



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2352**

**Appeal PA-040155-1**

**Ministry of Health and Long-Term Care**



Tribunal Service Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The requester (now the appellant) made a request to the Ministry of Health and Long-Term Care (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for the following records that are mentioned in the June 24, 1987 agreement between the Ministry and the Ontario Medical Association (OMA):

1. The "Fact Finder Report"
2. The November 30, 1981 Memorandum of Understanding

The Ministry issued a decision letter where it advised that the requested records do not exist. Specifically, the Ministry stated as follows:

The search was conducted in the Health Services Division, Provider Services Branch and Operational Support Branch. [Named individual], Director, Provider Services Branch, indicates that a complete thorough search of this branch was conducted and that no responsive records were found. The Ministry is only required to retain records for a maximum of a ten-year period. [Named individual], Director, Operational Support Branch, indicates that a complete and thorough search of this branch was conducted and that no responsive records were found, as retention schedules do not extend for this period of time.

Upon receiving the Ministry's decision letter, the appellant wrote again to the Ministry, requesting a copy of its policy on retention of records.

The appellant subsequently appealed the Ministry's decision and also noted that he did not receive the Ministry's response to his request for the records retention policy.

During mediation, the mediator requested that the Ministry send a copy of the applicable retention policy and schedule to the appellant, with a copy to the mediator. The Ministry sent a copy of a retention schedule to the appellant.

The appellant informed the mediator that the retention schedule he received from the Ministry does not indicate how it applies to the records he has requested. The mediator relayed this to the Ministry and asked them to provide an explanation to the appellant.

The Ministry wrote to the appellant, copying the mediator, stating, "The standard retention schedule for types of information such as a Memorandum of Understanding is seven years. Since the document that you are requesting is twenty-three years old, the specific records schedule is no longer available."

Further mediation was not possible and the appellant requested that this file proceed to adjudication.

I sent a Notice of Inquiry to the appellant and the Ministry informing them that an oral inquiry will be held to determine whether the Ministry conducted a reasonable search for the records that respond to the request. The oral inquiry was held by way of teleconference. The Ministry was represented by three individuals: the Senior Manager of the Operational Support Branch, Health

Services Division; the Executive Assistant at the Operational Support Branch; and the Freedom of Information Co-ordinator. The Freedom of Information Co-ordinator did not provide any evidence.

The appellant spoke on his own behalf.

## **DISCUSSION:**

### **Introduction**

In appeals involving a denial of access due to a claim that records do not exist, the sole issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*.

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

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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

### **Ministry's Representations**

The Ministry submits that it searched for the records in the records file at the Operational Support Branch of the Ministry that is located on the 11<sup>th</sup> Floor of Hepburn Block. The Ministry advises that documents of the type requested are stored in this area. No records were found. The Ministry further submits that it looked for the retention schedule relating to the records and also no applicable retention schedule was found.

The Ministry also notes that the Provider Services Branch was searched as set out in their decision letter dated April 28, 2004 and as stated in the decision letter, no records were found. The Ministry was unable to provide further details of the search at the Provider Services Branch.

In regards to the retention schedule sent to the appellant, the Ministry submits that while this was not the retention schedule for the particular records at issue, the Ministry provided the retention directive to the appellant to establish the normal retention period for documents of a similar nature.

### **Appellant's Representations**

The appellant in his representations refers to the June 24, 1987 Agreement between the Ministry of Health and the OMA entitled, "Thirteenth Report of the Ontario Joint Committee on Physician's Compensation for Professional Services", provided to him on March 12, 2004. The appellant notes that the 1987 agreement refers to both November 30, 1981 Memorandum of Understanding and the chairman's Fact Finder Report.

The appellant proceeded to read from the operative part of the agreement that states the following:

This agreement is made pursuant to the Memorandum of Agreement between the parties dated November 30, 1981. Words and expressions defined therein have the same meaning where used herein.

The appellant submits that from the above statement, it can be concluded that in 1987, the 1981 Memorandum of Agreement existed and secondly, the 1981 agreement is needed to understand the 1987 agreement.

The appellant further submits that in the first page of the 1987 agreement, there is mention of the chairman for the Ontario Joint Committee on Physician's Compensation for Professional Services presenting his Fact Finder Report on June 19, 1987. This is five days before the 1987 Agreement was created.

From this, the appellant concludes that in 1987, the two documents he has requested existed. The appellant submits that while he cannot prove that the requested records still exist, the records did exist in 1987. The appellant goes on to state that there has been no evidence shown by the Ministry as to what has happened to these records. Moreover, the appellant argues that the records he has requested are important documents that one would expect the Ministry to keep.

On the issue of the retention schedule, the appellant first provides representations on the retention schedule and Ministry directive provided to him during mediation. The appellant notes that Schedule 0935-R provided to him on July 15, 2004, refers to patient files and is specific. Schedule 0935-R does not refer in any way to the records requested.

The appellant notes that the schedule is dated 1988 and only shows that there was a retention schedule for these particular patient records. It should be noted that the retention schedule provides for a retention of 10 years.

The appellant then refers to a letter he received from a Team Lead at the Ministry. This letter states:

The standard retention schedule for types of information such as a Memorandum of Understanding is seven years. Since the document that you are requesting is twenty-three years old, the specific records schedule is no longer available.

The appellant states that since there is a retention schedule for the type of records he has requested the Ministry should be required to produce it. The appellant submits that the Ministry should not be able to rely on a retention schedule and yet not be able to provide it.

Finally, the appellant submits that in his opinion there is no absolute policy on when documents should be destroyed. It is usually based on the type of document and its importance.

The appellant in conclusion suggests that there are a number of searches that the Ministry could have undertaken including: asking individuals involved in the negotiations of the of the 1987, 1996, 2002 or 2004 Agreements; looking for any records that may be in storage, and finally searching the Minister's office.

### **Ministry's Reply Representations**

The Ministry, in response to the appellant's representations, re-emphasized that they had undertaken thorough searches and no responsive documents had been located.

The Ministry also noted again that there is no retention schedule from that period and that the seven-year period noted for Memorandum of Understandings comes from the Common Records Schedule for Administrative Records for Government of Ontario published by the Archives.

In response to the appellant's suggestions about possible searches, the Ministry states that it only searched its own records; the records were not stored in any way, and due to political changes, any records held by past ministers would be in the archives.

### **Finding**

The Ministry's submissions do not satisfy me that the searches it conducted were reasonable. The Ministry searched its own record files and then due to the age of the records it appears that the Ministry relies on two retention schedules to explain why the records do not exist. Unfortunately, the two retention schedules do not apply directly to the records requested and as such, in my view, it is unreasonable for the Ministry to rely on them.

Furthermore, the Ministry did not contact Ministry officials involved in the negotiations between the Ministry and the OMA despite the fact that there have been a number of subsequent agreements between the Ministry and the OMA on similar subject matter. I would expect that a reasonable search would include asking individuals who deal with the subject matter contained in the records about the records requested by the appellant.

The Ministry further states that the records at issue are not placed in storage or microfiche. However, the Ministry is unable to definitively state that the records were destroyed.

As stated above, the Ministry is not required to prove with absolute certainty that further records do not exist. However, the Ministry has not provided sufficient evidence to show that it has made a reasonable effort to locate the responsive records. Accordingly, I will order the Ministry

to conduct the searches suggested by the appellant, namely to contact Ministry officials and staff who are engaged in current negotiations or were engaged in prior negotiations with the OMA regarding the requested records. I will also order the Ministry to search its record files again and any other such areas where the responsive records might be located including the Minister's office.

**ORDER:**

1. I order the Ministry to conduct a search for the responsive records by contacting Ministry officials and/or staff who were or may have been involved with the Ontario Medical Association in negotiations regarding physician compensation.
2. I order the Ministry to conduct a further search of its record files and any other such area where the responsive records may be located including the Minister's office.
3. I order the Ministry to provide the appellant with information as to the results of these further searches in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension under section 27.
4. I order the Ministry to provide me with a copy of the correspondence referred to in Provision 3 by forwarding it to my attention at the Commissioner's office.

Original Signed By: \_\_\_\_\_

Stephanie Haly  
Adjudicator

December 13, 2004 \_\_\_\_\_