Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4320-I

Appeal PA20-00470

Human Rights Tribunal of Ontario

October 31, 2022

Summary: The appellant alleges that the Human Rights Tribunal of Ontario (the HRTO) failed to conduct a reasonable search in response to his request for all emails that contain his name and/or any of his three HRTO file numbers for a specified date range. In this interim order, the adjudicator finds that the HRTO did not conduct a reasonable search and she orders it to conduct a further search for responsive records.

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

Orders Considered: Orders 134 and P-880.

OVERVIEW:

[1] The Human Rights Tribunal of Ontario (the HRTO), part of the Social Justice Division (SJD) of Tribunals Ontario, received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all emails that contain the appellant's name and/or any of his three HRTO file numbers between a specified date range (HRTO files).

[2] The HRTO issued a decision taking the position that some records fall outside the scope of the *Act* under the draft orders or decisions exclusion at section 65(3.1) of the *Act*, and that email communications between adjudicator and staff and those encompassed by deliberative privilege would not be disclosed. However, the appellant

was granted partial access to the remaining records located.

[3] The appellant appealed the HRTO's decision to the Office of the Information and Privacy Commissioner (the IPC).

[4] During mediation, the appellant confirmed that he was not pursuing access to the portions of the records withheld under an exemption or exclusion. However, he took the position that additional records should exist, including correspondence sent between the HRTO and the respondents to his HRTO files (the respondents), without the appellant being copied, and correspondence that took place on a specific date with the Social Justice Tribunal of Ontario (SJTO)[1] and the Premier of Ontario regarding the HRTO files. The HRTO advised the mediator that no additional responsive records exist and no further searches were conducted.

[5] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry.

[6] As the adjudicator assigned to this appeal, I decided to conduct an inquiry into this matter. Representations were exchanged between the HRTO and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In this interim order, I find that the HRTO did not conduct a reasonable search and I order it to conduct a further search for responsive records.

DISCUSSION:

[8] The sole issue in this appeal is whether the HRTO conducted a reasonable search for responsive records.

[9] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[2] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[10] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[3]

[11] The *Act* does not require the institution to prove with certainty that further

[1] The HRTO was part of Social Justice Tribunals Ontario before being incorporated into Tribunals Ontario.
[2] Orders P-85, P-221 and PO-1954-I.
[3] Order MO-2246.

records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[4] that is, records that are "reasonably related" to the request.[5]

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[6] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[7]

[13] 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.

Representations of the parties[8]

[14] The HRTO submits that its search for records was reasonable, complete and thorough, that nothing more can be done to search for responsive records and that further searches will not lead to the discovery of additional records.

[15] The appellant submits that the HRTO failed to perform a complete search in response to his request and because the HRTO never clarified the request with the appellant, any ambiguity needs to be ruled in his favour.[9]

[16] In response, the HRTO submits that the appellant's access request was straightforward and easy to understand and it is inaccurate to say that if the request had been clarified, the appellant would have been given all responsive records.

The HRTO's affidavit

[17] To support its position, the HRTO submits an affidavit, sworn by an employee (the employee) in the Access to Records and Information Office (the access office) for Tribunals Ontario.[10]

---

[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] While the appellant states that the main issue in this appeal is that the HRTO has failed to release the records, it said it would in its decision, I disagree. The HRTO's decision was clear that it was disclosing responsive records, except those between adjudicator and staff, and those encompassed by deliberative privilege, and excluded under section 65(3.1) of the *Act*. The sole issue in this appeal is whether the HRTO conducted a reasonable search for records responsive to the appellant's request.
[9] See Orders P-134 and P-880.
[10] The access office of Tribunals Ontario is responsible for processing access to information requests received by the administrative tribunals under the umbrella of Tribunals Ontario, which includes the HRTO.

[18] The HRTO explains that the employee is knowledgeable and experienced in searching for records and she used her best efforts to locate records reasonably responsive to the request. It explains that this employee has the necessary knowledge and expertise to lead thorough and reasonable searches for records and that she had the assistance of other team members, including experienced counsel. It also explains that the HRTO's acting assistant registrar (the assistant registrar) was the liaison between the access office and the HRTO, as she was familiar with the appellant's HRTO files and she had worked on other access requests for internal communications with the HRTO.

[19] The employee affirms that she responded literally to the appellant's access request because it was straightforward, specific and needed no clarification. She advises that a copy of the appellant's request was forwarded to the assistant registrar to coordinate a search of HRTO staff's internal records. In response, the employee confirmed that searches were conducted within work email accounts and on the case management systems, and she received responsive records, which included the communications of case processing officers, team leads and assistant registrars in relation to the appellant's HRTO files. She also indicates that, after the decision was sent to the appellant, he advised her that the disclosed records did not include all of the emails responsive to his request. In the affidavit, the employee affirms that the emails alleged to exist by the appellant were not found and, to her knowledge, do not exist. She also affirms that she or anyone else at the HRTO, cannot do anything further to search for responsive records.

[20] The appellant submits that the HRTO only performed a search for his first HRTO application and only provided details about this search; it failed to conduct a search for his other two HRTO files and to provide the details of these searches. He explains that his second HRTO file would have included at the very least his application to the HRTO and motions filed related to that file. He also explains that his third HRTO file would have included correspondence notifying the respondents of the receipt of that application or requesting information from the appellant's union.

[21] The appellant submits that the HRTO was very selective in the records it disclosed to him. He refers to Order PO-4174, where, in response to an appellant's request for records about herself, the HRTO disclosed everything related to her in the HRTO's files, including "the appellant's HRTO application files, internal staff records related to these applications and records related to the appellant's correspondence with the HRTO".

[22] He compares the circumstances of the current appeal to that in Interim Order MO-3693-I, where the adjudicator in that appeal found that she had insufficient evidence to uphold the reasonableness of the city's search for records relating to Study B, where the city could not explain why the appellant only received records in relation to Study A.

[23] In response, the HRTO submits that its representations and affidavit address all three of the appellant's HRTO files and the vast majority of the responsive records relate to the first HRTO file. It explains that, at the time of its decision, the only records in the appellant's third HRTO application was his application form and accompanying documents, and the HRTO's confirmation of its receipt. It also explains that emails identified in the search for the appellant's second HRTO file were either subject to deliberative privilege or fell outside the date range of the request. It further submits that records created after the date of its decision are outside the scope of the appellant's request, and there is no obligation to provide such records during the course of an appeal.

[24] The HRTO responds to the appellant's reference to IPC Orders PO-4174 and MO-3693-I. In response to the first order, the HRTO submits that while the appellant indicates that this order supports his claim that the HRTO's search was both unreasonable and incomplete, he provides no explanation of how the circumstances described in that appeal relate to this appeal. With respect to the second order, the HRTO submits that the records at issue in that case were not similar to the records withheld in this appeal, and all access requests are dealt with on a fact specific and case-by-case basis. It submits that this order has no application to the current appeal.

Missing records

[25] The appellant submits that there exist other emails containing his name and/or the numbers of his HRTO files that were not disclosed in response to his request. In support of this, the appellant provides me with a chart of emails in his possession, some of which he claims the HRTO failed to disclose to him.

[26] In response, the HRTO submits that, with the exception of emails that fall outside the date range of the request and any communications subject to privilege, it has disclosed all records requested. It also submits that the records in the chart are not within the scope of the request because the appellant sought communications pertaining to his name and HRTO files, and did not ask for the adjudicative records themselves. It submits that the documents in the appellant's chart fall outside the scope of the request.

[27] The HRTO also submits that the appellant clarified that he is seeking two categories of withheld records: (1) *ex parte* communications between the HRTO and the respondents; and (2) correspondence sent to the HRTO by the Premier's Office on a specific date. It submits that using best efforts, the HRTO was unable to find such records.

[28] The appellant takes issue with the HRTO indicating that he clarified his request.

Appellant's complaint about his HRTO files

[29] The appellant states that he sent a complaint to the Premier of Ontario regarding

the HRTO's handling of his HRTO applications, which forwarded his previous complaint of a week earlier to the SJTO. The appellant explains that the HRTO responded to his complaint approximately two hours after his email to the Premier of Ontario. The appellant submits this evidence to support his belief that the HRTO had a dialogue with either the Ministry of the Attorney General's office, the Premier's Office or the SJTO, in the two hours between sending his complaint to the Premier of Ontario and receiving the response from the HRTO. Despite a request to conduct a search for additional records during this timeframe, the appellant explains that the HRTO refused to do so. It is the appellant's belief that such records exist and that the HRTO is purposely withholding them because it would demonstrate the HRTO's lack of independence.

[30] The appellant believes that he is entitled to the HRTO's response to his complaint (even though he already has a copy of it), as well as the email to the HRTO from the SJTO because such emails would contain his name and/or the number of his first HRTO file. Given that his initial complaint was sent directly to the SJTO, not the HRTO, and the response from the HRTO responded to his email to the SJTO, he submits that the email between the SJTO and the HRTO should have been disclosed to him. The appellant submits that "this glaring omission alone demonstrates the unreasonableness of the HRTO search for his responsive records".

[31] The HRTO submits that, while the appellant may genuinely believe that the HRTO failed to disclose communications with the Premier's Office, he has not established a reasonable basis for finding that additional records exist. According to the HRTO, a decision of the Divisional Court (the court), dismissing the appellant's application for judicial review of a decision in one of the appellant's HRTO files (the court's decision), found that the appellant's allegations that the HRTO only reactivated his HRTO file when the Premier of Ontario purportedly intervened was speculative. The HRTO agrees with the court, and submits that it is speculative that any correspondence exists between the HRTO and the Premier's Office.

[32] The HRTO also responds that there is no casual connection between the appellant's contact with the Premier's Office and the HRTO's response to his complaint. It explains that it is unlikely that the HRTO could have communicated with the Premier's Office about the appellant's concerns, drafted a response and received final approval to send the response in just over two hours.

[33] In response to the appellant's assertion that the HRTO did not send him a copy of its response to his complaint, the HRTO submits that it did not include the email in question because it was sent directly to the appellant and re-sending it was unnecessary, and because the appellant included the email as part of his reply representations, he has already verified that he has the record.

Records between respondents and the HRTO

[34] The appellant explains that, on several occasions, the respondents sent emails

with enclosures to the HRTO without copying the appellant on the same email, although he received a separate email from this respondent providing him with a copy of the same enclosures. He submits that he did not receive copies of such emails from the HRTO.

[35] In response, the HRTO submits that, while the appellant may genuinely believe that the HRTO failed to disclose communications with the respondents, he has not established a reasonable basis for finding that additional records exist.

[36] The HRTO acknowledges that "both parties sometimes tried to communicate with the HRTO without copying the other side", and these emails were merely cover emails enclosing adjudicative records that the appellant already had and contained nothing of substance that the HRTO failed to disclose to the appellant. Additionally, the HRTO submits that when the respondents failed to copy the appellant in accordance with its rules of practice, the HRTO did not respond to these emails. As a result, the HRTO submits that the emails do not respond to the request.

[37] In response, the appellant submits that the HRTO's admission further supports his position that the HRTO's search was unreasonable and contradicts the HRTO's statement during mediation that "no additional responsive records exist". He submits that the HRTO has not provided him with copies of such emails, which are responsive to his request.

Emails between the HRTO and the appellant's lawyer/the appellant

[38] The appellant submits that the HRTO did not disclose emails between the HRTO and his lawyer, emails between the appellant and a particular HRTO staff member and emails he had personally with the HRTO.

[39] The HRTO responds that some of the emails referred to by the appellant in his representations were disclosed to the appellant in the zip folder sent to him. It also responds that it has not disclosed records that are already in the appellant's possession.

[40] In response, the appellant submits that while the HRTO has already disclosed emails to him from the respondents and in the appellant's possession, it is now refusing to release such records to him, after he provided proof that additional records exist and the HRTO has failed to disclose them. He responds that it is not for the HRTO to speculate whether the appellant has some of the records or not; he is still entitled to such records.

[41] The appellant also provides me with a copy of an email from the respondent's lawyer, which specifies records related to his second HRTO file that the HRTO did not disclose to him. He explains that this email shows that the documents in that email are

within the time period of the request but the HRTO has failed to disclose them to him.[11]

Analysis and findings

[42] As explained below, I find that the HRTO has not conducted a reasonable search.

[43] First, the HRTO has restricted itself to searching for and/or disclosing responsive records because, in my view, it has taken the position that the appellant has narrowed his request to two categories of records and/or he is not seeking access to records that were sent to him personally. However, the HRTO submits no evidence to support this, especially given its representations that the request was clear and did not require clarification. I am mindful that, where an institution does not discharge its obligation under the *Act* to clarify the scope of a request, an institution cannot rely on a narrow interpretation of the scope of a request and any ambiguity needs to be ruled in the appellant's favour, as the appellant points out.[12]

[44] The appellant's representations are clear that he is seeking access to records that were sent to him personally. Also, based on the evidence before me, it is my view that the appellant relies on the two categories of records to demonstrate that additional records exist that were not disclosed to him, and not to narrow the scope of his request. As such, I conclude that the HRTO chose to narrow the scope of the request unilaterally.

[45] Second, I am compelled by the appellant's representations cumulatively that responsive records exist that the HRTO has not disclosed to him. At a minimum, it appears as though some of the documents in the appellant's chart may not have been disclosed to the appellant by the HRTO. While I am willing to accept that there is no email between the HRTO and the Premier's Office, it seems reasonable that there exists an email between the HRTO and the SJTO, which led to the HRTO's response to the appellant's complaint, both of which were not disclosed to the appellant. In addition, it seems reasonable that there were emails sent to the HRTO that were not copied to the appellant given the HRTO's admission that "both parties sometimes tried to communicate with the HRTO without copying the other side".

[46] Third, while the HRTO submits that some of the documents in the appellant's chart fall outside the scope of the request, it has not specifically indicated how each missing document on this chart falls outside the scope of the request. From my review of the chart, at the very least, it would appear as though some of the documents are within the date range of the request. As the HRTO did not provide the IPC with a copy of the records located by its search, nor did it provide an index of such records, I am unable to verify the HRTO's claim that the documents in the appellant's chart fall outside the scope of the request, or even if they were in fact disclosed to him, without

[11] Assuming the respondents sent these to the HRTO by email.
[12] Orders 134 (applied in Order PO-1730) and P-880.

more details.[13]

[47] Fourth, the HRTO was asked to provide a written summary in affidavit form of all the steps taken in response to the request, including details of the searches carried out. While it submits the affidavit of the employee who coordinated the search, it lacks details about the various employees who actually conducted the searches, the specific places they searched for records responsive to the appellant's request and the specific steps they took to carry out their searches.

[48] For these reasons, I find that the appellant has provided a reasonable basis to conclude that further responsive records exist. Although the *Act* does not require the HRTO to prove with certainty that further records do not exist, I am not satisfied with the HRTO's evidence that it made a reasonable effort to identify and locate responsive records. I disagree with the HRTO that "nothing more can be done to search for responsive records and that further searches will not lead to the discovery of additional records."

[49] Accordingly, I am not upholding the HRTO's search for records and I find that the HRTO has not conducted a reasonable search, in the circumstances of this appeal. Accordingly, I will order the HRTO to conduct further searches for responsive records.

ORDER:

1. I order the HRTO to conduct further searches for all emails that contain the appellant's name and/or the numbers of his HRTO files for the date range.

2. I order the HRTO to provide me with an affidavit(s) or affidavits, sworn by the individual(s), who coordinated and/or conducted the further searches and have direct knowledge of the searches, describing its search efforts, **by November 21, 2022**. At a minimum, the affidavit should include the following:

    i. The names and positions of the individual(s) who conducted the searches and their knowledge and understanding of the subject matter and the scope of the request;

    ii. The steps taken in conducting the search, including information about the types of files searched, the nature and location of the search and steps taken in conducting the search;

[13] I am confused by the HRTO's representations with respect to emails that were merely cover emails, enclosing adjudicative records that the appellant already had and "nothing of substance that the HRTO failed to disclose to the appellant". I am equally confused by the HRTO's representations that emails where the respondents failed to copy the appellant were not responsive to the appellant's request. Without examining such records, I fail to understand how emails that contain the appellant's name and/or the number of his HRTO files, within the date range, could be considered "nothing of substance that the HRTO failed to disclose to the appellant" or outside the scope of the request.

iii. The results of the search, set out in an index of records;

iv. Whether it is possible that responsive records existed but no longer exist. If so, the HRTO must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and

v. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.

3. If the HRTO locates additional records (or no records) as a result of its further searches, I order it to issue another access decision to the appellant, in accordance with the requirements of the *Act*, treating the date of this interim order as the request date for the purpose of the procedural requirements of the access decision.

4. In order to verify compliance with this order, I reserve the right to require the HRTO to provide the IPC with a copy of the access decision referred to in order provision 3. I also reserve the right to require the HRTO to provide the IPC with a copy of the records it discloses to the appellant as a result of order provision 3.

5. I remain seized of this appeal to deal with issues arising from order provisions 1 and 2.

Original Signed By: October 31, 2022

Valerie Silva
Adjudicator