that more records should exist. However, the board conducted the ordered search, its third in total, located a responsive record and provided it to the appellant. In my view, the board's search was reasonable. The board is not required to prove with absolute certainty that further records do not exist and I find that it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In addition, it is my view that the appellant has not provided a reasonable basis for concluding that further responsive records exist. I find that there is no evidence before me that would suggest that a further search would result in locating the information the appellant seeks. Accordingly, I find that the board's search with respect to this part of the request was reasonable.

***Search for part 30(f) of the request***

[42] Part 30(f) of the appellant's request is for the original Word (or other application) file for a memo written by an employee of the board on December 22, 2014. The appellant submits that the print screen provided by the board does not represent the requested document, being the original Word file for the memo written by a specified employee on December 22, 2014 entitled "File Memorandum Details." The appellant submits that this is evident by conducting a side-by-side comparison of the print screen document provided by the board with her attachment of the memo that she received from the board on April 8, 2016. The appellant submits that while the two documents may appear identical at a glance, closer scrutiny confirms that they are not identical with the appellant pointing to several inconsistencies between the two documents. The appellant submits that the board's affidavit is misleading as the record was not provided to her "as requested" and ordered.

*Finding*

[43] In her representations, the appellant distinguishes between the print screen provided to her by the board in its subsequent search and a memorandum she attached to her representations from March 2017 (attachment H3). She notes several differences between the two documents which include:

- The print screen document does not say "File Memorandum Details" unlike the H3 attachment
- The print screen document states "4:55 p.m. On December 22, 2014" while the H3 attachment has a separate category for "Date of Call" and "Time of Call"
- The print screen states "[the appellant's name] and College of Veterinarians" while the H3 attachment does not.

[44] Although the appellant is not satisfied because this is not the record, "as requested," I find the print screen is responsive to her request. I find that the board has completed a reasonable search for this part of the request, noting that to date it has completed three searches relating to the request. Again, I confirm that the board is not required to prove with absolute certainty that further records do not exist and I find that it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records to this part of the request. In addition, I find that there is no evidence before me that would suggest that a further search would result in locating the exact record requested by the appellant. Therefore, I find that the board's search with respect to this part of the request is reasonable.

***Search for part 30(g) of the request***

[45] Part 30(g) of the appellant's request is for an email she sent to the board on February 26, 2016 with the attached original PDF file and the corresponding source code for the email. The appellant submits that the board acknowledged that what it was providing in September 2018, with respect to this part of her request, was a Word document with "the email's internet header information." The appellant submits that the terms "email header" and "source code" are not interchangeable and refers to the document "Find Email Headers and Source Code," which set out that an email's header is one part of the email's entire multi-part source code. She submits that the board has effectively provided source code piecemeal (i.e. copied and pasted email header source code into a Word document, and then indirectly sent other portions of source code pertaining to email body content and PDF attachment content separately via an Outlook email) and it is, therefore, "impossible to verify that all of these separate source code elements are from the same original entity." She submits that in order to verify that all of the separate source code elements provided are from the same original entity, the board needs to provide the source code on CD as a continuous *in situ* desktop screen recording and highlight the PDF attachment base64 encoding.

***Finding***

[46] The board has now conducted three separate searches for responsive records relating to the request. For records relating to part 30(g) it has provided to the appellant what it located. The appellant is of the view that the information provided relating to this part of her request is incomplete as the various source code elements should comprise a single cohesive entity. However, in my view, the board has conducted a search for records relating to this part and has provided to the appellant what it located. Despite the appellant's dissatisfaction with the form of the information received, I find that the board search for records responsive to this part of her request is reasonable.

***Search for part 30(h) of the appellant's request***

[47] Part 30(h) of the appellant's request is identified as a fax cover sheet and faxed document she sent to the board on February 27, 2016. The board was ordered to

conduct a further search for this part of the request. As noted, the board's affidavit confirmed that it conducted a further search for a record relating to this part of the request, and after locating a responsive record provided same to the appellant.

[48] In her representations, the appellant does not address part 30(h) of her request.

*Finding*

[49] The board was ordered to conduct a further search with regard to this part of the appellant's request and according to its evidence it located and provided same to the appellant. The board has now conducted three separate searches for this part of the request and provided what it located to the appellant. Therefore, I find that its search for this part of the appellant's request is reasonable.

***Search for part 30(i) of the appellant's request***

[50] Part 30(i) of the appellant's request is identified as the formal access request letter the appellant hand delivered to the board on March 9, 2016. The board was ordered to conduct a further search for this part of the request. As noted, the board's affidavit confirmed that it conducted a further search for a record relating to this part of the request, and after locating a responsive record provided same to the appellant.

[51] In her representations, the appellant does not address part 30(i) of her request.

*Finding*

[52] The board was ordered to conduct a further search with regard to this part of the appellant's request and according to its evidence it located and provided same to the appellant. The board has now conducted three separate searches for this part of the request and provided what it located to the appellant. Therefore, I find that its search for this part of the appellant's request is reasonable.

***Conclusion***

[53] The appellant suggests that there is evidence of a "massive and deadly government cover-up" and suggests that a public inquiry into the matter be initiated.

[54] Despite the appellant's assertion that there is a "cover-up" going on, the evidence before me supports that the board has responded to the appellant's request in a reasonable way. Further, at least three searches have been completed by the board with respect to the access request.

[55] In this order, I find that the board's subsequent search for records responsive to part 6 and parts 30(a) and 30(c) - (i) of the appellant's request is reasonable. However, as noted, there was an accidental omission in the order provision in Interim Order PO-3869-I with respect to parts 16, 24, 30(b) and the remaining records under part 30(ii) of the request and I will order the board to conduct a further search with regard to

these parts of the request.

**ORDER:**

1. The board is ordered to conduct a further search in response to the appellant's request relating to this appeal, in particular, records that relate to parts 16, 24, 30(b) and 30(ii) (except for a fax cover sheet dated August 21, 2014) of the request.
2. I order the board to provide me with an affidavit sworn by the individual(s) who conducts the search(es), by **May 6, 2019** deposing its search efforts. At a minimum, the affidavit(s) should include information relating to the following;
  - a. The names and positions of the individuals who conducted the searches
  - b. Information about the types of files searched, the nature and location of the search and the steps taken in conducting the search, and
  - c. The results of the search.
3. If the board locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from item 1 of this order.
5. I uphold the remainder of the board's search as reasonable.

Original Signed By: \_\_\_\_\_  
Alec Fadel  
Adjudicator

\_\_\_\_\_ April 29, 2019