

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3337-I

Appeal PA11-297

Ministry of Children and Youth Services

April 30, 2014

Summary: The appellant submitted an access request to the Ministry of Children and Youth Services for records relating to its Autism Intervention Program. He subsequently narrowed his access request. The sole issue to be resolved in this appeal is whether the ministry conducted a reasonable search for records that are responsive to his narrowed request, as required by section 24 of the *Act*. The adjudicator finds that the ministry did not conduct a reasonable search for responsive records and orders it to conduct a new search.

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

OVERVIEW:

[1] The appellant submitted the following access request to the Ministry of Children and Youth Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I make [a] request for the following documentation for the "Nine Regional Program Providers" as it applies to the document "Autism Intervention Program Guideline [Revision] Effective as of January 1, 2007 "Revision Date February 12, 2007 under the heading/sub-headings "Program Delivery – Accountability – Evaluation":

Services Contracts (for each of the nine Regional Program Providers.)

Detailed Evaluation Report (for each of the nine Regional Program Providers.)

Details of the methodologies used to formulate/measure the effectiveness of Regional Program Providers services.

Formulas used to measure the effectiveness of the Regional Program Providers services.

Executive Summary Reports (as it relates to the concluding summary of evaluations of the Regional Program Providers.)

Lessons Learned as a result of the evaluations of the nine Regional Program Providers.

Best practices developed as a result of the evaluations of the nine Regional Program Providers.

All Policy Documentation, Program Directive(s), Program Procedures and Program Memorandums as it applies to the IBI Program administered by the nine Regional Program Providers.

The documentation that defines the Government Structure of the MCYS IBI Program offered [through] the Regional Program Providers.

From the initial date of the IBI Program Implementation by Regional Program Providers to the present date.

[2] Autism is a complex neurological disorder that usually appears during the first three years of a child's life.¹ The ministry funds and provides a range of services and supports to children and youth with autism and their families. The Autism Intervention Program (AIP) is for children who have been diagnosed with autism toward the severe end of the spectrum. Its goal is to provide high quality, evidence-based intensive behavioural intervention (IBI) and associated services to children and youth with autism and their families.²

[3] The AIP operates within the geographic boundaries of the ministry's nine regional offices. The ministry has contracted with service providers in these nine

¹ "About Autism" at www.children.gov.on.ca/htdocs/English/topics/specialneeds/autism/about.aspx.

² Autism Intervention Program – Program Guidelines, section 1.2 at www.children.gov.on.ca/htdocs/English/topics/specialneeds/autism/guidelines/guidelines.aspx.

regions who deliver AIP services.³ In addition, it has published guidelines that govern the delivery of IBI and associated services to children with autism by the nine regional program providers.⁴ Section 6.6 of the guidelines contains a subheading entitled "Evaluation" which states that, "The [ministry] is committed to monitoring the [AIP] to determine that the program achieves its goals and objectives and makes efficient use of public resources. Systemic processes and outcome evaluation will be done periodically by the ministry and the results reported."

[4] Upon its receipt of the appellant's request, the ministry contacted him and after ongoing discussions, both parties agreed that his request would be narrowed to the following records:

General government records for the nine regional program providers as it applies to the document "Autism Intervention Program Guidelines Revision effective as of January 1, 2007: (Revision date February 12, 2007) under the heading/sub-heading "Program Delivery – Accountability":

1. the most recent Executive Summary or overall evaluation of all of the Ministry of Children and Youth Services' regional offices; and
2. the most recent detailed evaluations or findings for each of the ministry's nine regional offices.

[5] In response to this narrowed request, the ministry issued a decision letter to the appellant that provided him with access to two responsive records:

- (1) a section of the ministry's Autism Services Quarterly Report (Q2 2010-2011), which relates to the AIP; and
- (2) a table listing data relating to the AIP (Q2 2010-2011), broken down by ministry region.

[6] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC) because he believes that additional records should exist. Consequently, the issue to be resolved in this appeal is whether the ministry conducted a reasonable search for records that are responsive to the appellant's narrowed

³ Central East Region (Kinark Child and Family Services), Central West Region (Erin Oak Kids Centre for Treatment and Development), Eastern Region (Children's Hospital of Eastern Ontario), North East Region (Hands - The Family Help Network), Hamilton/Niagara Region (Hamilton Health Sciences – McMaster Children's Hospital), Northern Region (Child Care Resources), South East Region (Pathways for Children and Youth), South West Region (Thames Valley Children's Centre) and Toronto Region (Surrey Place Centre).

⁴ See note 2 above.

request. The appeal was assigned to a mediator, who communicated with both parties and also held a teleconference with them to determine if this issue could be resolved.

[7] The appellant advised the mediator that evaluation records should exist that analyze whether or not the AIP is meeting its goals or objectives. He claimed that the ministry did not respond to the second part of his request because it did not disclose records to him that specifically evaluate the nine regional program providers.

[8] The ministry provided the mediator with two academic studies that it has funded that evaluate the qualitative outcomes of children in the AIP, and indicated that these studies could be shared with the appellant. However, it advised the mediator that no additional responsive records exist, and claimed that the appellant was now seeking records that are outside the scope of his narrowed request.

[9] This appeal was not resolved during mediation and it was moved to adjudication for an inquiry. The adjudicator assigned to the appeal at that time issued notices of inquiry to the ministry and the appellant and received representations from both parties.

[10] In his initial representations, the appellant stated that he had "come to the conclusion that the responsive records regarding the [AIP] 'evaluations' are non-existent and that the ministry is only interested in tracking financial data." However, he later telephoned the IPC and stated that he had submitted a new access request to the ministry and, in response, received "evaluation" records that he believes are actually responsive to the narrowed request that is at issue in this appeal.

[11] This appeal was then transferred to me to complete the adjudication process. I invited the appellant to submit supplementary representations to support his claim that he has received "evaluation" records through a new access request to the ministry and to explain why these records are relevant to the reasonable search issue in this appeal. In response, the appellant submitted supplementary representations to me that address that issue.

[12] I then sent the ministry a copy of the appellant's initial and supplementary representations and invited it to submit reply representations. In response, I received reply representations from the ministry.

[13] For the reasons that follow, I find that the ministry did not conduct a reasonable search for records responsive to the appellant's narrowed request, and I order the ministry to undertake a further search for responsive records.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Did the ministry conduct a reasonable search for records that are responsive to the appellant's narrowed request?

[14] 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*.⁵ 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.

[15] 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.⁶ To be responsive, a record must be "reasonably related" to the request.⁷

[16] 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.⁸

[17] In its representations, the ministry sets out the search efforts made by its employees to locate responsive records. It states that after the parties agreed to the wording of the appellant's narrowed request, its Client Services Branch located two responsive records in a shared drive maintained by the branch. These search efforts are documented in a sworn affidavit by a senior program analyst at the ministry. The ministry disclosed these records to the appellant.

[18] After the appellant filed his appeal with the IPC and the file was moved to mediation, the ministry states that it held an internal meeting involving its Client Services Branch, Specialized Services and Supports Branch, and Legal Services Branch. At this meeting, it was decided that the Specialized Services and Supports Branch would conduct a search of its files for additional records that might be responsive to the appellant's narrowed request.

[19] The ministry describes this additional search for records and the outcome as follows:

⁵ Orders P-85, P-221 and PO-1954-I.

⁶ Orders P-624 and PO-2559.

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

. . . the Senior Policy Analyst responsible for the [AIP] at the Specialized Services and Supports Branch conducted a search of the electronic and hard copies filing systems in the branch for any reports related to the [AIP]. This was a broad, open-ended search for any type of evaluation of the [AIP], including any financial analyses, program reviews or assessment of outcomes for children in the program. While potentially responsive files were identified, these documents were considered to be outside the scope of the request.

[20] In the affidavit of the Senior Policy Analyst who conducted this search, he specifies that he located 340 pages of records that might have been responsive to the request. However, as indicated by the ministry in its submissions, it concluded that these records were not responsive to the appellant's narrowed request.

[21] I accept that the ministry assigned experienced program/policy analysts to conduct searches for records that it deemed to be reasonably related to the appellant's narrowed request. However, it is evident from the parties' representations that the ministry and the appellant have different interpretations of the appellant's narrowed request and particularly what types of records "reasonably relate" to his request.

[22] In a nutshell, the appellant believes that his narrowed request is for evaluation records that measure the effectiveness of the AIP in a "qualitative way" and this includes records that evaluate the services delivered by the nine regional program providers. The ministry's position is that such records are outside the scope of the appellant's narrowed request.

[23] As noted above, the appellant states that he submitted a new access request to the ministry and, in response, received "evaluation" records that he believes are actually responsive to the narrowed request that is at issue in this appeal. He provided me with a copy of the decision letter and index of records that he received from the ministry in response to his new request. The decision letter contains the wording for his new request, which was as follows:

1) I am requesting copies of the final version of any decision document submitted to senior management setting out how the [AIP] is to be evaluated and monitored since 2003, or for each point since 2003 when a change occurred;

2) I am requesting copies of the final service contracts for the ministry's Eastern Regional [AIP] between September 2008 and March 2010 (which should include all amendments, schedules, operational plans, budget documents, service descriptions, service delivery models, business models, any budgeting, planning documentation, performance indicators, governance structure, and details of the quantitative and qualitative data

service providers are required to provide back to the ministry under these service contracts.

[24] In response, the ministry located and disclosed 11 records to the appellant that contain a total of 789 pages. In particular, record 7 is entitled, "Kinark Child and Family Services Central East Preschool Autism Services – Program Review (February 2006)." Record 9 is entitled, "Preschool Intervention Program for Children with Autism Evaluation Plan Report (August 8, 2005)."

[25] The appellant states that record 7 is a "formal evaluation" of one of the regional program providers (Kinark Child and Family Services), and that record 9 sets out a "framework methodology to validate the overall effectiveness of the AIP." He submits that these records are actually responsive to his narrowed request in this appeal and are evidence that further records should exist. With respect to record 7, he states:

The "Kinark" document [is] clearly an evaluation document. The document makes observations and analysis regarding the delivery of the [AIP], as well as recommendations as to service delivery and accountability.

The "Kinark" document is identified as being "Volume 1" implying that additional "Program Review" reports or evaluations do exist.

It is for this reason I feel the [ministry] does in fact have in their possession additional documentation for the purpose of monitoring and evaluation of the [AIP] as specified by the [AIP] Guidelines under section "6.6 Accountability."

[26] To be responsive, a record must be "reasonably related" to the request.⁹ Consequently, in assessing whether the ministry conducted a reasonable search for records that are "reasonably related" to the appellant's narrowed request, it must be established whether the ministry interpreted the scope of his request properly. As noted above, both parties agreed to the following wording for his narrowed request:

General government records for the nine regional program providers as it applies to the document "Autism Intervention Program Guidelines Revision effective as of January 1, 2007: (Revision date February 12, 2007) under the heading/sub-heading "Program Delivery – Accountability":

1. the most recent Executive Summary or overall evaluation of all of the Ministry of Children and Youth Services' regional offices; and

⁹ See note 7 above.

2. the most recent detailed evaluations or findings for each of the ministry's nine regional offices.

[27] The appellant's narrowed request can be broken down into three parts: the preamble, item 1 and item 2. All three parts of the request must be taken into consideration and read together contextually in determining the scope of his narrowed request and the types of records in the ministry's custody or under its control that are reasonably related to this request. In my view, the preamble is an introductory clause that provides a general description of the records to which the appellant is requesting access, and items 1 and 2 then provide greater details about the specific records he is seeking.

[28] The beginning of the preamble states that the appellant is seeking "general government records for nine regional program providers." The "nine regional program providers" is a reference to the nine service providers that the ministry has contracted with in each of its nine regions to deliver the AIP (e.g. Kinark Child and Family Services (Central East Region), Erin Oak Kids Centre for Treatment and Development (Central West Region), Children's Hospital of Eastern Ontario (Eastern Region), etc.).¹⁰ Consequently, it is clear from the preamble that the appellant is seeking records relating to these nine regional program providers.

[29] The preamble goes on to say that the appellant is seeking these records as they "[apply] to the document 'Autism Intervention Program Guidelines Revision effective as of January 1, 2007: (Revision date February 12, 2007) under the heading/sub-heading "Program Delivery – Accountability." This latter wording provides context for the types of records that the appellant is seeking that relate to these nine regional program providers and the time boundaries that cover his narrowed request.

[30] The AIP Guidelines govern the delivery of IBI and associated services to children with autism by the nine regional program providers delivering the AIP. The "Program Delivery – Accountability" heading/subheading cited by the appellant in the preamble is a reference to section 6 of the Guidelines and particularly section 6.6 (Accountability).

[31] Section 6.6 states that regional program providers "are accountable to the families they serve for the quality of their services." In addition, it requires each local ministry office to negotiate service contracts with each regional program provider that, amongst other things, "gives [ministry] regional staff the authority to observe and evaluate the services offered by the Regional Program¹¹ and to inspect all records and books of account." In addition, there is a subheading entitled "Evaluation" that puts an onus on the ministry to evaluate the AIP:

¹⁰ See note 3 above for a complete list of the nine regional program providers.

¹¹ The term "Regional Program" in the AIP Guidelines means the regional program provider.

The [ministry] is committed to monitoring the [AIP] to determine that the program achieves its goals and objectives and makes efficient use of public resources. Systemic processes and outcome evaluation will be done periodically by the ministry and the results reported.

[32] Given the requirements set out in section 6.6 of the Guidelines, the plain and simple meaning of the preamble of the appellant's narrowed request is that he is seeking records relating to the accountability requirements that apply to the regional program providers that deliver AIP services. In terms of timeframe, the preamble refers to the Guidelines "effective as of January 1, 2007". Consequently, the appellant is seeking any records that came into existence from January 1, 2007 to the date that he and the ministry agreed to the wording of his narrowed request (March 7, 2011).¹²

[33] Items 1 and 2 provide greater details about the specific records he is seeking. Under item 1, the appellant is seeking, "the most recent Executive Summary or overall evaluation of all of the Ministry of Children and Youth Services' regional offices." Under item 2, he is seeking, "the most recent detailed evaluations or findings for each of the ministry's nine regional offices."

[34] These two items must be read in conjunction with the preamble to the appellant's narrowed request, in which he is seeking records relating to the accountability requirements that apply to the regional program providers that deliver AIP services. Consequently, I find that the "evaluation" records that the appellant is seeking under items 1 and 2, which flow from the preamble, include records that evaluate the delivery of AIP services by the regional program providers that fall under the ministry's nine regional offices.

[35] I agree with the appellant that his narrowed request is for evaluation records that measure the effectiveness of the AIP in a "qualitative way" and this includes records that evaluate the services delivered by the nine regional program providers. I find that the ministry's view that such records fall outside the scope of the appellant's narrowed request is not reasonable.

[36] However, the two records that the appellant received from the ministry as a result of his new request (records 7 and 9) fall outside the timeframe of his narrowed request in this appeal, which I have interpreted as being from January 1, 2007 to March 7, 2011. Consequently, I find that these two records are not responsive to his narrowed request. In my view, record 7, which is a program review/evaluation of a regional program provider (Kinark Child and Family Services) would have been responsive to item 2 of his narrowed request if it had fallen within the correct timeframe.

¹² The ministry sent a letter to the appellant, dated March 7, 2011, that confirmed the wording of his narrowed request.

[37] In its reply representations, the ministry submits that the appellant's new access request was "broader in scope and timeframe" than his previous narrowed request, and that records 7 and 9 are "outside the scope" of that previous request. Although the ministry is correct about the timeframe, it made the following submissions about record 7, which reveal why it believes that records that evaluate the quality of services delivered by the nine regional program providers do not fall within the scope of the appellant's narrowed request:

. . . [U]nder [his new access request], the ministry also disclosed a report entitled the Kinark Child and Family Services Central East Preschool Autism Services Program Review Report Volume 1 (February 2006). This older report is specific to one regional **provider** of autism services (a transfer payment agency), and is not reflective of "findings for each of the ministry's nine regional **offices**." It is therefore the ministry's position that this record is not responsive to [the appellant's previous narrowed request], which specifically asked for "the most detailed evaluations or findings for each of the Ministry's nine regional offices."

[emphasis in original]

[38] The ministry's position that item 2 of the appellant's narrowed request only encompasses records relating to the ministry's nine regional offices and not regional service providers, is an overly restrictive interpretation of this part of his request. As I found above, items 1 and 2 of the appellant's narrowed request must be read in conjunction with the preamble, in which he is seeking records relating to the accountability requirements that apply to the "regional program providers" that deliver AIP services. Consequently, the evaluation records that the appellant is seeking under item 2, which flow from the preamble, include records that evaluate the delivery of AIP services by the regional program providers that fall under the ministry's nine regional offices.

[39] In my view, the ministry did not properly interpret the scope of the appellant's narrowed request, particularly item 2, and this led it to conduct searches for records that were flawed. Consequently, I find that the ministry did not conduct a reasonable search for responsive records, as required by section 24 of the *Act*, and I will order it to conduct a further search for records that reasonably relate to the appellant's narrowed request.

[40] I am cognizant, however, that the appellant has received a substantial amount of additional records (789 pages) in response to his new access request. As a result, I will order the ministry to conduct a relatively simple additional search for responsive records that focuses on records that reasonably relate to item 2 of the appellant's narrowed request.

ORDER:

1. I order the ministry to conduct a new search for any records in its custody or control that are responsive to item 2 of the appellant's narrowed request. The ministry's search should cover any such records created between January 1, 2007 and March 7, 2011. As stipulated in this order, the evaluation records that the appellant is seeking under item 2 of his narrowed request, which must be read in conjunction with the preamble, include records that evaluate the delivery of AIP services by the regional program providers that fall under the ministry's nine regional offices. To be clear, such records would include any evaluation or program review of a regional program provider that is similar to the "Kinark Child and Family Services Central East Preschool Autism Services – Program Review (February 2006)" if it was created between January 1, 2007 and March 7, 2011. If there is more than one evaluation or program review for a specific regional program provider within this time frame, the most recent one would be the responsive record.
2. With regard to order provision 1, I order the ministry to provide me, by **June 2, 2014**, with representations on the new search that it carries out to locate responsive records, including:
 - (a) the names and positions of the individuals who conducted the searches;
 - (b) information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
 - (c) the results of the search.
3. The ministry's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in *IPC Practice Direction Number 7*, which is available on the IPC's website. The ministry should indicate whether it consents to the sharing of its representations with the appellant.
4. If the ministry locates responsive records as a result of the search referred to in order provision 1, I order it to issue an access decision to the appellant in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original Signed By:
Colin Bhattacharjee
Adjudicator

April 30, 2014