

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3216

Appeal PA12-159

University of Ottawa

June 14, 2013

**Summary:** The requester sought records from the university about herself for a specified time period. The university located responsive records; however, the appellant believed that additional responsive records existed. This order requires the university to conduct another search for responsive records.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1), 24.

**Orders and Investigation Reports Considered:** Order PO-3009-F.

### OVERVIEW:

[1] The University of Ottawa (the university) received two requests under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for all academic and non-academic communications relating to the requester for a specific time period.

[2] The university issued a decision providing partial access to the records, citing the application of the exclusion in section 65(8.1) (employment and labour relations), and the exemptions in sections 18 (economic and other interests) and 21(1) (personal privacy) as the basis for denying access to some of the records, and also advised that some information found in the records was not responsive to the request.

[3] The requester, now the appellant, appealed this decision on the basis that there should be additional records.

[4] The university advised the mediator that as the program attended by the appellant was offered through a named hospital and Algonquin College, as well as the university, other responsive records may be in the custody of those institutions.

[5] The appellant's representative advised the mediator of a specific email, in which another email was referenced as the basis for the appellant's belief that the second email should exist. He also noted that meetings and correspondence were referred to in the records, however records relating to these meetings and correspondence were not included.

[6] The university undertook two additional searches during the mediation process, but no additional records were located. The appellant's representative advised that he was not satisfied, and has asked that this file be moved to adjudication to determine whether the university conducted a reasonable search for responsive records.

[7] During adjudication, representations were exchanged between the parties in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*.

[8] In this order, I require the university to conduct another search for responsive records.

## **DISCUSSION:**

### **Did the university conduct a reasonable search for records?**

[9] 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.<sup>1</sup> 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.

[10] 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.<sup>2</sup> To be responsive, a record must be "reasonably related" to the request.<sup>3</sup>

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

[11] 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.<sup>4</sup>

[12] 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.<sup>5</sup>

[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.<sup>6</sup>

[14] 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.<sup>7</sup>

[15] The institution was asked to provide a written summary of all steps taken in response to the request. In particular it was asked the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched

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<sup>4</sup> Orders M-909, PO-2469, PO-2592.

<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

<sup>7</sup> Order MO-2213.

and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[16] The university submits that it had no need to contact the appellant for additional clarification as the scope of the request was clear. It states that its Freedom of Information Coordinator (FOIC) advised the Dean of a named faculty, the Vice-Dean Academic of this faculty and her assistant of the appellant's access to information request. It states that a search for records was conducted in the Office of the Dean, the Vice-Dean and the university's communication department. This search provided no additional responsive records.

[17] Accompanying the university's representations was an affidavit from the FOIC. In response to her request that searches be conducted for responsive records, the FOIC states that:

I received a copy of the telephone logs that correspond with the Dean's, Vice-Dean and Vice-Dean's Administrative Assistant's extension number. The search for the telephone logs was performed by the University's Computing and Communications Services...

[T]he Administrative Assistant, Access to Information and Privacy Office contacted the Dean's Assistant to verify if a search for records had been performed. The Dean's Assistant confirmed that a search has been completed and that no records responsive to the request existed...

[T]he Vice-Dean Academic ...confirmed during a telephone conversation with me that a reasonable search for records had been performed and that a copy of her student file had already been provided to the appellant prior to her filing the access to information request that is subject to this appeal...

I sent an email to the Vice-Dean Academic ...requesting that she verify if an additional record from [the appellant] exists. [T]he Vice-Dean Academic ...confirmed that no additional records exist.

[18] The appellant states that she did not receive most of the records she requested, in particular, she did not receive a copy of a specific email from a named professor to the Vice Dean, as well as communications from this professor to a specific university committee and from another professor to two employees of the university.

[19] The appellant points out that the Vice-Dean has not provided an explanation as to why a specific email was not identified, nor did the search request from the FOIC specifically mention this email. She states that the FOIC only made a blanket request for the Vice-Dean to search whether additional records from this identified professor exist.

[20] In addition, the appellant states that the university has not located in its searches a response to communications from two professors to the committee. She refers to an email from a professor to the appellant which stated as follows: “[Another named professor] has discussed it with the university and is following up by sending in documentation required.”

[21] The appellant also submits that she has not been provided with information regarding a named professor’s contact with the committee prior to the commencement of the allegation against the appellant that is the subject matter of the records.

[22] The appellant states that she has made a companion request to Algonquin College for responsive records. Nevertheless, she states that the subject matter of the records comes within the sole jurisdiction of the university and the responsive information should be in university’s control. The appellant concludes by stating that the university has acted in a subjective and arbitrary manner in its search for the responsive records and has not provided any explanation that the specific records mentioned in her representations do not exist.

[23] Despite being provided with an opportunity to provide reply representations, the university chose not to respond to the appellant’s submissions by way of reply.

### ***Analysis/Findings***

[24] The appellant’s request is quite detailed and seeks communications between named university professors, deans, vice-deans, students, committee members and other university staff, as well as records about the appellant in a specific university faculty.

[25] From my review of the university’s decision letters and its representations, I have no evidence that the university specifically asked individuals to conduct searches for the specific records sought by the appellant in her request. In its decision letter and in its representations, the university merely states that:

...a search was conducted in the offices of the Dean, the Vice-Dean, the Vice-Dean’s Assistant and the voice communications coordinator.

[26] During the mediation stage of this appeal, the university performed another search when it asked the Vice-Dean if a specific email from a named professor exists.

The Vice-Dean responded that this email does not exist. However, it does not appear that the university expanded its search during mediation to include all of the records sought by the appellant in her request.

[27] I have reviewed the appellant's very detailed representations as to what additional responsive records should exist, which the university did not reply to. Taking into consideration the university's representations, I find that the university has not conducted a reasonable search for responsive records.

[28] In making this finding, I am also relying on a letter from the university to the appellant during the mediation stage of this appeal,<sup>8</sup> which included the following four points:

1. Most of the academic records in the [appellant's] file were not included because they were excluded from the scope of the request...
2. [Three named professors] are not University of Ottawa employees but rather employees of Algonquin College. An access to information request would need to be submitted at the College in order to obtain access to these individuals' records.
3. The university has conducted a search in the Dean's office, however, no records were located in this office.
4. The Vice-Dean has conducted a reasonable search for records responsive to your request and no further responsive records exist.

[29] I previously issued an order to the university concerning what types of records that may be in the custody of university professors may be also within the control of the university. In Order PO-3009-F,<sup>9</sup> I determined that:

1. records or portions of records in the possession of an APUO member [Association of Professors of the University of Ottawa] that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;
2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;

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<sup>8</sup> Tab 5 to the university's representations.

<sup>9</sup> See paragraph 181 of Order PO-3009-F.

3. administrative records are *prima facie* in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

[30] The appellant identifies several university staff by name, including professors, in her request. Based on the short time frame of the request and its wording, I find that the appellant is primarily seeking records relating to herself concerning an issue that was brought before one of the university's committees. The records that the appellant is seeking do not relate to the named professors' own personal matters, nor are these records related to teaching or research that are likely to be impacted by academic freedom.

[31] It appears to me that the records the appellant is seeking are primarily administrative records, which are *prima facie* in the university's custody and control. I find the university's response that, "Most of the academic records in the appellant's file were not included because they were excluded from the scope of the request," is not a proper response in the circumstances of this appeal.

[32] I stated in Order PO-3009-F the proper procedure to be followed when records are in the custody or control of the university's professors:

Accordingly, the next steps should be for the university to request that APUO members produce records to it that would be responsive to the clarified request and are in the university's custody or under its control, taking these three criteria<sup>10</sup> into account. The decision as to whether exclusions or exemptions apply to such records is for the university to make, subject to appeal to this office.

[33] In this appeal, I have no evidence that the university actually communicated the exact particulars of the appellant's request to the university staff named in her request.

[34] I also disagree with the university decision not to request responsive records from three of the professors named in the appellant's request, as they are not university employees. In its representations, the university provided a copy of an email from one of these professors. In this email, this professor identifies herself and the other two professors as being part of a collaborative program that is operated by both the University of Ottawa and Algonquin College.

[35] I find that the university should have sought responsive records from these three named professors, as well as the other university staff named in the request, in order to determine whether any records in the custody or control of these individuals were also in the university's custody or control. As stated in Order PO-3009-F,<sup>11</sup> this office has

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<sup>10</sup> The three criteria are set out in paragraph 181 of Order PO-3009-F.

<sup>11</sup> See section 10(1) of *MFIPPA* and paragraphs 89 to 100 of Order PO-3009-F, in particular.

developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, which are set out in a number of orders.<sup>12</sup>

[36] Based on my review of the appellant's representations, which the university did not reply to, I find that the appellant has provided a reasonable basis for me to conclude that additional responsive records exist. I also find that the university has not provided 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. Accordingly, I will order the university to conduct another search for responsive records, taking into account the analysis set out above, as well as the discussion in Order PO-3009-F.

**ORDER:**

1. I order the university to conduct a further search for records responsive to the request that are in the custody and control of the university, taking into account the analysis set out above, as well as the discussion in Order PO-3009-F. The university is to conduct this search within the time period specified in section 26 of the *Act*, treating the date of this order as the date of the request and without recourse to a time extension under section 27 of the *Act*.
2. I order the university to provide a decision letter to the appellant regarding the results of this search in accordance with the provisions of the *Act*.

Original signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ June 14, 2013

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<sup>12</sup> Orders 120, MO-1251, PO-2306 and PO-2683.