

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3156

Appeal PA11-303-2

Ontario Heritage Trust

January 25, 2013

Summary: The appellant submitted a four-part access request for records relating to the bidding and evaluation process conducted by the Ontario Heritage Trust (the OHT) with respect to a specific project. The OHT identified records responsive to the request and granted partial access to them, denying access on the basis of a number of exemptions. With respect to parts 1 and 2 of the request, the OHT located one responsive record. The appellant appealed the OHT's decision to deny access to portions of the records pursuant to the identified exemptions and also claimed that, with respect to parts 1 and 2, additional records should exist. Accordingly, whether the OHT conducted a reasonable search was also at issue. During mediation, the exemption claims were resolved and the only issue that remained was the reasonableness of the OHT's search. In this order, the adjudicator finds that the OHT conducted a reasonable search, as required by section 24 of the *Freedom of Information and Protection of Privacy Act*, and dismisses the appeal.

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

OVERVIEW:

[1] The appellant made a four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Heritage Trust (the OHT) for the following information:

1. Documents containing RFS [Request for Submissions] Evaluation Criteria as it was on July 24, 2009, when the "Ontario Heritage Trust Corporate Website Redevelopment Project – RFS 07-24-09" was initially released.
2. Documents related to any revisions made to the RFS Evaluation Criteria for "RFS-07-24-09" after July 24, 2009.
3. All proposals received by the [OHT] in response to "RFS 07-24-09".
4. All the evaluation documents regarding "RFS 07-24-09" prepared by the [OHT] during its decision-making process, including the specific scores given for each of the Evaluation Criteria, and the total score awarded, for each evaluated proposal.

[2] The OHT located responsive records and issued a decision granting partial access to the requested information. With respect to parts 1 and 2 of the request, the OHT advised that it had located one responsive document entitled "Ontario Heritage Trust Website Redevelopment Project 2009-2010, RFS Proposal Evaluation RFS 07-24-09". It explained that the evaluation criteria were created and in place before any submissions were evaluated and were not revised in any way after the evaluation of submissions began.

[3] In a series of decision letters issued to the appellant, the OHT granted partial access to the records. It denied access to portions of the records responsive to parts 3 and 4 of the request pursuant to sections 17(1)(a), (b), (c), and (d) (third party information) and 18(1) (economic interests) of the *Act*.

[4] The appellant appealed the OHT's decision to deny access to portions of the records responsive to parts 3 and 4 of his request, as well as the reasonableness of the OHT's search for records responsive to parts 1 and 2.

[5] Following mediation of the appeal, the application of the exemptions was no longer at issue. However, the appellant continues to believe that additional records responsive to parts 1 and 2 of his request exist.

[6] As mediation did not resolve all of the issues on appeal, the file was transferred to the adjudication stage for an inquiry. Representations were sought and received from the parties on whether the board conducted a reasonable search for records that are responsive to the appellant's request. These representations were shared between the parties in accordance with the practices of this office.

[7] The appeal was transferred to me to complete the inquiry. The sole issue to be decided in this appeal is whether the search conducted by the OHT is reasonable. For the reasons that follow, I uphold the OHT's search for responsive records and dismiss the appeal.

DISCUSSION:

Did the board conduct a reasonable search for responsive records?

[8] 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 of the *Act*.¹ 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.

[9] 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.² To be responsive, a record must be "reasonably related" to the request.³

[10] 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.⁴

[11] 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.⁵

[12] 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.⁶

[13] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.⁷

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Order MO-2213.

Representations

[14] The OHT's representations, which include sworn affidavits from three employees, set out the steps that its staff took to locate records responsive to the appellant's request.

[15] The OHT submits that the appellant advised the Freedom of Information Coordinator (the FOIC) of his intent to file an access request for the "Ontario Heritage Trust Corporate Website Redevelopment Project – RFS 07-02-09." At that time, the FOIC contacted the employees who were experienced and knowledgeable in the subject matter and asked them to locate all related documents. Once the official request was received, an additional search was conducted for the specific records sought by the appellant.

[16] Searches were conducted by the Director of Corporate Businesses and Services, the Manager of Marketing and Communications, and the Senior Web Communications and Marketing Specialist. The OHT's representations state that all three employees searched for responsive records through their paper files and notes as well as their electronic files, using the keyword search criteria: "Ontario Heritage Trust Corporate Website Redevelopment Project - RFS 07-24-09," and "Evaluation Criteria."

[17] The OHT submits that a fourth individual, who sat on the evaluation team but was on secondment at the time of the search, was contacted. He confirmed that he did not have personal possession of any files related to the subject matter of the request, other than his files that remained in the possession of the OHT. Those files were searched by the Manager of Marketing and Communications, and the Senior Web Communications and Marketing Specialist.

[18] The OHT submits that the searches yielded numerous documents related to the request including: evaluation criteria, summaries of all evaluations, evaluations from each reviewer, and proposals from all respondents.

[19] Following those initial searches, the appellant took the position that additional records with respect to parts 1 and 2 of his request should exist. As a result, the OHT submits that it conducted an additional thorough search and review of the search process and did not locate any additional documents related to the creation of the evaluation criteria. It states that the evaluation criteria provided to the appellant as the only record responsive to parts 1 and 2 of his request, was broken down as follows:

Evaluation Criteria	Weighting (%)
Content Management System (CMS)	50
Mandatory Deliverables	10
Cost	20
Resources	10

References/Portfolio	10
Total	100

[20] The OHT submits that the evaluation of the four submitted vendor proposals was completed in October 2009 by the evaluation team which consisted of the Manager, Marketing and Communication, the Senior Web Communications and Marketing Specialist, and the individual who was on secondment when the search for responsive records was conducted. The OHT submits that prior to opening the submissions, the evaluation team verbally decided to review the evaluation criteria and the weighting for CMS was lowered from 50% to 40% and the weighting for mandatory deliverables was increased from 10% to 20%. It further submits that because the evaluation team revised the criteria in an in-person meeting there were no additional written records related to the evaluation criteria.

[21] In their affidavits, all three individuals state:

I swear this affidavit in response to an appeal of the Ontario Heritage Trust's decision that additional records cannot be provided to the appellant on the basis that they do not exist. My affidavit is for the purpose of supporting the reasonableness of the Agency's search, and for no other improper purpose.

[22] In his representations, the appellant submits that he is not satisfied with the one-page, undated document that was released in response to parts 1 and 2 of his request for evaluation criteria. He submits that there are at least two different versions of the evaluation criteria document and identifies that two records were disclosed to him in response to a subsequent, separate, request. He submits that in response to the second request he received copies of two versions of the evaluation criteria document: The first version is the same one that was disclosed in response to the current request which values the CMS at 50% and a second version that values the CMS at 40%. He provided copies of both documents.

[23] The appellant also submits that the dates of the two versions of evaluation criteria documents are significant.

[24] First, he states that part 1 of the request at issue was for the criteria as it was on July 24, 2009, when the RFS was initially released, and part 2 was for revisions made to the criteria after that date. However, the only document released to him in response to that request is undated. When he questioned the OHT, it responded that during the search it did not locate any records that identified the date the evaluation document was created. However, based on documents released to him in response to his subsequent request, the appellant states that he has established and, he submits the OHT would have known, the date a second version of the evaluation criteria document was created (after August 20, 2009) and modified (September 28, 2009). He submits

that even though he requested records that documented any revisions to the evaluation criteria, the OHT only released one of the two records. He submits that the OHT should have known that the second version was responsive but that it only gave him the first version of the evaluation criteria and refused to release the second version.

[25] Second, the appellant states that the dates the evaluation criteria were modified are significant because the Ontario government's published procurement policy states that the evaluation criteria must be clearly set out in the tender documents. The appellant disputes the OHT's submission in its representations that once the evaluation of submissions was underway, the evaluation criteria were not modified in any way. He submits that they were modified after the bids were opened and points to a number of records that suggest that the initial evaluations had begun before the final evaluation criteria were established.

[26] The appellant concludes his representations by submitting that the OHT failed to disclose all responsive records. He alleges that the OHT "issued false statements regarding the creation and modification of the evaluation criteria" and that it "mounted a sustained and deliberate effort to prevent parts of the relevant information from being released."

[27] On reply, the OHT reiterated that the search it undertook to locate records responsive to the appellant's request was reasonable.

[28] It submits that it initially provided the appellant with a copy of one criteria document in response to parts 1 and 2 of the request in the current appeal. It states that it subsequently discovered an additional record containing an adjustment to the criteria (a change to the CMS amount) and that this record was provided to the appellant.

[29] The OHT also submits:

As the [OHT] has already indicated (with documentation to support its claim), the criteria were only changed once. The appellant allows that the criteria were initially developed at the time of the RFS deadline for submissions (as corroborated by [OHT] documentation). The [OHT] also informed the appellant ([through documents provided to him in his second request]) that the criteria were adjusted when the team first met to conduct evaluations. There is no additional documentation to support a further change to the criteria. At the RFS submission deadline (August 30, 2009), a summary chart of submitted cost estimates was prepared and sent to evaluation team members prior to their meeting. This summary chart did not signal the beginning of the evaluation process. The evaluation began when the team met on September 28, 2009, at which time the evaluation criteria were adjusted.

Finding and analysis

[30] I have considered the parties' representations and have reviewed the records that the OHT located and disclosed to the appellant. For the reasons that follow, I find that the OHT has provided sufficient evidence to demonstrate that it has conducted a reasonable search to identify and locate records responsive to parts 1 and 2 of the appellant's request, as required by section 24 of the *Act*.

[31] First, as noted above, a reasonable search is one in which an experienced employee who is knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request. In the circumstances of this appeal the OHT had the Director of Corporate Businesses and Services, as well as two members of the evaluation team for the project at issue, the Manager of Marketing and Communications and the Senior Web Communications and Marketing Specialist, conduct searches. I accept that all three individuals are experienced employees who are knowledgeable in the subject matter of the request.

[32] Additionally, the OHT contacted another individual, the third individual on the evaluation team, who was on secondment and was not working at the OHT at the time of the search. This individual confirmed that other than his files which remained in the possession of the OHT, he had retained no records responsive to the request.

[33] According to the OHT, the three individuals identified above who were working at the OHT at the time of the request conducted a physical search of their paper files and notes and a search of their electronic files using, in my view, reasonable keyword search criteria. These individuals also conducted similar searches of the OHT records of the third individual on the evaluation team who was on secondment at that time. The results of this search amounted to a number of responsive documents, including one record detailing the evaluation criteria used by the OHT.

[34] Once it was established that the appellant believed that additional records should exist with respect to parts 1 and 2 of the request, further searches were conducted and no additional records related to the creation of the evaluation criteria were located. Finally, a further search was conducted in response to a second request from the same requester and a second version of the evaluation criteria was found. This second version was provided to the appellant, together with the first version, in response to his second request.

[35] I find that experienced employees have made a reasonable effort to identify and locate responsive records as required by section 24 of the *Act* and that the OHT's search was reasonable.

[36] The appellant's representations suggest that because the OHT located an additional document, a second version of the evaluation criteria, only following a

number of initial searches, that the search that it conducted was not reasonable. The appellant suggests that because the modifications to the evaluation criteria were initially made verbally the OHT should have known that, at minimum, another version identifying modifications made to the evaluation criteria should have existed at the time it only provided him with one version. I accept, that at the time the searches were conducted for the current appeal, only one version of the evaluation criteria could be located despite the fact that subsequently a second version was identified. The appellant has since been provided with both versions of the evaluation criteria. Both versions are undated.

[37] As noted above, 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. I have found that the searches conducted by the OHT were reasonable.

[38] Moreover, the appellant has not provided me with any evidence to establish a reasonable basis that additional versions of the record detailing the evaluation criteria, or any other records related to the evaluation criteria and its modifications might exist. As stated above, 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.

[39] A fair portion of the appellant's representations stress the fact that the OHT modified the evaluation criteria after the evaluation process began and that this is contrary to the Ontario government's published procurement policy. It is not my role to determine whether the OHT is complying with established guidelines and procedures in this respect. Presumably, there are other accountability mechanisms and procedures to address such matters. My only role is to determine whether the OHT has conducted a reasonable search for responsive records created and found within the OHT's record holdings.

[40] Finally, I do not accept the appellant's suggestions that the OHT "mounted a sustained and deliberate effort to prevent parts of the relevant information from being released." The evidence before me indicates that the OHT treated the appellant's request diligently and made efforts to locate responsive records relating to the evaluation criteria and its modifications. In my view, there is no evidence to substantiate his claim that the OHT has intentionally withheld any requested records.

[41] In conclusion, I find that the OHT conducted a reasonable search for responsive records as required by section 24 of the *Act*.

ORDER:

I uphold the OHT's search for responsive records and dismiss the appeal.

Original Signed By: _____ January 25, 2013
Catherine Corban
Adjudicator