Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2661

Appeal PA07-80

McMaster University

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NATURE OF THE APPEAL:

McMaster University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (*Act*) from two journalists. The request stated as follows:

> I would like to access to the number of times McMaster has initiated contact with CSIS, the RCMP, the FBI or any other security service with respect to McMaster's nuclear reactor over the period of last six years.
>
> *This is a request for records, and as such is a request for all of the information contained in any records that are at least partially responsive to the request. Please do not sever non-responsive information.* [Emphasis added.]

After receiving the request, the University's Freedom of Information and Protection of Privacy Co-ordinator (the Co-ordinator) wrote to one of the requesters on November 1, 2007, seeking clarification. The Co-ordinator's letter sets out the first paragraph of the request (as quoted above) and goes on to state:

> I have been asked to seek clarification by asking you to be more specific about the exact type and/or intent of the initiated communication to which you refer. The staff at McMaster's Nuclear Reactor communicates regularly and routinely with security services for purposes of regulatory compliance. Are you seeking information about the number of all contacts, including such routine contacts, or are you seeking information about more specific types of communications?

The requester responded by e-mail on November 22, 2007. She indicated that she seeks access to all contacts, and requested that the contacts be broken down as follows:

- contacts with CSIS;
- contacts with RCMP;
- contacts with FBI; and
- contacts with other security services, by name of security service.

The University subsequently issued a decision letter responding to the request. It recites the first paragraph of the initial request, set out above, and makes no reference to the second paragraph, nor does it refer to the correspondence around clarification that the University initiated with its letter of November 1, 2007. The University's decision letter then states that "there are no records responsive to your request."

The requester (now the appellant) appealed the University's decision to this office. A mediator from this office discussed the issues in dispute with the parties. Mediation did not result in settlement of the appeal. The mediator's report states:

> During mediation, the appellant noted that the nuclear reactor at McMaster is regulated by the Canadian Nuclear Safety Commission (CNSC), which oversees security at the reactor. As the university is required to follow compliance regulations of CNSC, the appellant indicated that it is probable that records regarding safety must be kept at the university to satisfy compliance reporting.

The appellant also advised the mediator that it is known for certain that the RCMP was involved at least once during the time period covered by the request because the reactor's own manager of radiation safety confirmed this. The appellant again referred to a story published on October 18, 2003 involving the RCMP after a U.S. report that an al-Qaeda terrorist posed as a student while trying to get nuclear material for a dirty bomb. She indicated that it is not reasonable that there are no records responsive to the request.

In response, McMaster advised that any contact with security agencies is generally conducted by telephone conversation and that it does not log information regarding such calls. As such, McMaster advised that no records relating to such contact with security agencies are created. McMaster indicated that it interprets the appellant's request as being a request for McMaster to perform a calculation and that it is not obligated to perform such calculations or to organize the information in the manner requested by the appellant.

During the course of mediation, the mediator suggested to McMaster's representative that there appear to be responsive records contained in the records package of a related appeal at this office (PA07-81). McMaster's representative disagreed with the mediator's assessment, noting that the related appeal was a request for "specific correspondence" and that the nature of this request is for a substantially different record. As previously noted, McMaster advised that contact with security agencies is conducted by telephone conversations and it does not tally such calls or record information conveyed therein. As such, McMaster indicated that there are no records relating to the "number of times" contact with security agencies was made. Although certain calls may have resulted in the creation of a record, McMaster noted that such records are not responsive to this request which specifically relates to a computation.

The interpretation and scope of request therefore became an issue during mediation. The appellant advised the mediator that she is looking for any correspondence relating to her request and is willing to clarify the wording of her request to assist McMaster in the identification of such records. McMaster advised the mediator that the request was clear and unambiguous and therefore requires no further clarification.

This matter was then transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry. I commenced the inquiry by providing a Notice of Inquiry to the University, setting out the facts and issues in the appeal and inviting its representations. The University responded with representations, including an affidavit from the Director of Nuclear Operations and Facilities for McMaster University. The University maintains that no record containing the number of contacts with the law enforcement agencies exists.

I then sent a Notice of Inquiry to the appellant, inviting her representations. The appellant responded with representations. She maintains that responsive records ought to exist, and that these records may not necessarily take the form of an actual "number of times" the University contacted security services about its reactor. The appellant believes that this is implicit in the original request and therefore decided not to make a fresh request.

After receiving the appellant's representations, I decided that they raised issues to which the University should be invited to reply. I therefore provided the University with a copy of the appellant's unsevered representations, and invited its reply representations. The University responded with reply representations.

DISCUSSION:

SCOPE OF THE REQUEST

In this case, it is apparent that the University and the appellant are not in agreement as to the scope of the appellant's request, and I will have to determine this before considering whether the University's search for records was reasonable.

Clearly, information that would be responsive to the request would include the "number of times" the University contacted security services with respect to its nuclear reactor during the period specified in the request. In the discussion of "reasonableness of search," below, I will consider whether the University conducted a reasonable search for this information, as well as any other records found to be included within the scope of the request.

In its representations, the University's essential argument is that the scope of the request is not an issue because of its plain wording. According to the University, the request clearly sought the number of times the University contacted various law enforcement agencies with respect to the nuclear reactor. The University submits that "where a request is clear and is not reasonably open to several possible interpretations, the request cannot be considered ambiguous."

The University submits that, as the request is not ambiguous, there is no obligation to seek clarification or resolve ambiguity in favour of the requester as set out in Order P-134. The University relies on Order P-880 for the proposition that the request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive. Order P-880 establishes that, in order to be considered responsive, a record must be "reasonably related" to the request.

In view of the fact that its own Freedom of Information and Privacy Co-ordinator (referred to elsewhere in this order as the Co-ordinator) wrote to the appellant on the record and expressly asked for (and received) clarification, I find it surprising, to say the least, that the University would argue that clarification of the request was not required. The University's representations do not refer to this correspondence at all. In a similar fashion, the University's decision letter issued in response to the request recites only the first paragraph of the request (which referred to

the "number of times" contact was made), and completely ignores the second paragraph and the clarification subsequently provided by the appellant.

In these circumstances, it is necessary to explore the nature and effect of the request itself, and the subsequent correspondence about clarification between the Co-ordinator and the appellant during the processing of the request.

Clarification is provided for in section 24(2) of the *Act*, which states:

> If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Section 24(1) requires that the requester "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record."

In Order PO-2634, I commented on the meaning and scope of section 24(2). I stated:

> In Order P-214, former Commissioner Tom Wright made a distinction between the "clarification" of a request under section 24(2) and the "narrowing" of a request, and the impact of this distinction on the applicable start date for calculating the time for response under section 26. He stated:
>
> > I do note that the institution has referred to the telephone conversation with the appellant of November 5, 1990 as "the discussion which clarified the request". As this telephone call merely narrowed the scope of the original request (which had provided the institution with sufficient detail regarding the nature of the records being requested), in my view the thirty day time limit must be calculated from the date the original request was first received by the institution.
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> Section 24(2) is the starting point for the concept of "clarification" and the fact that the 30-day time limit only begins to run once necessary clarification of the request has taken place.
>
> …
>
> The mandatory section 24(2) requires the institution to undertake the process of clarifying a request that is not sufficiently detailed, and until the request is "clarified", the 30-day time limit for responding does not begin (see Order 81).
>
> Thus the character of any discussions that take place concerning the scope of a previously-submitted request is crucial for determining the date it is considered to

> have been submitted. I agree with former Commissioner Wright that unilateral narrowing by a requester, subsequent to filing an initial request, is not "clarification" for the purposes of section 24(2), and in such a case, the 30-day time limit begins to run on the date the request was first received by the institution.

In this case, it is clear that the contact was initiated by the University, specifically seeking "clarification", and that the appellant's response did not in fact narrow the request, so Orders P-214 and PO-2634 do not mean that this should be treated as something other than clarification under section 24(2).

As well, in my view, the second paragraph of the initial request (as quoted above) is very significant. To reiterate, it stated that "[t]his is a request for records, and as such is a request for all of the information contained in any records that are at least partially responsive to the request." It is clear from this wording that the appellant did not want her request refused simply because she was asking for the "number of times" contact had occurred; clearly she wanted supporting records if those were all that were available. It is also the case that, by adding this second paragraph, the clarity and simplicity of the first paragraph was modified, and in my view, it was entirely appropriate for the Co-ordinator to contact the appellant to seek clarification, as she did. In her representations, the appellant also states that during mediation, she attempted to clarify that any responsive information would be satisfactory, and that an actual number was not required.

In any event, having sought and received clarification, it was incumbent on the University to respond to the clarified request, rather than returning to the original wording (minus the second paragraph) and proceeding as it did, ignoring the fact that clarification was both requested and received.

The effect of the University's conduct is to delay the processing of the request, and to necessitate the matter proceeding through an appeal before a proper access decision is made. All of this took place because the University initially followed section 24(2), and then ignored its own decision that clarification was required, and also ignored the clarification that was in fact given. I am concerned by this course of conduct. The University is an institution subject to the access-to-information regime in the *Act*, and has an obligation to process requests in the spirit of the legislation, one of whose stated purposes (set out at section 1(a)(i)) is:

> … to provide a right of access to information under the control of institutions in accordance with the principles that … information should be available to the public….

In Order MO-2285, a recent decision involving a request in the form of questions, which the institution in that appeal had rejected as a proper request under the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent of the *Act* for municipal government bodies), I stated:

> Where a request is framed as a question or series of questions, the institution must determine whether its record holdings contain information that would answer the question(s) asked.
>
> …
>
> In short, institutions that receive a request for access that is in the form of a question or series of questions must determine what records they have that may be responsive to the questions and provide an access decision based on those records. This duty is the same regardless of the nature of the information sought.

In my view, similar considerations apply here. Given the wording of the full request, including the second paragraph, the best course was the one initiated by the Co-ordinator. Having sought and received clarification, it was incumbent on the University to review its record holdings for records that are "reasonably related" to the subject matter of the request, as stated in Order P-880 (cited above). Unfortunately, this did not happen, as the University decided to ignore the clarification and relied on only the first paragraph of the initial request.

Based on the complete wording of the initial request and the later clarification provided by the appellant, I conclude that the request is for the following information:

> (1) the number of times McMaster has initiated contact with CSIS, the RCMP, the FBI or any other security service with respect to McMaster's nuclear reactor over the period of six years prior to the date of the request, broken down as follows:
>
> - contacts with CSIS;
> - contacts with RCMP;
> - contacts with FBI; and
> - contacts with other security services, by name of security service; and
>
> (2) in the absence of statistical information, any records showing or recording such contacts during the period mentioned in the request.

In my view, item (2) is implicit in the second paragraph of the request, and in the appellant's response to the University's request for clarification.

I will now determine whether the University has conducted a reasonable search for records of this nature.

REASONABLE SEARCH FOR RECORDS

In appeals involving a claim that no records exist that are responsive to a request, the issue to be decided is whether the University has conducted a reasonable search for records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the

circumstances, I will uphold the University's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the University to prove with absolute certainty that 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 [Order P-624].

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist.

With respect to a record showing the "number of times" contacts were made, the University provided an affidavit from its Director of Nuclear Operations and Facilities affirming that there is no tally of the "number of times" the contacts referred to in the request took place. Upon my review of the University's representations and the affidavit, it is clear that a search was conducted and I am satisfied that no record showing such a numerical tally of contacts exists. The University has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records showing the number of times contact was made.

However, the appellant provided representations supporting the contention that other records, which would be responsive to the restated request set out at the end of the preceding section of this order, may actually exist. In particular, the appellant indicated that an employee at the nuclear reactor had previously confirmed that, on at least one occasion, the RCMP had been contacted.

In addition, based on information in the mediator's report (reproduced above), my attention has been drawn to other records that exist which appear to be responsive to the request. Several records from Appeal PA07-81 include information about contacts with law enforcement agencies with respect to the nuclear reactor. While these records do not provide the total number of contacts in and of themselves, and records of this nature are not created for every contact that may have occurred, I am satisfied (as noted above) that records identifying contacts are responsive to the request.

Based on the interpretation of the request set out in its decision letter and representations, it is clear that no search for records of this nature, which are also described in item (2) of the restated request, above, was conducted.

As such, I find that this aspect of the University's search was not reasonable, and I will order the University to conduct such a search.

ORDER:

1. I uphold the University's search for records that contain a "number of times" that law enforcement agencies were contacted with respect to the nuclear reactor.

2. I order the University to conduct a search for any records showing or recording contacts with CSIS, the RCMP, the FBI and any other security service with respect to McMaster's nuclear reactor during the period mentioned in the request, and to issue an access decision to the appellant, with a copy to me, in accordance with sections 26, 28, and 29 of the *Act*, treating the date of this order as the date of the request.

Original signed by: April 17, 2008
John Higgins
Senior Adjudicator