

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3816-I

Appeal MA17-59

Regional Municipality of York

August 8, 2019

Summary: The appellant submitted a verbal access request under the *Act* to the region to obtain a copy of his Ontario Works file. The region granted the appellant access to most of the responsive records located. The region withheld a small portion of one record claiming that disclosure would constitute an unjustified invasion of personal privacy under section 38(b). The appellant appealed the region's decision to this office and claimed that additional records should exist. During mediation, the appellant sought to expand the scope of his request to include surveillance footage of himself attending the region's office to pick up the records disclosed to him in response to his verbal request. The region took the position that any records relating to the appellant's attendance at its office fall outside the scope of the appellant's request. Given the unique circumstances of this appeal, the adjudicator orders the region to issue an access decision in response to the appellant's request for records relating to his attendance to the region's office. The adjudicator also finds that the region's search for the appellant's complete Ontario Works file was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 17.

OVERVIEW:

[1] The appellant submitted a verbal request to the Regional Municipality of York (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "any and all information held by Ontario Works with [his] name in any means stored (e.g. computers, paper, microfiche, etc.)."

[2] In a decision letter, dated March 16, 2016, the region granted the appellant with full access to 32 records it located onsite. The region granted partial access to one

record claiming that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). The region advised that it had additional files located at its offsite storage facility and the estimated fee to recover these records would be \$52.39. The region also advised the appellant that it does not have custody or control of the records held by the Region of Peel and transferred this portion of the request to the Region of Peel.¹

[3] The appellant appealed the region's decision in this appeal and a mediator was appointed to explore settlement with the parties. During mediation, the appellant questioned the reasonableness of the region's search for responsive records and indicated that he believed that additional records should exist, including records relating to his attendance at the region's office to pick up records. The appellant also advised that he wanted the names of the receptionist and security guard on duty on the day in question.

[4] In a second decision letter, dated April 7, 2017, the region wrote to the appellant to advise that in an effort to resolve part of the appeal, it was prepared to waive its fee to conduct a search to locate offsite records. In the same letter, the region also advised the appellant that his request for records relating to his attendance to its office was outside the scope of the original request.² In the alternative, the region advised that these records qualify for exemption under section 38(a), in conjunction with section 13 (danger to safety or health), and section 38(b) (personal privacy).

[5] The region issued a third decision letter, dated April 20, 2017, granting the appellant full access to 45 records located at an off-site storage facility.

[6] The region subsequently wrote to the appellant on June 14, 2017 to advise that it continues to take the position that the appellant's request for records relating to his attendance at its office "is outside of the scope of [the] original request which was only for your Ontario Works file." The region went on to advise the appellant that he would have to file a new request under the *Act* for these records.

[7] At the end of mediation, the appellant advised the mediator that he was not pursuing access to the information withheld under the personal privacy exemption under section 38(b). This removed the section 38(b) exemption from the scope of the appeal. The mediator's report indicates that the appellant confirmed that he would make a new request for records relating to his attendance to the region's office. However, the appellant continued to take the position that additional records responsive

¹ The appellant subsequently made a request to the Region of Peel for these records and appealed the decision he received from the region. The issues in that appeal were addressed in Interim Order MO-3841-I.

² The region provided this office with a copy of the requested video footage along with the names of the receptionist and security guard on duty the day in question.

to his original request should exist.

[8] The file was transferred to the adjudication stage of the appeals process and an adjudicator was assigned to the appeal to conduct an inquiry.

[9] During the inquiry, I sought and received the representations of the parties. In his representations, the appellant claims that additional responsive records exist, including records relating to his attendance to the region's office. The region was given an opportunity to provide representations in response to the appellant's submissions, which it did.

[10] In this order, I find that the appellant's request for records relating to his attendance to the region's office fall outside the scope of the request and do not reasonably relate to his original verbal request. However, I find that the region should have made a decision in response to the appellant's request for these records and order the region to issue an access decision. I also find that the region's search for the appellant's Ontario Works file is reasonable and dismiss this part of the appeal.

PRELIMINARY ISSUE:

What is the scope of the request? What records are responsive to the request?

[11] Section 17 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 record³;

(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

³ Though the *Act* requires requests to be made in writing, the appellant in this matter was able to make a verbal request for records under the *Act*; his access request was transcribed after he made an accommodation request to the region.

assistance in reformulating the request so as to comply with subsection (1).

[12] 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.⁴ To be considered responsive to the request, records must "reasonably relate" to the request.⁵

[13] The appellant's request sought access to:

Any and all information held by Ontario Works with my name on – any means stored (e.g. computer, paper, microfiche, etc.)

[14] The request form included the appellant's date of birth and Ontario Works ID number.

[15] The request form is dated March 1, 2016. Presumably, this is the date the region transcribed the appellant's verbal request.

[16] There does not appear to be any dispute that the appellant sought access to his complete Ontario Works file through the verbal request. There is also no dispute that the appellant did not request access to records relating to his attendance at the region's office until the mediation stage of the appeal process.

[17] Though the Mediator's Report indicates that the appellant advised he would file a new request, the appellant provided submissions during the inquiry in support of his position that the video footage of his attendance at the region's office should fall within the scope of this appeal. The appellant also submitted that the region should provide him with the names of the region's receptionist and security guard who were on duty when he attended the region's office to pick up the records. In his submissions, the appellant explained that his efforts to file a verbal request to the region for these records had been unsuccessful. However, I note that at the end of mediation, the region confirmed that it would accept further verbal requests from the appellant.

[18] The region takes the position that any records relating to the appellant's attendance at its office fall outside the scope of the request for the following reasons:

- Records capturing the appellant's attendance to the region's office were created after the date of the original request; and

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

- The wording of the appellant's request narrows its scope to records "held by Ontario Works" and the requested records are held by the region's Corporate Services Department.

[19] In support of its position, the region states that:

[its Corporate Services Department, Property Services Branch] is a completely different function from Ontario Works which falls under the Community and Health Services Department for a different and specific purpose unrelated to Property Services. There is no functional connection or purpose of the surveillance data that relates to the appellant's Ontario Works file.

[20] The appellant takes the position that records relating to his attendance at the region's office to pick up records are responsive to his verbal request for "any and all information" in his Ontario Works file.

Decision and Analysis

[21] The dispute between the parties is whether the appellant's request for records relating to his attendance at the region's office, which were created after he filed his verbal request, fall within the scope of the appellant's request.

[22] The region argues that the records relating to the appellant's attendance at its office to pick up records do not "reasonably relate" to the original request because they were created after the date of the request.⁶ The region also argues that the appellant's verbal request should be confined to records "held by Ontario Works".

[23] During the inquiry process, I wrote to the region and inquired whether it would be prepared to reconsider its position, given the fact that the region had previously provided accommodation to the appellant. At the same time, I also invited the region to provide representations in support of its position that the records responsive to the appellant's expanded request qualified for exemption under section 38(a), in conjunction with section 13 (danger to safety or health), and 38(b) (personal privacy). The region responded that it "adequately addressed the original transcribed request received on March 1, 2016. The appellant received a copy of his complete Ontario Works file up until March 1, 2016, in response to the wording of the request." The region did not provide representations on the claimed exemptions.

[24] Having regard to the wording of the original transcribed request, I agree that the scope of the request does not include records relating to the appellant's attendance to the region's office to pick up records as such records would have been created after the

⁶ Orders P-880 and PO-2661.

request was filed.

[25] However, I have considered the submissions of the parties and am of the view that the region could have done more to offer the appellant assistance in responding to his expanded request once he verbalized during mediation that he was also seeking access to records relating to his attendance at the region's office. Instead, the region took the position that the appellant should file another request – despite its knowledge that the appellant required accommodation to make his original request. As mentioned above, the appellant states that his subsequent attempts to file a verbal request have been unsuccessful. There is support for this submission in the region's correspondence to the appellant, dated June 16, 2017; in directing him to make a new request for the records related to his attendance at their offices, the region informs him that his "request must be in writing".

[26] Given the unique circumstances of this appeal, particularly the fact the appellant's original verbal request was transcribed by the region as opposed to being submitted directly by him or an agent, I find that the region should have, either during mediation, when it became aware of the appellant's request for the additional records or subsequently, when the appellant attempted to make a verbal request, treated the appellant's position as a verbal request and offered to transcribe it for him as it had for the original request.

[27] Accordingly, for the purposes of this appeal, I find that an appropriate remedy is to order the region to issue an access decision in response to the appellant's request for records relating to his attendance at the region's office to pick up the records.

[28] In arriving at this decision, I took into account the fact that the appellant consistently voiced his desire to obtain access to records relating to his attendance at the region's office during the mediation and inquiry stages of this appeal. Though the mediator's report indicates that the scope issue was settled at mediation, I find that, notwithstanding that the scope of the original request should not include the additional records, the region should have responded to the appellant's subsequent verbal requests, once the region was aware of them.

[29] I have decided that the purpose and spirit of the *Act*, combined with the unique circumstances of this appeal, dictate that the appropriate remedy is to order the region to issue an access decision. I note that section 43(1) and (3) state:

(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

...

(3) Subject to this Act, the Commissioner's order may contain any conditions the Commissioner considers appropriate.

[30] In Order M-618, former Commissioner Tom Wright explained that sections 43(1) and 43(3) do not afford the Commissioner unlimited remedial power, but they do embody the Legislature's intentions that the Commissioner should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act*. As this statement – and the established principles of statutory interpretation – imply, reference to the fundamental purposes of the *Act* must be made. These fundamental purposes are outlined in section 1, which state:

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[31] I commend the region for facilitating a process that enabled the appellant to make a verbal request initially, despite the wording in section 17(1)(a) of the *Act*. The region's accommodation of the appellant would appear to meet its obligations under the *Accessibilities for Ontarians with Disabilities Act*, and/or the *Ontario Human Rights Code*. However, I find that the region's strict adherence to the initial transcribed request under the circumstances could result in the creation of a barrier to the appellant exercising his right to request information about him held by the region.

[32] Having regard to the above, I will order the region to issue an access decision to the appellant in response to his request for the video footage of his attendance at the region's office, in addition to the names of the security guard and receptionist on duty on the same day.

[33] However, should the appellant wish to seek access to any other records held by the region relating to himself or his Ontario Works file created after March 1, 2016, he must file a new request by contacting the region directly. I am not prepared to order the region to issue an access decision for these records. It appears that during mediation, the appellant indicated that he also wanted access to any records created after March 1, 2016 placed in his Ontario Works file. However, the appellant did not address this issue in his submissions filed during the inquiry stage of the appeal. Nor

am I satisfied from the material before me that the appellant raised it in a manner that the region should have responded.

DISCUSSION:

Did the region conduct a reasonable search for records?

[34] The appellant submits that he has not received copies of receipts he submitted for reimbursement. He also submits that there should be records relating to his Ontario Disability Support Program (ODSP) claim and services the region arranged for him. The appellant also submits that records relating to the region's denial of benefits and a drug card should exist.

[35] The region provided representations explaining the searches it conducted in response to the appellant's verbal request. In support of its position that it conducted a reasonable search, the region provided affidavits from the caseworker assigned to the appellant's file along with the caseworker's supervisor. The supervisor indicates that from the appellant's Ontario Works start date to the date of the request, she had two interactions with the appellant regarding complaints he filed about his caseworker. She advised that the appellant's complaints were entered into the Social Assistance Management System (SAMS), which is a province-wide case management system. The supervisor advises that she received a request from the Access and Privacy Office for the appellant's "complete file." In response, she directed the Operations Support Clerk, "an experienced employee" who has completed all the requests for this particular office for the past two years, to retrieve the "active hard copy file in the office as well as SAMS case notes." The supervisor advises that hard copy files are typically retrieved from the case worker's office area and the SAMS case notes are searched and retrieved by inputting the client's number into the case management system. The supervisor reports that in this case the hard copy of the appellant's file was quickly retrieved along with the case notes and financial history. The caseworker advises that she made notes of her interactions with the appellant in SAMS and did not create any other records.

[36] In response to the appellant's specific concerns, outlined above, the ministry advised in its reply representations that:

- it conducted a further search of the appellant's file during the inquiry stage and confirmed that no other receipts were located other than a receipt it already located and provided the appellant;
- any ODSP records are within the custody and control of the Ministry of Community and Social Services, not the region; and
- no records relating to a denial of benefits or a drug card were located as the appellant's Ontario Works benefits were granted, not denied.

[37] The region provided a copy of a letter, dated May 30, 2016, that it provided to the appellant, which indicates that two replacement drug cards were mailed to him. This correspondence also confirms his eligibility to receive Ontario Works and references his pending ODSP application. The region also provided a copy of a Social Benefits Tribunal decision in which the appellant conceded that he did not submit transportation receipts for reimbursement.

Analysis and Finding

[38] 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 17.⁷ 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.

[39] 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.⁸ To be responsive, a record must be "reasonably related" to the request.⁹

[40] 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 reasonably related to the request.¹⁰

[41] 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.¹¹

[42] I have reviewed the submissions of the parties and am satisfied that the region conducted a reasonable search for a complete copy of the appellant's Ontario Works file. In my view, the region's retrieval of the physical file at its onsite and offsite locations and its location of the case notes and payment history of SAMS demonstrates it made a reasonable effort to identify and locate responsive records. In addition, I am satisfied that the individuals responsible for coordinating or conducting the searches were experienced in the relevant subject matter of the request and expended a reasonable effort to locate responsive records. I also note that the region conducted an additional search during the inquiry stage and did not locate any additional records.

⁷ Orders P-85, P-221 and PO-1954-I.

⁸ Orders P-624 and PO-2559.

⁹ Order PO-2554.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2185.

[43] 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.¹² In this case, the appellant argues that copies of receipts for reimbursement along with records of the region's denial of benefits and a drug card should be in his file. The appellant also argues that records relating to his OSDP claim should be located in his file. However, I find that there is insufficient evidence to establish a reasonable basis for the appellant's belief that such records exist. In fact, the region's evidence that there was no denial of Ontario Works benefits and that the appellant was subsequently approved for ODSP benefits suggests that the requested records may be in the custody or control of another institution. In any event, the *Act* does not require the region to prove with absolute certainty that further records do not exist. Rather, the region was required to provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records, and I am satisfied that it did.

[44] I find that the region conducted a reasonable search for the appellant's Ontario Works file and dismiss this part of the appeal.

ORDER:

1. I find that the region's search for the appellant's Ontario Works file was reasonable and dismiss this part of the appeal.
2. I order the region to issue an access decision to the appellant in response to his request for video surveillance footage of himself and the names of the security guard and receptionist on duty the day he attended the region's office to pick up records. The region's access decision shall be made in accordance with section 19 of the *Act*, treating the date of this order as the date of the request.
3. I remained seized of this appeal in order to deal with any other outstanding issues arising from order provision 2 of this interim order.

Original Signed by: _____

Jennifer James
Adjudicator

August 8, 2019

¹² Order MO-2246.