



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1793

Appeal PA-990423-1

Ontario Human Rights Commission



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BACKGROUND:

The appellant has been involved in protracted dealings with the Ontario Human Rights Commission (the OHRC) relating to a complaint he made under the Human Rights Code. He subsequently made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the OHRC for access to its file related to his complaint. The OHRC issued a decision granting access to some responsive records and denying access to others. The appellant appealed this decision and Appeal PA-990297-1 was opened.

During mediation of this appeal, the Mediator, the appellant and the OHRC's Freedom of Information and Privacy Co-ordinator met to review the contents of the appellant's OHRC file. The Mediator, at the appellant's request, created an index outlining all documents contained in the file. As a result of the discussions held during mediation, Appeal PA-990297-1 was closed.

NATURE OF THE APPEAL:

Subsequent to the meeting which resulted in the closing of Appeal PA-990297-1, the appellant wrote to the Mediator indicating that there were documents missing from his OHRC file. He believes that these records should exist, thus raising the reasonableness of the OHRC's search for responsive records as an issue. Consequently, Appeal PA-990423-1 (the current appeal) was opened.

During mediation, the appellant provided the Mediator with a list of records which he felt should be contained in his file. The appellant had copies of some of the records and did not have copies of others. The Mediator sent this list of records to the OHRC.

After reviewing the list, the OHRC advised the appellant that some records were contained in the case file. The OHRC acknowledged that other records were not in the file but that the copies of these records which had been provided by the appellant during the mediation stage of Appeal PA-990297-1 had been placed in the file. Finally, the OHRC indicated that other records could not be located in the file.

The appellant continues to believe that certain records should exist in his OHRC file.

I sent a Notice of Inquiry to the OHRC, initially. The OHRC submitted representations and an affidavit sworn by the Executive Assistant to the Executive Director (the EA) in response. I decided to move this inquiry into stage two and sought representations from the appellant. I modified the Notice of Inquiry which was initially sent to the OHRC to reflect specific questions I requested the appellant to address arising from the OHRC's submissions. I also enclosed the non-confidential representations and affidavit of the OHRC and asked the appellant to review them prior to preparing his response. The appellant did not submit representations in response to the Notice, but rather indicated that he had previously made representations to this office and would be relying on them. As Appeal PA-990297-1 was closed during the mediation stage the appellant would not have been in a position to make "representations" as contemplated during the inquiry process. However, I have reviewed both appeal files and have considered all of the correspondence submitted to this office from the appellant which is not mediation privileged as constituting the "representations" to which he refers.

RECORDS:

The four records (or types of records) which the appellant believes should exist and form part of his OHRC file are:

1. Correspondence from the OHRC to a named company (the company) regarding his complaint;
2. Response(s) from the company to the OHRC regarding his complaint;
3. Correspondence dated July 17, 1998 from a named individual to the OHRC; and,
4. Correspondence dated September 1, 1998 from another named individual to a third named individual.

DISCUSSION:

REASONABLE SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the OHRC indicates that further records do not exist, it is my responsibility to ensure that the OHRC has made a reasonable search to identify any records which are responsive to the request. The Act does not require the OHRC to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the OHRC must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request (Orders M-282, P-458 and P-535, for example).

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the OHRC's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist (Order M-686).

The appellant's position

With respect to item (3) referred to above, the appellant indicates in his correspondence that in a July 15, 1998 letter, the named individual stated that he would write a letter to the OHRC on July 17, 1998. The appellant states that it appears that neither he nor the OHRC have received it. Apart from stating that he believes that other documents are missing from his file, the appellant does not provide any specific detail as to which documents these might be or why they should exist.

The OHRC's response

The OHRC indicates that the appellant filed a human rights complaint against the named company and a number of its employees alleging discrimination because of handicap. The OHRC indicates further that the complaints went through the regular case process including reconsideration and the file was closed in April, 1999.

In her affidavit, the EA states that she has been directly involved in the processing of the appellant's access requests beginning in October 14, 1998. She outlines the history of her dealings with the appellant up to July 28, 1999, the date that the OHRC issued its decision on access (which led to Appeal PA-990297-1). She notes that the appellant was advised at that time that he would receive approximately 645 pages and that the remaining 31 pages of records were being withheld in whole or in part under sections 49(b) with reference to section 21(3)(b), 13(1) and 14(1)(c) and (d) of the Act. The EA states that in the course of preparing this response, she reviewed the entire contents of the appellant's file. In doing so, she indicates that she pulled each page and numbered it accordingly.

The EA states further that the OHRC's Registrar met with the appellant and the Mediator on October 28, 1999 to allow the appellant an opportunity to compare his own file with that of the OHRC's to determine which records he still required and to discuss why he was not entitled to certain information. As a result of this meeting the OHRC provided the appellant with 247 pages in whole or in part. The EA indicates that in the course of preparing these records for disclosure, she again reviewed the entire file.

The EA indicates that after Appeal PA-990297-1 was closed, she was contacted by the Mediator and advised that the appellant believed more records should exist and that a new appeal would be opened to address this issue (the current appeal), but that it was essentially a continuation of the previous one.

During the mediation stage of the current appeal the Mediator forwarded a letter written by the appellant to the OHRC. In this letter, the appellant outlined the documents he did not have, but which he believed should have been in the OHRC's file. The EA states that she responded to this letter and indicated which of the documents referred to by the appellant were in the OHRC's file and the status of each one. The EA notes that she again searched the entire contents of the OHRC's file in responding to this letter.

The EA states that she subsequently received another letter from the Mediator outlining the appellant's concerns related to, among other things, the company's reply to his complaint and the July 17, 1998 letter (referred to above). She states that again she searched the entire contents of the file for the specific purpose of locating records responsive to his request as identified in his most recent correspondence. She states that she was unable to locate the two letters referred to above (items 3 and 4). She also indicates that she was not able to locate any other of the company's replies pertaining to the appellant's complaint apart from what the OHRC has already disclosed to him.

The EA states that it is not clear to her what exactly the appellant is looking for when he requests correspondence from the OHRC to the company. She indicates that the OHRC has made the contents of its file available to the appellant from the beginning. She submits that the appellant's request is too broad

and unspecific, particularly in these circumstances, since he has seen the contents of the file and knows what records do exist. The EA states that it is unclear to her what the appellant is still seeking.

The EA states that the appellant has only one complaint case file and that she has searched that file at least four times. She indicates that it is very unlikely that any record has been shredded or otherwise destroyed as the OHRC's record retention policy requires it to maintain files for seven years before they are archived.

Findings

In reviewing the circumstances of this case from its inception, that is, from the date the first appeal (PA-990297-1) was opened, it is apparent that the OHRC has made numerous attempts to understand what records the appellant is seeking and to look for them. It is equally apparent that the OHRC's files are not complete, considering that it has acknowledged that certain records which were in the appellant's custody were, in fact, not in its file. This includes correspondence between the OHRC and the appellant and other correspondence I can only assume was relevant to the appellant's complaint as the OHRC agreed to place it in the file.

With respect to the July 17, 1998 letter, I am satisfied that the appellant has established a reasonable basis for believing that the record "might" exist. However, the mere fact that the individual indicated his intention to write a letter on a particular date is not sufficient to establish that the letter was, in fact, written. It only provides the OHRC with information to assist it in searching for such a letter.

On the other hand, the appellant has provided no basis for believing that the September 1, 1998 letter should exist. Further, I agree with the OHRC that items 1 and 2 are unspecific as to the exact documents the appellant believes should exist. I find this particularly to be the case since the OHRC has already provided him with documents which would be responsive to this part of the request. Further, the appellant has had an opportunity to view the OHRC's file, and has also been advised of the records to which access has been denied. For example, in an index sent to the appellant in December, 1999, the OHRC identified certain records as follows:

Letters sent to several [named company's] officials along with their responses & investigative reports from Commission.

The OHRC advised the appellant of the status of these records as follows:

Unable to disclose as relates to third party information.

As I indicated above, the Act does not require the OHRC to prove with absolute certainty that further records do not exist. Rather, the OHRC must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request. I accept that the OHRC only had one case file relating to the appellant and it was reasonable for it to conduct its search only in this location. I am satisfied that the search for responsive records was conducted by a knowledgeable employee and that this individual made every reasonable attempt to understand the records the appellant

was seeking and to search for them. In particular, although the appellant has established that the July 17, 1998 letter “might” exist, I find that the OHRC has made reasonable efforts to locate it. Accordingly, in the circumstances of this appeal, I find that the search for responsive records conducted by the OHRC was reasonable and this appeal is dismissed.

ORDER:

The OHRC’s search for responsive records was reasonable and this appeal is dismissed.

Original signed by: _____
Laurel Cropley
Adjudicator

June 21, 2000