

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3255

Appeals PA12-343 & PA12-355

Ontario Northland Transportation Commission

September 13, 2013

Summary: Two individuals submitted requests to the Ontario Northland Transportation Commission (the ONTC) for information about payments made to a named third party and/or a named advertising company. In each case, the ONTC notified the third party (the affected party) of the request and sent a record it had created containing information claimed to be responsive to each request. The affected party opposed the disclosure of both records, arguing that they do not contain information about him or his company. The ONTC issued access decisions, indicating that it would disclose the records. The affected party appealed the decisions to this office. For the purpose of the appeals, the ONTC created a third, joint, record for both requests and submitted it to this office. The adjudicator finds that the joint record created by the ONTC is not responsive to either request and, instead, orders disclosure of the two records sent to the appellant upon notification, with qualifying statements.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24 and 54(3).

Orders and Investigation Reports Considered: Order MO-2863.

OVERVIEW:

[1] This order addresses two requests that were submitted six-weeks apart by different requesters under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Northland Transportation Commission (the ONTC). The first

request sought access to "... the cost of contracts the ONTC paid out to [a named company] from 1978 to 1993."¹ The second request sought "... copies of all payments from the [ONTC] to [a named individual] and/or [a named company] from 1978 to present [2012]."²

[2] The ONTC created a record for each request containing information about money paid to specific vendors in certain years. The ONTC notified the individual named in both requests as an affected party, and in accordance with section 28 of the *Act*.³ The ONTC provided the affected party with a copy of the relevant record created for each request.

[3] In response to the notification letters sent by the ONTC regarding both requests, the affected party responded, opposing disclosure of the records and expressing concern about the source, and accuracy, of the information in the records created by the ONTC. In particular, he disclaimed any interest in the company identified in both of the records created by the ONTC for notification purposes. Specifically, the affected party advised the ONTC that in 1992, he sold the assets of the company named in the requests to the company listed in the records created by the ONTC.⁴

[4] After receiving the affected party's representations, the ONTC issued a decision granting full access to the created records to both requesters. Upon receipt of the ONTC's access decisions, the affected party (now the appellant) appealed them to this office, which opened Appeals PA12-343 and PA12-355.

[5] A mediator was appointed to explore resolution of the issues. The same mediator dealt with both appeals. During mediation, some clarification was achieved through discussions with the parties, including the ONTC, the appellant and the original requesters.⁵

[6] In Appeal PA12-343, respecting "contracts paid out" to the named company from 1978 to 1993, the original requester clarified that he was seeking information related to the appellant with respect to the business he had with the ONTC and what he was paid. In Appeal PA12-355, respecting "all payments" by the ONTC to the appellant or the named company from 1978 to 2012, the original requester confirmed that she was

¹ The first request was dated, and received by the ONTC on, April 30, 2012. This request led to Appeal PA12-343.

² The second request was undated, but is date-stamped by the ONTC as received on June 11, 2012. The second request led to Appeal PA12-355.

³ Section 28(1) requires notification of affected parties prior to disclosure of information that might be subject to the mandatory third party information or personal privacy exemptions in sections 17(1) and 21(1) of the *Act*. In this way, affected parties are afforded an opportunity to provide submissions as to whether the requested records should be disclosed.

⁴ This company is identified in this order as "HDL."

⁵ For example, the ONTC advised that no data is available for the years before 1988.

seeking access to records relating to payments made to the appellant and/or his company.

[7] As stated, two separate records were created by the ONTC in response to the two requests and were provided to the appellant with the section 28 notification and with the subsequent access decisions. However, when the appeals were opened with this office, the ONTC created a different, third record and submitted a copy of the record as the single responsive record for both appeals. The appellant strongly disputes the responsiveness of the third record, in particular.

[8] As a mediated resolution was not possible, the appeals were transferred to the inquiry stage and assigned to me. I decided to conduct a joint inquiry into Appeals PA12-343 and PA12-355.

[9] In the usual course, an adjudicator sends out a Notice of Inquiry outlining the issues to seek representations from the party bearing the onus of proof with respect to establishing their position. Usually, this initial Notice of Inquiry is sent to the institution claiming exemptions under the *Act* to deny access to requested records. In third party matters, such as these two appeals, the Notice of Inquiry is typically sent first to the third party appellant, who is opposing an institution's proposed disclosure of records. After reviewing the files for Appeals PA12-343 and PA12-355, however, I concluded that further clarification of the ONTC's position on responsiveness should be obtained prior to contacting the appellant for his representations.

[10] Accordingly, I sent a letter Notice of Inquiry to the ONTC. I received representations from legal counsel for the ONTC in these appeals. The ONTC's representations contained yet another (fourth) record claimed to be responsive to both requests, which the ONTC asked me to share with the appellant. After obtaining additional clarification regarding submissions made by the ONTC, I sent a modified letter Notice of Inquiry to the appellant, along with the ONTC's representations and various attachments. The appellant submitted brief representations in response.

[11] In this order, I find that the record created for the appeal of the ONTC's decisions in Appeals PA12-343 and PA12-355 is not responsive to the requests. Instead, I order the ONTC to disclose the two separate records created for the purpose of notifying the appellant of the requests, under certain terms.

DISCUSSION:

[12] At an earlier stage of these appeals, the ONTC also argued that section 17(1) of the *Act* does *not* apply to the record and that it should be disclosed to the requesters. Notably, however, the appellant apparently does not claim that the mandatory third party information exemption in section 17(1) applies, or that the mandatory personal privacy exemption in section 21(1) does. Rather, as stated, he argues that the

information the ONTC proposes to disclose is inaccurate or is not responsive to the requests. Accordingly, there is no appeal of these exemptions before me.

Is the record created by the ONTC responsive to the requests?

[13] As outlined in the introduction to this order, the ONTC initially provided the appellant with a separate responsive record for each request at the notification and decision stages. The record created by the ONTC for the first request (Appeal PA12-343) covers the period from 1988 to 1992 and consists of a chart outlining payments apparently made to a certain company by the ONTC in those five years. The record created by the ONTC in response to the second request (Appeal PA12-355) contains data from the years 1988 to 1992, 1995 and 2006 and consists of a chart listing payments apparently made to the appellant and two named companies by the ONTC.

[14] On appeal, however, the ONTC submitted a single, different record that it claimed is responsive to both appeals. This third record appears to combine the information in the two separate records initially created by the ONTC at the notification stage.⁶ The appellant challenges disclosure of the record because he believes that the information does not relate to him, but rather to a company in which he has never had an interest, financial or otherwise. The appellant's position is, essentially, that the numerous created records are not responsive to the requests. The ONTC maintains that the records are responsive to the requests, based on corporate searches and (unidentified) "internal documents."

[15] In the letter Notice of Inquiry sent to the parties, I set out the provisions of section 24 of the *Act* and the principles associated with determining responsiveness, as developed in past orders of this office. I noted that section 24 imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. The relevant parts state:

- 24(1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

⁶ The record submitted to this office by the ONTC as the responsive record for both appeals is an 8½ x 14 chart with columns titled Vendor Number, Vendor Name, the years 1988 to 2012, and an untitled column containing the totals.

(2) 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).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the Act. Generally, any ambiguity in the request should be resolved in the requester's favour.⁷

[17] To be considered responsive to the request, records must "reasonably relate" to the request.⁸

[18] In the letter Notice of Inquiry, I also stated the following:

Most relevant in the circumstances of these appeals is the principle described in the second bullet point, above, namely that to be considered responsive to a request, information must be *reasonably related to* the request. Based on the wording of the requests submitted in Appeals PA12-343 and PA12-355, I am not satisfied that the record created by the ONTC⁹ is responsive to both requests. In fact, it appears that the created record contains information that is outside the scope of both requests and/or is inaccurate. While determination of the accuracy of a record is not, strictly speaking, a matter within the jurisdiction of this office, it is effectively raised in these appeals in the context of determining responsiveness under section 24(1) of the *Act*. ...

On this point, I require confirmation from the ONTC regarding what record is considered responsive in Appeals PA12-343 and PA12-355: the two versions sent to [the appellant] with notification, or the single version contained in the appeal files' records folder?

To explore and potentially resolve the issue of responsiveness in these appeals, and perhaps the appeals themselves, I am asking the ONTC to provide me with representations regarding the steps taken to identify information responsive to the request.

The ONTC is asked to provide information about what sources or documents were searched to compile the information about contracts with [the named company], or payments made to [the appellant] or [the named company], during the time periods specified in each request,

⁷ Orders P-134 and P-880.

⁸ Orders P-880 and PO-2661.

⁹ The third, different, record, printed on 8½ x 14 paper, as described above.

leading to the creation of the record the ONTC proposes to disclose to the two original requesters. ...

In this regard, I am asking the ONTC to comment on the reporting of contracts with (PA12-343) or payments made to (PA12-355) [the specific company ("HDL")] as being in relation to the appellant. I have reviewed the 1992 incorporation documents for this company that were provided to this office during mediation. I am aware that the ONTC referred to "internal emails" about the appellant's purported involvement with ... HDL after 1992.

However, I am asking the ONTC to **provide representations in support of its position that funds paid to ... HDL by the ONTC constitute information responsive, or *reasonably related to*, the requests for information about the appellant ... in Appeals PA12-343 and PA12-355** [emphasis in original].

Representations

[19] During the inquiry, I did not seek representations from the original requesters because I concluded that the requesters had clearly conveyed their interest through the wording of each of the requests and during the earlier appeal stages. The requester in Appeal PA12-343 seeks information related to the appellant with respect to business he had with the ONTC and what he was paid. This requester indicates that he does not want information about a company that is not associated with the appellant. The requester in Appeal PA12-355 is looking for payments made by the ONTC to the appellant and any company in which he had an interest.

[20] The ONTC claims that it read the requests "liberally" as seeking information about payments made to the company named in the requests "or to companies with a similar name" within the relevant date range. The ONTC submits that its interpretation of the request was appropriate because:

Neither request should be read as a request for information about payments made to any specific corporation. Neither request uses the words "Inc" "Ltd" or "Corp" to denote the entity about which information is being sought. ... [T]hese factors suggest a general intent rather than an intent to use [the company named in the requests] in [a] technical or limiting way.

[21] The ONTC explains that its database search using the interpretation described above revealed that it had made payments to four specified entities for advertising and communication services. According to the ONTC, these are "payments reasonably

related to a request for monies paid to [the named company].” The ONTC submits that it was then faced with:

... two reasonable options. One reasonable option was to go back to the requesters and ask whether they wanted access to information about payments made to ... HDL ..., [the appellant] and [another company with the appellant’s surname]. The other reasonable option was to decide the requests exactly as ONTC did.

ONTC could *not* have answered the requests by advising the requesters that it had no responsive records. ...

ONTC came to believe that the figures in its database that show payments to ... HDL ... from 1988¹⁰ to 1992 reflect payments actually made to [the company named in the requests] from 1988 to 1992.

[22] Second, the ONTC indicates that it “takes no position on the appellant’s affiliation with ... HDL or [a named company]” and claims that the issue of affiliation is not relevant in this appeal. The ONTC explains that it provided notice to the appellant because it believed that he was affiliated with HDL and the other corporations that included his surname in the company name.

[23] Third, the ONTC claims that the two separate records that it provided to the appellant in giving notice do not disclose all information in the ONTC’s custody or control. According to the ONTC, this “explains the discrepancy between the records under appeal” and the additional record sent to this office.¹¹ The ONTC provided an additional, fourth, version of a payment record and pointed out certain features of it in comparison to the two records initially sent to the appellant with the section 28 notice.

[24] Finally, the ONTC submits that the responsive records were produced from its database “as data was recorded in the database.” The ONTC acknowledges that the responsive records appear to erroneously attribute to HDL revenues that were actually paid to the company named in the requests. The ONTC explains:

Given ... HDL ... did not exist until 1992, it appears that the attribution of payments to ... HDL ... [from] 1988 to 1992 is inaccurate in the records [as provided to the appellant for notification purposes]. ONTC believes that it re-assigned [the] vendor number [of the company named in the requests] to ... HDL ... at some point after the sale and that the figures in

¹⁰ Throughout the ONTC’s representations, reference is made to “1998” in the context of the time period of the responsive information, which is 1988 to 1992. Wherever this minor error appears in quoted excerpts of the ONTC’s representations, I have corrected it to read “1988.”

¹¹ “Additional record in your files” appears to refer to the single record submitted to this office as responsive to both requests.

its database that show payments to ... HDL ... from 1988 to 1992 reflect payments actually made to [the company named in the requests] from 1988 to 1992.

[25] With respect to this error, the ONTC proposes to address the payment attribution error by providing a qualifying statement to the requesters with the record. The record the ONTC is referring to is the fourth version of the record produced and submitted as Tab "G" with the ONTC's representations. The qualifying statement would indicate to the requesters that HDL had purchased the assets of the company named in the requests "in or around March 1992." The ONTC adds that the appellant ought to advise the ONTC if he views the qualifying statement as inaccurate.¹²

[26] In response to the initial notification by the ONTC, the appellant stated that:

... HDL ... is NOT the company the request was made for, and therefore the statement you plan on issuing is completely inaccurate. To further re-iterate, I have never had any interest in ... HDL

[27] During mediation, the appellant reiterated the earlier statements about his lack of connection with HDL and stated: "There is no information relating to [me] contained in the records at issue." During the inquiry, the appellant responded to my acknowledgement of concerns with responsiveness (in the letter Notice of Inquiry) by expressing agreement with my "preliminary view" that the "record contains information that is outside the scope of both requests and/or is inaccurate." Further, the appellant submits that:

ONTC has no records of any cost of contracts paid out to [the company named in the requests] from 1978 to 1993. And they have no copies of payments from ONTC to [the company] from 1978 to present.

As I have repeatedly confirmed with ONTC, I do not have, and have never had, any interest or ownership in ... HDL ..., which is the record they intend to disclose.

Analysis and findings

[28] To begin, based on my consideration of the wording of the two requests submitted, and the confirmation provided by the requesters after the appeals were filed with this office, I am satisfied that each requester's interest was clear. I find that there was a shared interest in learning about funds paid by the ONTC to the appellant and his

¹² The ONTC's representations include submissions on the IPC's lack of jurisdiction over the "accuracy of the ONTC's business records." This order does not review the accuracy of the figures and so these representations are not set out in their entirety.

advertising company specifically, and that it did not extend to other unrelated entities whose names incidentally contained the appellant's surname.

[29] The importance of ensuring a request's clarity early on in the process, so that an institution might meet its obligations under the *Act*, has been discussed in many orders of this office. Adjudicator Frank DeVries recently summarized it in Order MO-2863, as follows:

... Clarity concerning the scope of a request and what the responsive records are is a fundamental first step in responding to a request and, subsequently, determining the issues in an appeal. Furthermore, adopting a liberal interpretation of the request ensures that records which might be responsive to the request are not omitted from the search. In addition, if an institution chooses to adopt a limited interpretation of a request, it ought to indicate to a requester the limits of its search.¹³

[30] I agree with Adjudicator DeVries. Such clarity is also crucial in circumstances where the attribution of information, or its reasonable relation to the request, is in question. In my view, the ONTC's processing of the requests went astray because the approach to identifying responsive information involved searching for "companies with a similar name" to the one listed in the requests *without further exploration or clarification* with the requesters. I reject the ONTC's submission that the absence of words such as "Inc." "Ltd." or "Corp." accompanying the company named in the requests "suggests a general intent rather than an intent to use [the company named in the requests] in [a] technical or limiting way." In my view, the ONTC had an obligation to indicate to the requesters the limits to its identification of responsive records earlier on in the processing of the requests, or at least as soon as the appellant had expressed reasonable concerns about responsiveness, which I accept that he did upon notification of the proposed disclosures.

[31] The ONTC conceded during this inquiry that it could have "go[ne] back to the requesters and ask[ed] whether they wanted access to information about payments made to ... HDL ..." as well as to the appellant and the company named in the requests. However, it chose not to do so, in spite of the appellant challenging the connection between the information produced by the ONTC as responsive and, in particular, his connection to HDL. This was unfortunate.

[32] To further compound matters, the ONTC amalgamated the information from the two separate records it created in Appeals PA12-343 and PA12-355 for notification purposes and created a third record for this office in processing the appeals. No rationale for creating a joint record has been provided. This order addresses two

¹³ In this passage, Adjudicator DeVries also outlines the issue of responsiveness as discussed in Orders P-880 and PO-1730.

requests from two separate individuals, and although the subject matter is quite similar, the scope of each request is different. Accordingly, I find that the single record created and submitted to this office on appeal contains information that is outside the scope of each request.

[33] As stated, my preliminary view that this single record contains information falling outside the scope of each request was conveyed to the parties during the inquiry. This led the ONTC to create yet another (fourth) record, the one appearing at Tab "G" of its representations. This record contains additional information relating to payments made to two more vendors that appear, on the evidence before me, to have no connection to the appellant.¹⁴ As stated earlier, the ONTC claimed that emails or other information in its custody or control suggested a connection between the appellant and HDL after 1992. Despite being asked to provide information about the connection, the ONTC submitted no internal documents or other evidence, aside from the various corporate documents relating to HDL's purchase of the assets of the appellant's advertising company, and other corporate matters.

[34] The ONTC argues that affiliation and accuracy are not for me to determine. However, I must be satisfied by the evidence that the information the ONTC proposes to disclose to the two original requesters is reasonably related to their respective requests. In my view, disclosure of either of the two records created by the ONTC during the appeal stage that compile (and supplement) the information provided to the appellant for notification purposes would entail disclosure of information that is *not* reasonably related to their requests. Further, I am not satisfied that the qualifying statement proposed by the ONTC (to the effect that HDL had purchased the assets of the company named in the requests "in or around March 1992") would adequately dispel the impression made by the inclusion of information that is outside the scope of the respective requests.

[35] In fashioning a remedy in this situation, I rely on subsections 54(1) and (3) of the *Act*, which state:

After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. ...

Subject to this *Act*, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

¹⁴ These two additional vendors appear to be related to HDL and/or its successor company.

[36] These provisions do not afford the Commissioner unlimited remedial power, but they do embody the Legislature's intention that the Commissioner and her delegates should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act*.¹⁵

[37] In my view, the information that is reasonably related to both of the requests essentially already exists in the form of the two separate records initially created by the ONTC for notification purposes. In saying this, I accept that the listing of HDL as the vendor that supplied advertising services to the ONTC between 1988 and 1992 – when that company did not even exist during most of that period – is the result of an erroneous substitution of HDL for the company named in the requests.

[38] Since no exemptions are claimed and none of the mandatory exemptions apply, I will order the ONTC to disclose the two records, under terms intended to clarify the provenance of the information for the requesters.

[39] In Appeal PA12-343, the ONTC is to disclose the record that shows the cost of contracts the ONTC paid out to the named company from 1978 to 1993. In Appeal PA12-355, the ONTC is to disclose the record that shows payments from the ONTC to the appellant and/or the named company from 1978 to 2012.

[40] Along with each record, the ONTC is to provide each of the requesters with a relevant explanation of the limitations of the information identified as responsive. Specifically, the ONTC should clarify that:

1. There are limitations on the time periods of the responsive information (i.e., for PA12-343, no responsive data exists prior to 1988, or after 1992; and for PA12-355, no responsive data exists prior to 1988, and thereafter, from only seven years of the time period identified in the request);
2. The vendor name associated with the amounts for 1988-1992 (i.e., HDL) is not correct and requires qualification. As proposed by the ONTC, this note should explain the inadvertent and erroneous re-assignment of the vendor number for the company named in the request(s) to HDL, following the sale of assets of the named company to HDL in or around March 1992.
3. There is no documentation to support an accurate determination of the portion of the 1992 figure that was paid out to the company named in the request, compared to the portion of it paid out to HDL, after the March

¹⁵ See Order M-618, where former Commissioner Tom Wright reviewed subsections 43(1) and 43(3) of *MFIPPA*, the equivalent provisions in the *Act's* municipal counterpart. See also the purposes of the *Act*, which are outlined in section 1.

1992 sale of the named company's assets to HDL. For this reason, the figure shown for 1992 is not considered a reliable representation of "contracts paid out" to the named company (PA12-343) or "payments made" to the appellant or the named company (PA12-355) for that year, as applicable.

[41] The ONTC may also include any further clarification thought necessary to ensure the original requesters' understanding of the content of each record.

ORDER:

I order the ONTC to disclose the two records to the respective requesters in Appeals PA12-343 and PA12-355, in accordance with the terms imposed by this order. The ONTC must send the relevant record to each of the original requesters by **October 21, 2013, but not before October 16, 2013.**

Original Signed by: _____
Daphne Loukidelis
Adjudicator

_____ September 13, 2013