Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4119-I

Appeal PA19-00560

Ryerson University

March 11, 2021

Summary: The appellant sought, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), a copy of any agreements made between Ryerson University (the university) and a specific law firm for the provision of legal services to the university. The university denied that responsive records exist. The appellant appealed the decision on the basis of his belief that the university did not conduct a reasonable search for responsive records.

In this interim order, the adjudicator orders the university to conduct another search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, sections 24, 52(8), 52(13), and 56(1).

OVERVIEW:

[1] This order addresses the issue of the search by the university for contracts or retainer agreements between it and a specific law firm.

[2] The requester sought, under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), a copy of any agreements made between Ryerson University (Ryerson or the university) and a specific law firm for the provision of legal services to the university. Specifically, the requester sought:

> ...the contract and retainer(s) that were signed by Ryerson University (Ryerson) and [a named law firm] in 2017/2018/2019 when [the law firm] was hired by Ryerson to provide legal services.

[3] The university issued a decision letter (the initial decision letter)[1] to the requester denying the request on that basis that his request was frivolous or vexatious. In this letter, Ryerson states that:

> ...please be advised that this request is denied on the basis that your request is frivolous or vexatious. Ryerson's decision is made in accordance with section 10(1)(b) of *FIPPA* as your pattern of conduct amounts to an abuse of right of access.
>
> In any event, [the law firm] is normally retained as counsel for the university's insurer and therefore, no such retainer would exist as between [the law firm] and Ryerson, and there would be no responsive records.

[4] The requester (now the appellant) appealed the university's decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was appointed to explore the possibility of resolution.

[5] During the course of mediation, the appellant challenged the university's characterization of his request as frivolous or vexatious. He further challenged the university's position that responsive records do not exist.

[6] The university agreed to conduct an additional search for records in the Office of the General Counsel and Secretary of the Board of Governors and issued a revised decision letter to the appellant dated February 21, 2020. The university no longer claimed that the request was frivolous or vexatious but it maintained the position from its initial decision letter that responsive records do not exist.

[7] The appellant continued to take the position that responsive records ought to exist and advised that he wished to pursue the appeal at adjudication. Therefore, the reasonableness of the university's search for responsive records is the sole issue in this appeal.

[8] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry. Representations were then sought from and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In this interim order, I order the university to conduct another search for responsive records.

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[1] The initial decision letter is dated November 14, 2019.

PRELIMINARY MATTERS

[10] The appellant made a number of assertions about Ryerson in his representations and requests for specific approaches to dealing with this appeal. I have addressed, below, only those matters that are related to the search issue being addressed in this order.

1. In-person hearing to call witnesses

[11] The appellant sought to have this inquiry conducted by means of an in-person hearing and to have witnesses subpoenaed. He states that the live testimony of witnesses could support his representations and expose "Ryerson's fraud/fabrication/forgery."

[12] Pursuant to sections 52(8)[2] and 56(1)[3] of *FIPPA*, I may, as the Commissioner's delegate, summon and examine on oath any person who, in my opinion, may have information relating to the inquiry.

[13] I have reviewed the appellant's request and the written submissions of both the university and the appellant. I find that this is not the case where an in-person inquiry is required in order for me to adjudicate upon the reasonable search issue regarding the records requested in this appeal. Nor do I find that it is necessary for me to subpoena witnesses in order to make a decision in this appeal.

[14] As well, the appellant has not provided me with information to substantiate his position that it is necessary to have witnesses testify in-person before me to provide evidence about "Ryerson's fraud/fabrication/forgery" in relation to Ryerson's search for responsive records. In the circumstances of this appeal, it was not necessary for me to make a finding on any fraud, fabrication or forgery by Ryerson in order to determine whether Ryerson conducted a reasonable search for the records requested by the appellant.

2. Insurer records

[15] The appellant would like the IPC to conduct an inquiry and review documents about the "alleged and unnamed insurer" mentioned in Ryerson's decision letters. He would also like to know the name of the insurance company.

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[2] Section 52(8) reads:
The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose, the Commissioner may administer an oath.

[3] Section 56(1) (the delegation powers) reads:
The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation.

[16] Further, the appellant would like to know the name of the Ryerson employee (and the department in which that person works) who claimed in the decision letters that any responsive records would be in the possession of an insurance company because the university's insurer is the entity that retains the law firm.

[17] If the appellant would like access to records about the insurance company mentioned in the decision letters, as well as information about the Ryerson employee that referred to the insurance company, he will have to make a separate request to Ryerson for them. I find that such records are not within the scope of the appellant's request, set out above, that is being adjudicated in this inquiry. The appellant's request is for contracts or retainers between the law firm and the university, signed by the university, which are in the university's custody or control. Although ambiguity in a request should generally be resolved in favour of the requester, I find there is no ambiguity here since the appellant specially sought agreements signed by Ryerson.

3. Communication between Ryerson and the IPC

[18] The appellant alleges that there were "backchannel communications" between the IPC and Ryerson in the course of processing this appeal.

[19] The appellant maintains that it is improper for the IPC and Ryerson to communicate directly with each other.

[20] I disagree with the appellant that there have been "backchannel communications" between the IPC and Ryerson during the inquiry. Any communication by me with Ryerson during the inquiry was for the purpose of seeking or receiving representations.

[21] Section 52(13) of *FIPPA* allows such communication. It reads:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50(3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

[22] Therefore, with regard to the communication between the IPC and Ryerson for the purpose of seeking or receiving representations in this appeal, the appellant is not entitled to be part of any communication between the IPC and Ryerson. Likewise, Ryerson is not entitled to be part of any communication between the IPC and the appellant.

[23] Section 52(13) is tempered by the common law requirements of procedural fairness, which are reflected in the IPC's *Practice Direction 7* on the sharing of

representations among the parties to an appeal. Ryerson's representations were shared with the appellant in accordance with this *Practice Direction*.

[24] I am satisfied that any communication between Ryerson and the IPC during the adjudication of this appeal was made in accordance with *FIPPA* and for the purpose of the inquiry being conducted.

DISCUSSION

Did the university conduct a reasonable search for records?

[25] This order addresses the issue of the search by the university for contracts or retainer agreements between it and a specific law firm.

Representations

[26] The university indicates that its decision letter advised the appellant that the law firm is normally retained as counsel for the university's insurer, which means that there would be no such contracts or retainers between the law firm and the university.

[27] The university states that its Administrative Coordinator, Legal Support (the coordinator), an employee within the relevant department of the university who has the requisite experience and expertise, conducted a search for the responsive records. The university submits that, as a part of her search, the coordinator discussed the request with the university's Compliance and Policy Advisor. The coordinator also conducted a search in her own email account. The results of her search indicated that there were no responsive records.

[28] The university further states that the adequacy of the coordinator's search is supported by the university's practices with respect to how relationships with external legal counsel are structured. Specifically, the Office of the General Counsel, which the coordinator works in, is the relationship holder for external legal counsel at the university for uninsured legal claims. It states that if there had been responsive records, which it specifically denies that there were, these records would be held within the coordinator's office. It states:

> Similarly, with respect to insured claims against the university, external law firms retained to represent the university for such claims are retained by the university's insurer; accordingly, again, in such cases, there would be no records akin to the responsive records.

[29] The university says that to confirm its conclusion that there are no responsive records, it contacted the law firm named in the request and it provided a letter from the

law firm dated February 19, 2020 with its representations.[4] This letter states:

> We understand that a *FIPPA* Request has been made for a copy of a retainer agreement between Ryerson University and [the law firm] regarding the retainer of [this law firm] to defend Ryerson University in Ontario Superior Court of Justice Claim No. [#], issued out of the [named] Small Claims Court.
>
> Please be advised that there was no such retainer agreement. [The law firm] has an ongoing relationship with Ryerson, and represents Ryerson with respect to a number of matters. As such, there is no "retainer agreement" with respect to each new matter.
>
> We should add that, if such a retainer agreement did exist, in our view it would be subject to solicitor-client privilege. However, as indicated, in this case such an agreement simply does not exist.

[30] The university states that there is no indication that the records requested may have once existed but no longer do, or that responsive records have been destroyed in accordance with its authorized records retention schedule.

[31] The appellant refers to the decision letters that state that responsive records are in the possession of an insurer.

[32] The appellant also disputes Ryerson's position that it did not directly retain the law firm. He refers to information he received from another request where it appears the law firm issued documents upon the suggestion and instruction of Ryerson. He says that in these documents, Ryerson is referred to as the client of the law firm.

[33] Specifically, the appellant refers to a decision letter in another request where he sought the dollar amount (including legal fees, retainer fees, applicable taxes and other charges) paid by the university to the law firm in 2018 and 2019. He states that this other decision letter seems to suggest that:

a. Ryerson and [the law firm] had/have a contractual relationship.

b. Ryerson was invoiced for the services it received from [the law firm].

c. [The law firm] invoiced Ryerson for the legal services it provided to Ryerson.

d. Ryerson made payments to [the law firm].

e. Ryerson paid legal and retainer fees to [the law firm].

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[4] This letter from the law firm was also referred to and enclosed with the university's revised decision letter sent to the appellant.

f. Ryerson has at least fourteen records relating to the contractual relationship between [the law firm] and Ryerson.

g. Ryerson has document(s) that mention the name of the employee(s) or department(s) that made payment(s) to [the law firm].

h. Ryerson has document(s) that mention the name of the employee(s) or department(s) that authorized payment(s) to [the law firm].

[34] The appellant refers to the letter provided by the university from the law firm that indicates that a specific retainer agreement does not exist. However, the appellant states that this does not prove that no other responsive retainer exists. He points out that this letter relates to a retainer agreement for a specific small claims court proceeding, while his request was not limited to a specific court proceeding.

[35] As well, the appellant points out that the court proceeding referred to in the law firm's letter provided by the university did not exist during the years 2017 and 2018, which are two of the three years referred to in his request. He states that the law firm's letter:

> ...contains no clear and explicit statement suggesting that there is no contract and retainer whatsoever between Ryerson and [the law firm]. Even if "there is no retainer agreement with respect to each new matter," it does not mean that there is no contract and retainer whatsoever. [The letter] does not mention any named or unnamed insurer.

[36] The appellant further submits that Ryerson's search was not reasonable, as:

- only one email account was searched by an employee (whose name and title have not been disclosed to me) is not sufficient; and,
- Ryerson has not explained why it did not contact the insurer to obtain a copy of the responsive records.

[37] In reply, the university repeats its previous representations. It reiterates that there are no responsive records, either in the university's possession or not in the university's possession.

[38] The university states that the other request referred to by the appellant was for invoices paid by the university to the named law firm in 2018 and 2019 and other related matters that are exempt from disclosure pursuant to section 19 of the *Act* (solicitor-client privilege). The appellant did not appeal the decision in that request.

[39] The university states that the fact that the university paid invoices to the named law firm in 2018 and 2019 is consistent with the university's position that the named law firm has an ongoing relationship with the university such that there is no "retainer

agreement" with respect to each new matter.

[40] In sur-reply, the appellant states that Ryerson makes contradictory claims, namely, that the responsive records are possessed by an insurer and that responsive records do not exist. He also submits that Ryerson acknowledges that, between 2017 and 2019, it paid "invoices" (legal and retainer fees) to the law firm. He states that legal and retainer fees imply the existence of a contract and/or retainer between Ryerson and the law firm.

[41] The appellant refers to Ryerson's decision letters, which he submits demonstrate that the responsive records are possessed by an unnamed insurer. He also refers to evidence from his previous request that shows that the university's legal department retained the named law firm as external counsel.

Analysis/Findings

[42] 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.[5] 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.

[43] 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.[6] To be responsive, a record must be "reasonably related" to the request.[7]

[44] 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.[8]

[45] 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.[9]

[46] 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.[10]

[47] The university was asked in the Notice of Inquiry to provide details of any

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.
[10] Order MO-2246.

searches carried out to respond to the request, including:

- by whom were they conducted,
- what places were searched,
- who was contacted in the course of the search,
- what types of files were searched, and
- what were the results of the searches?

[48] The university was also asked about its record retention policies or practices and whether responsive records exist that are not in its possession.

[49] The request seeks the contract and retainer(s) for legal services that were signed by the university and the law firm from 2017 to 2019.

[50] In its revised decision letter, the university states that a search was conducted by the university's Office of the General Counsel and Secretary of the Board of Governors on January 10, 2020 and no responsive records were found.

[51] From the university's representations, it appears that it only conducted a search in one email account in the identified office. Specifically, it said that its Administrative Coordinator, Legal Support, in the Office of the General Counsel, conducted a search in her email account, and there were no responsive records.

[52] The university's position is that, when claims are made against it for insured matters, the insurer retains the law firm. It indicates, however, that for non-insured claims, the university retains the law firm directly. Based on the wording of the request, as noted above, I find that it encompasses contracts or retainers between the law firm and the university, not those between the law firm and the university's insurer.

[53] In support of its position that no responsive records exist, the university referred in both its revised decision letter and in its representations, to the letter dated February 19, 2020,[11] from the law firm. This letter addresses only a specific Small Claims Court case and a retainer agreement for it, not any or all contracts or retainers for the entire three-year period set out in the request.

[54] I also note that the university's evidence is that it did use the law firm for legal services in 2018 and 2019, and it paid the law firm's invoices for them. I am not satisfied from the university's evidence that it has properly searched for any retainer agreements related to these 2018 and 2019 invoices or for the year preceding, 2017.

[55] As set out above, the university was asked to provide details of the searches it

[11] Referred to above.

conducted. I find the evidence provided in response to be insufficient to establish that the university conducted a reasonable search for responsive records, namely the contract and retainer(s) that were signed between the university and the law firm for the three-year period between 2017 and 2019.

[56] I find that the university has not expended a reasonable effort to locate records that are reasonably related to the request. Taking into account the parties' representations and the initial and revised decision letters, I find that Ryerson did not conduct a proper search for responsive records.

[57] In particular, I find that the university did not take into account the following considerations:

- The university could have searched for responsive paper records in the Office of the General Counsel and Secretary of the Board of Governors. If a responsive contract or retainer exists, it could have been held in paper format, especially if a copy was not emailed between the parties for the relevant three-year period.

- The university could have searched for responsive email records in other email accounts, apart from that of the coordinator, in the Office of the General Counsel and Secretary of the Board of Governors. If a responsive contract or retainer exists, other individuals in that office, including legal counsel, could have held such.

- The university also could have searched for responsive electronic and paper records in the record holdings of the university staff that would have been signatories to any contract or retainer between Ryerson and the law firm. I note that the university has retained the law firm for non-insured matters.

- Finally, the university could have asked the law firm for the responsive records sought for the relevant three-year period, but did not. I note that the law firm has an ongoing relationship with Ryerson, and represents Ryerson with respect to a number of matters.

[58] As such, I will order the university to conduct another search for responsive records, taking into account the wording of the request and the considerations outlined in this order.

ORDER:

1. I order the university to conduct a further search in response to the appellant's request in accordance with the considerations set out in this order.

2. I order the university to provide me with an affidavit sworn by the individual(s) who conduct(s) the further searches **by April 12, 2021**, describing its search efforts. The affidavit(s) should include the following information:

    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(es) and the steps taken in conducting the search(es); and

    c. the results of the search(es)

3. The information should be provided by way of representations with the affidavit that may be shared with the appellant, unless there is an overriding confidentiality concern.

4. If the university locates additional responsive records because of its further search, I order the university to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

5. I reserve the right to require the university to provide me with a copy of the information it discloses to the appellant in accordance with this order.

6. I remain seized of this appeal in order to address the matters arising out of this order.

7. The timelines noted in this order may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: March 11, 2021

Diane Smith
Adjudicator