

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-3422

Appeal PA13-514

Ministry of Labour

November 7, 2014

**Summary:** The appellant sought access to certain records referred to in correspondence from the ministry that related to the settlement of his employment standards complaint. He was not satisfied with the records disclosed to him, arguing that other records ought to exist and appealed the ministry's decision. Based on the evidence provided to the adjudicator and in the absence of submissions from the appellant, the search by the ministry is upheld and the appeal is dismissed.

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

### OVERVIEW:

[1] The Ministry of Labour (the ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

You are hereby authorized and directed to release to the undersigned [the appellant] the complete contents of [a specified] File number. Including, but not necessarily limited to, all documents communications, memoranda notes, records (including those received or sent, or stored electronically etc. And this will constitute your authority For so [sic]

[2] The ministry located responsive records and disclosed them, in part. The ministry withheld portions of the records in accordance with the mandatory third party information exemption in section 17(1) and the discretionary personal privacy exemption at section 49(b).

[3] The requester, now the appellant, appealed that decision.

[4] During mediation, the appellant took the position that additional documents ought to exist. The appellant explained that he received a letter dated August 4, 2011 from an Employment Standards Officer (the ESO) with the ministry, which stated:

I [the identified ESO] have been provided with:

- Written document of the terms of settlement (see copy enclosed), and
- Confirmation that all the terms of the settlement have been met

[5] The appellant indicated that he has not received the documentation noted above, specifically the "document of terms of settlement" and the "Confirmation". He is seeking a copy of those documents. In addition, the appellant is seeking a hand written letter dated May 19, 2011 which he sent to the ministry's office in Sault Ste. Marie advising that he was taking civil action against the ministry in relation to his employment standards complaint. The appellant is also seeking a recording of any telephone conversations between himself and the employment standards office, as well as any logs related to those conversations. Specifically, he is seeking records relating to any discussions related to the proposed settlement of his employment standards complaint.

[6] The mediator forwarded the appellant's concerns to the ministry and asked the ministry to address the specific points above. The ministry provided the following response:

The Regional Program Manager, who is an experienced Ministry employee with extensive expertise in the Ministry's employment standards program, adjudications, and IT file management systems, undertook searches in the ESIS database (Employment Standards Information System) from which responsive records would be located and derived. ESIS is the electronic repository for all documentation relating to employments standards claims. The Regional Program Manager confirmed that any records beyond those already disclosed do not exist.

[7] The ministry also confirmed to the mediator that telephone conversations with ministry employees are not recorded; therefore, no recorded conversations exist. The ministry also confirmed that any hand-written correspondence would have been scanned to the ESIS; therefore, no hand-written letters exist.

[8] The mediator advised the appellant of the ministry's response and he reiterated that he was seeking access to the two documents referred to in the ESO's letter to him of August 4, 2011. The appellant states that he has not received these documents and that he did not agree to settle the employment standards claim. Therefore, he is not surprised that a "terms of settlement agreement" did not exist. The appellant, however, contends that other documentation addressing the settlement (or his instructions not to settle) must exist, such as the officers notes or notes about his conversations discussing his dispute.

[9] Just prior to the issuance of the mediator's report, the ministry wrote to the mediator on February 26, 2014 to advise that, in its view, it has provided the appellant with access to all of the responsive records, with the exception of certain third party information withheld under section 17(1) and further personal information withheld under section 49(b). The ministry also advised that the appellant has the right to appeal the decision of the Employment Standards Officer to the Ontario Labour Relations Board, and that the appellant has availed himself of the opportunity to do so.

[10] The appellant was not satisfied with the ministry's response and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I first sought and received representations from the ministry, a complete copy of which was shared with the appellant, along with a Notice of Inquiry.

[11] As noted above, certain information was severed from the records that were disclosed to the appellant on the basis that it is exempt under section 17(1) or section 49(b). However, I am unable to determine, based on the contradictory communications that took place between the appellant and the mediator, whether he continues to be interested in obtaining access to the severed information. In the Notice of Inquiry provided to the appellant, I sought to confirm with him whether he continued to seek access to the undisclosed information from the records which were identified as responsive to his request. I did not, however, receive a response from him. Because of this ambiguity surrounding the remaining issues in this appeal, I did not seek representations from the ministry on the application of these exemptions to the records and this inquiry is restricted to a determination of the reasonableness of the ministry's search for the records referred to in the ESO's August 4, 2011 letter.

[12] The sole issue for determination in this appeal is whether the ministry conducted a reasonable search for records responsive to the appellant's request. In this order, I find that the ministry's search was reasonable and I accept its explanation as to why the records sought by the appellant do not exist.

## **DISCUSSION:**

### **REASONABLE SEARCH**

[13] 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.

[14] 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>.

[15] 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>.

[16] 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>.

### **The ministry's representations**

[17] The ministry was asked to provide a written summary of all steps taken in response to the request. In particular:

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?

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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.

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

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

- (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 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.

[18] Specifically, the ministry was asked to clearly describe the steps taken to locate the records which the appellant is seeking, or provide me with an explanation as to why such records do not exist. The appellant has taken issue with the ministry's search for the following records:

- The two categories of records referred to in the ESO's letter to the appellant dated August 4, 2011, described as:
  - Written document of the terms of settlement (see copy enclosed), and
  - Confirmation that all the terms of the settlement have been met
- other documentation addressing the settlement (or his instructions not to settle), such as the officers notes or notes about his conversations discussing his dispute
- a recording of any phone conversations between himself and the employment standards office or any logs related to those conversations

- the contents of the ESIS, which I assume to be a file tracking system, which relate to the appellant and his employment standards claim

[19] The ministry's representations included an affidavit sworn by the Program Manager with its Employment Standards office in Mississauga, who is familiar with the ministry's record-keeping systems and with the specific issues extant in the appellant's claim file. This individual is also familiar with the operations of the Employment Standards Information System (ESIS) which is maintained by the ministry to monitor and track all correspondence and data pertaining to all employment standards matters, including the appellant's claim. In the affidavit, the Program Manager explains in detail the process whereby all documents and notes of telephone conversations are entered into the ESIS by the ESO assigned to each individual claim file. He adds that correspondence such as the August 4, 2011 letter sent to the appellant is generated using form letters which are sent to individual recipients, like the appellant, with a copy maintained electronically in the ESIS. He advises that the entire contents of the appellant's file on the ESIS has been disclosed to him, with the exception of some severances under sections 17(1) and 49(b).

[20] The affiant also relates in detail the steps which he took in relation to the search for the records pertaining to the appellant's claim. This search included a review of all of the ESIS entries relating to the appellant which revealed the sequence of events that led to the ESO writing the August 4, 2011 letter to the appellant advising him that his claim had been settled. The Program Manager also states that the reference to "written document of the terms of settlement" was included in the letter in error as there is no such written document. In addition, the Program Manager explains that the reference to "confirmation that all the terms of settlement have been met" does not mean that a specific document exists but rather, refers to the fact that the ESO received proof in the form of a photocopy of a cheque payable to the appellant and had confirmed its receipt with him in a telephone conversation.

[21] On the basis of this search of the ESIS and in the course of his own review of the circumstances surrounding the settlement of the appellant's claim, the Program Manager ascertained that no further records responsive to the request beyond those identified exist.

### **The appellant's position**

[22] 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>. The basis for the appellant's claim that additional records ought to exist lies in the form letter dated August 4, 2011 which is referred to above. The letter refers to two items, "written documentation of the terms

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

of the settlement (see copy enclosed)" and "confirmation that all of the terms of the settlement have been met". The appellant argues that the letter dated August 4, 2011 did not include either of these items as attachments and that, because they are referred to therein, they must exist.

### **Analysis and findings**

[23] I have carefully reviewed the ministry's representations, particularly the Program Manager's affidavit. Based on this information, I am satisfied that the ministry has conducted a reasonable search for records responsive to the appellant's request. The content of the ministry's August 4, 2011 letter to the appellant would certainly lead one to believe that additional records about the settlement of his claim ought to exist. Based on the ministry's explanation, however, I am satisfied that the letter referred to these additional documents in error and that they do not, in fact, exist.

[24] The Program Manager's affidavit explains in clear language the steps taken to locate any responsive records in the ESIS system and the reasons why additional records do not exist. Based on this explanation and clarification, I find that the ministry has satisfied its onus of demonstrating that it has conducted a reasonable search for responsive records. On that basis, I dismiss the appeal.

### **ORDER:**

I uphold the ministry's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

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November 7, 2014