

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4256

Appeal PA19-00498

Social Benefits Tribunal

April 28, 2022

Summary: This order addresses one of two related requests made by the same individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Social Benefits Tribunal (SBT) for records relating to the SBT's processing of new SBT appeal files for him. The SBT issued a decision stating that no responsive records exist. The appellant appealed the SBT's decision to the IPC, claiming that responsive records should exist. After conducting several additional searches during the mediation stage of the appeal, the SBT located one responsive record. The appellant was still not satisfied with the SBT's search. In this order, the adjudicator finds that the SBT's search for responsive records was reasonable. She upholds the search and dismisses the appeal.

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

OVERVIEW:

[1] An individual with a number of appeals before the Social Benefits Tribunal (the SBT) had questions about the manner in which the SBT was processing his appeals with that tribunal. The individual was concerned that SBT was placing restrictions on the number of appeals that he could make to the SBT with respect to decisions made pursuant to the *Ontario Disability Support Program Act, 1997 (ODSPA)*.¹

[2] In an attempt to gain some clarity, the individual submitted a request to the SBT under the *Freedom of Information and Protection of Privacy Act* (the *Act*). This order

¹ S.O. 1997, c.25. Sched. B.

addresses the reasonableness of the search conducted by SBT to locate records responsive to that request.

[3] The requester sought access to the following information:

[A]ll recordings and documentation regarding my conversations with [the SBT staff member] that represented herself as [named individual] on April 20, 2018. I would like this to include all documents that the staff member, [named individual], used when [informing me] that the SBT was not opening appeals for [me] anymore. [Named individual] indicated that she was given instructions and I expect those to be included in this request.

[4] The SBT issued a decision stating that no responsive records were located. Specifically, the SBT stated: "The SBT does not record telephone conversations and is unable [to locate] any documentation with respect to this conversation."

[5] The requester, now the appellant, appealed the SBT's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to facilitate a resolution between the parties.

[6] During mediation, the SBT confirmed that it searched for but did not locate any records relating to the conversations that occurred between the appellant and the staff member named in the request, on April 20, 2018.

[7] The appellant stated that he continues to believe that records relating to this conversation should exist.

[8] The SBT agreed to conduct another search for responsive records. Following that search, the SBT advised the appellant that it does not have any recordings of the telephone conversations but that it had located one additional record, which it disclosed in its entirety to the appellant.

[9] The appellant advised that he continues to believe that more records responsive to his request should exist. As a result, the issue on appeal is whether the SBT conducted a reasonable search for records responsive to the appellant's request.

[10] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the SBT. The SBT provided representations.

[11] I then sought representations from the appellant. I provided him with a Notice of Inquiry and a copy of the SBT's representations, in their entirety, which I shared in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[12] Upon review of the file and the parties' representations, I decided that I did not need any further information from the parties.

[13] In this order, I uphold the SBT's search for responsive records as reasonable and dismiss the appeal.

DISCUSSION:

Did the SBT conduct a reasonable search for records responsive to the appellant's request?

[14] The appellant disputes the SBT's search for responsive records, claiming that additional records should exist, in particular, a recording of a telephone conversation that he had with a member of the SBT staff who, he submits, informed him that the SBT would not be opening new appeals for him.

[15] 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 24.² 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.

[16] 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.³ To be responsive, a record must be "reasonably related" to the request.⁴

[17] 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.⁵ 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.⁶

[18] 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.⁷

Representations

The SBT's representations

[19] The SBT submits that it has done a complete search and no records responsive to the request exist. It provided a sworn affidavit describing the searches that were

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

⁷ Order MO-2246.

conducted.

[20] The SBT explains that the appellant seeks records relating to a telephone inquiry he made to the SBT. The SBT submits that although the appellant was unable to identify the staff member to he spoke, he alleges he was told that staff had been instructed not to open any new appeals for him.

[21] The SBT's affidavit on the issue of search, was sworn by the individual who is the Coordinator of the Access to Records and Information Office (the Coordinator) at Tribunals Ontario, of which the SBT is a part. In that affidavit, the Coordinator submits that she has coordinated access requests for the SBT for nearly 10 years and has significant knowledge and experience related to SBT processes and records.

[22] The Coordinator submits that, in addition to general expertise about SBT records, she has also responded to previous access requests by the appellant for SBT records. She submits that as the request was straightforward and specific, it needed no clarification and she responded literally to it.

[23] The Coordinator submits that she advised the Assistant Registrar at the SBT of the request, providing her with copies of the request, and asked that the SBT search for responsive records. She states that, subsequently the Assistant Registrar of the SBT confirmed that SBT staff had completed their "first-round search" and provided her with one email exchange that was disclosed to the appellant. The Assistant Registrar also confirmed for the Coordinator that the SBT does not record telephone conversations between its staff and members of the public, including its appellants.

[24] The Coordinator advised that during mediation, the SBT agreed to conduct another search. She submits that again, the Assistant Registrar confirmed that an additional search had been conducted and no additional records responsive to the request were located. The Coordinator submits that SBT staff, including Appeal Resolution Officers who are most directly involved in processing SBT appeals, searched through their staff notes, emails and shared drives, as well as the SBT's case management system for responsive records.

[25] The Coordinator submits that based on the Assistant Registrar's expertise regarding SBT processes and records and her own considerable familiarity with the SBT and the appellant's prior access requests, she is satisfied that the search for records was reasonable and complete. She concludes her affidavit stating: "To my knowledge, neither I, nor the SBT, can do anything more to search for responsive records."

Appellant's representations

[26] With his representations, the appellant provided a "transcript" of what he describes as the "first telephone conversation" that he had with an SBT staff member on a particular date. It is a document that appears to have been drafted by the appellant himself, that sets out a conversation that he had, on the telephone, with a member of SBT staff. He submits that he provided a copy of that transcript of the

telephone conversation to the SBT in 2018 and then again, in 2019.

[27] The appellant submits that the transcript reveals that during that telephone conversation he was clearly advised by the SBT staff member that the SBT would not open an appeal for him and that he was given no explanation as to why. He submits that, as revealed by the transcript, he was directed to speak to another staff member. He submits that although he left a voice mail with that individual, his call was never returned. The appellant submits that the transcript demonstrates that no misunderstanding exists; SBT staff were instructed to refuse to open new appeals for him.

[28] The appellant submits that, for a staff member to clearly and precisely inform him that the SBT was not opening any new appeals for him, there must have been some prior internal discussion and/or decision made. He submits that the SBT has failed to provide him with any records that contain details about any such internal discussion, decision and subsequent direction to staff to inform him that the SBT was not opening any new files for him. The appellant submits that he seeks access to the information that would necessarily have preceded that telephone conversation and suggests that it could be in the form of an email, internal memo, meetings notes or something else. He submits that information that demonstrates some sort of discussion about not opening new appeals for him and then also instructions to staff to inform him must exist.

[29] The appellant acknowledges that he received access to several emails in which SBT staff are advised not to open new appeals for him, but says that none of those emails contain the reasoning behind the instruction. He submits that records containing the instructions to staff that he seeks would predate those emails.

[30] The appellant submits that the SBT has not indicated that any verbal instruction was provided to justify or explain the instruction to staff. He states that he "feels that information MUST exist" that reveals conversations amongst SBT staff explaining the reasoning behind the direction that they are not to open new appeals for him.

Analysis and findings

[31] I am satisfied that the SBT conducted a reasonable search for records responsive to the appellant's request.

[32] The SBT's representations demonstrate that experienced employees, knowledgeable in the types of records held by the SBT, made reasonable efforts to locate records responsive to the appellants' request, including recordings of any telephone conversations that the appellant had with SBT staff. I accept the SBT's explanation that it does not record calls between its staff and members of the public, including its appellants. I also accept that, despite multiple searches for other types of responsive records reasonably related to the request, such as emails, memoranda or meetings notes, no such records were located.

[33] Although, as indicated above, 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. While I appreciate that the appellant is convinced that records laying out the reasoning behind the messaging provided to him by SBT staff must exist, he has provided no reasonable basis for me to reach such a conclusion. From the information before me, it appears that the SBT made a procedural decision regarding the processing of the appellant's files; that if the appellant contacted the SBT to open a new appeal file, staff were not to open an appeal but were to direct him to speak to a manager.

[34] Additionally, as mentioned above, the SBT is not required to prove with certainty that additional records do not exist in order to satisfy the requirements of the *Act*. It must only show that it has made a reasonable effort to locate responsive records. Based on the evidence before me, I find that it has. The SBT's representations demonstrate that experienced employees knowledgeable in the types of records that SBT retains and the type of information that the appellant seeks access to, made reasonable efforts to locate responsive records and none were located.

[35] For these reasons, I find that the SBT's search for records responsive to the appellant's request was reasonable and in compliance with its obligations under section 24 of the *Act*. I uphold the search and I dismiss the appeal.

ORDER:

I uphold the SBT's search for records responsive to the appellant's request and dismiss the appeal.

Original Signed by: _____

Catherine Corban
Adjudicator

April 28, 2022