

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-3741

Appeal PA15-368-2

University of Ottawa

June 27, 2017

**Summary:** The requester sought university records about herself located in the university's Canadian Internet Policy and Public Interest Clinic and in the office of a professor under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. This order finds the scope of the request to be as clarified by the appellant's representative, but orders the university to conduct additional searches for responsive records.

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

**Orders and Investigation Reports Considered:** Order MO-1285.

### OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for information about the requester in her academic files or otherwise for the period of September 1, 2004 to December 31, 2014.

[2] The university contacted the requester on two occasions and asked that she clarify her request. The following is the final clarification provided to the university by the requester's representative:

Copies of all records, documents, notes, emails, letters, correspondence, minutes, memos, power point presentations, and information etc., located in the Canadian Internet Policy and Public Interest Clinic (CIPPIC) and in the office of [a named professor (the professor)] about [the requester], whether in her academic files or otherwise and dated anytime between September 1, 2004 - December 31, 2014 (inclusive) in accordance with the *Freedom of Information and Protection of Privacy Act*. Please exclude all administrative documents without limiting it to transcripts and admission documents.

[3] Following clarification, the university opened one file to deal with this request and a second file to deal with the general records. The university issued decisions on each file.

[4] The university advised the requester that in order to properly respond to the request, they would be extending the time to respond to July 16, 2015, pursuant to section 27 of the *Act*.

[5] The requester appealed the time extension to this office and file PA15-368 was opened to address the appeal as a deemed refusal issue. A Notice of Inquiry was sent to the university on June 29, 2015. The university proceeded to issue a decision on July 16, 2015 and accordingly, that appeal was closed at intake.

[6] The university's decision granted partial access to the responsive records. Access was denied to the withheld information pursuant to the exemptions in sections 13(1) (advice or recommendations), 17(1) (third party information), 22(a) (information published or available to the government), 49(b) (personal privacy), and the exclusions in sections 65(6) (employment or labour relations) and 65(8.1) (research exclusion) of the *Act*. The university also stated that certain records were withheld as they were deemed non-responsive to the request.

[7] The requester (now the appellant) appealed the university's decision and file PA15-368-2 was opened.

[8] During the course of mediation, the university issued a revised decision, granting partial access to records previously withheld. Access to some of the records continued to be denied pursuant to sections 17(1), 49(b), 65(6) and 65(8.1). The university also stated that certain records were withheld as they were deemed non-responsive to the request.

[9] Following the issuance of their revised decision, the university advised the mediator that they had erred in not disclosing some of the previously withheld records. Accordingly, the university proceeded to issue a subsequent revised decision, granting partial access to records previously withheld. Access to some of the records continued to be denied pursuant to sections 49(b), 65(6) and 65(8.1). The university also stated

that certain records were withheld as they were deemed non-responsive to the request.

[10] The mediator had discussions with the appellant regarding certain specified records which she believed could be disclosed and regarding further records which she believed existed at the university. The mediator conveyed this information to the university, and requested that they consider further disclosure and conduct a further search for the specified records.

[11] The university advised the mediator that it would disclose most of the requested records, however, it was unwilling to conduct a further search. The university did agree to provide the appellant with information regarding the manner in which the search was conducted.

[12] The university proceeded to issue a third revised decision, again granting partial access to records previously withheld. Access to some of the records continued to be denied pursuant to sections 49(b) and 65(8.1) of the *Act*. The university also noted that certain records were withheld as they were deemed non-responsive to the request. In addition, the university provided a description of their search in the revised decision letter.

[13] The mediator had further discussions with the appellant who believed that further records responsive to her request exist at CIPPIC. The appellant advised the mediator that the university had inappropriately narrowed the scope of her request by only searching the records of the professor, rather than searching all CIPPIC records. As a result, the scope of the request is at issue and the appellant feels that the university failed to conduct a reasonable search for records.

[14] As mediation did not resolve this appeal, the file was referred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the university and the appellant in accordance with section 7 of the IPC's<sup>1</sup> *Code of Procedure and Practice Direction 7*.

[15] In this order, I find that the scope of the request is as clarified above and I order the university to conduct additional searches for responsive records.

## **ISSUES:**

- A. What is the scope of the request? What records are responsive to the request?
- B. Did the institution conduct a reasonable search for records?

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<sup>1</sup> The Information and Privacy Commissioner, Ontario, Canada.

## **DISCUSSION:**

### **A. What is the scope of the request? What records are responsive to the request?**

[16] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (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;

. . .

- (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).

[17] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.<sup>2</sup>

[18] To be considered responsive to the request, records must "reasonably relate" to the request.<sup>3</sup>

[19] The university states that it contacted the appellant's representative on two occasions to obtain clarification and that the search for responsive records was based on the final clarified request. It states that the appellant's representative agreed to limit the locations of the search to the offices of CIPPIC and the professor (e.g. the program areas). Therefore, the university submits that records which may be located outside the program areas do not fall within the scope of the final clarified request., which seeks:

... all of the records, documents, notes, e-mails, letters, correspondence, minutes, memos, power point presentations, and information etc., located in the Canadian Internet Policy and Public Interest Clinic (CIPPIC) and in the office of Professor [name] about [the appellant], whether in her

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<sup>2</sup> Orders P-134 and P-880.

<sup>3</sup> Orders P-880 and PO-2661.

academic files or otherwise and dated anytime between September 1, 2004 - December 31, 2014 (inclusive)... Please exclude all administrative documents without limiting it to: transcripts and admission documents.

[20] The appellant states that she is now self-represented. The appellant states that her request required the university to provide records, documents and information (defined in the search terms) that would be discoverable through a search of CIPPIC and its director (the director) and the professor. She states that the search was initially narrowed to the current parameters by and at the request of the university, to which her representative at the time agreed, for the reason that it needed to be clarified to help the university conduct the search.

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

[21] I find that the scope of the appellant's request is as clarified above by her representative. The appellant even agrees that her representative agreed to the wording of the clarified request, as such the university did not choose to define the scope of the request unilaterally.

[22] I find that the request as clarified provided sufficient detail to allow the university to identify the records responsive to the request.

[23] Accordingly, I find that the scope of the request as clarified and set out above is clear. I am, therefore, upholding the university's position regarding the scope of the request.

### **B. Did the institution conduct a reasonable search for records?**

[24] 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>4</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.

[25] 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>5</sup> To be responsive, a record must be "reasonably related" to the request.<sup>6</sup>

[26] 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

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<sup>4</sup> Orders P-85, P-221 and PO-1954-I.

<sup>5</sup> Orders P-624 and PO-2559.

<sup>6</sup> Order PO-2554.

are reasonably related to the request.<sup>7</sup>

[27] 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>8</sup>

[28] 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>9</sup>

[29] The institution is required 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?
  - 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.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[30] The university submits that it conducted a reasonable search, as follows:

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<sup>7</sup> Orders M-909, PO-2469 and PO-2592.

<sup>8</sup> Order MO-2185.

<sup>9</sup> Order MO-2246.

The director of CIPPIC conducted a search for responsive records located within CIPPIC.

The director is an experienced employee of the legal clinic, knowledgeable of the information the appellant was seeking and where the information is located within CIPPIC.

The director searched all file types, including his email account, all paper and digital files of the clinic. The following key words were used to perform the search: “[appellant’s first name, last name, full name].” ...

The named professor conducted a search of his own records for records responsive to the final clarified request. The professor searched the areas where he maintained the responsive records, these areas include, his uOttawa email account, personal email account as well as electronic files. The [professor] used the appellant's name to perform his search. ...

To the best of the university's knowledge none of the records responsive to the final clarified request were destroyed.

The university is not in a situation where responsive records exist which are not in its possession.

[31] The appellant submits that the university’s search was improper. She states that on April 22, 2016, the university asked both the professor and the Director of CIPPIC to search their own email accounts, paper and electronic files including scanned documents and hand written notes. She objects to these two individuals conducting their own search, as opposed to the search being conducted by a neutral third party within the university. She states that this is of concern because both are intertwined in a litigation where she is the plaintiff and CIPPIC and the university are the defendants.

[32] The appellant further states that the search parameters included “all records,” which is broader than the search performed by these two individuals which only included “emails, scanned documents and handwritten notes.” As well, she states that the search requested all documents “about [appellant’s name]”, not simply with her name in them.

[33] The appellant states that the search performed by the Director of CIPPIC was limited to only a search by her name, and it is unclear what terms were searched by the professor as the university has not disclosed this. As such, she submits that the search terms used were not reasonable or liberal as both individuals would have been aware of additional documents “about [appellant’s name]” that may not have included her name specifically in them.

[34] The appellant submits that current and former staff of CIPPIC should have had their records searched, not just those of the Director of CIPPIC.

[35] The appellant is concerned that the university, in suggesting the narrowing of the scope of the search, took advantage of her and her representative's assumption that they were acting in good faith and intentionally narrowed the scope of the search to serve their own purposes. She states that the university was acting in bad faith from the beginning of this process and that it never intended to provide all of the documentation sought through the initial request. She states that other relevant documents may possibly be in another physical location outside of CIPPIC but within the university or moved to a different location, but that it does not want to disclose these records due to its conflicting interests (regarding the ongoing litigation).

[36] In reply, the university states that, consistent with section 24 of the *Act*, it is its practice for employees to search their own records in response to *FIPPA* requests. It states that it is difficult to see how the director of CIPPIC and the professor can be in a conflict of interest by carrying out their statutory duties, given that the *Act* clearly states that an experienced employee is responsible for identifying responsive records.

[37] The university states that the director of CIPPIC has conducted an extensive search, which included a search in all paper and digital files of the clinic. As a result of this search, it states that the director located many emails from the former director of CIPPIC's email account. It listed the records that were located that consist of email exchanges between the former director of CIPPIC and the appellant.

[38] The university further states that it is not suggesting that there are records "located outside the program and scope of the request" but that the appellant's representative agreed to limit the locations of the search and that whether there are records that may exist outside the program areas is irrelevant.

[39] In sur-reply, the appellant reiterates that the university, the director and the professor are in a conflict of interest position due to the ongoing litigation and that they have received in their professional and institutional capacities funds that relate to the ongoing litigation matter that are at the core of the ongoing litigation

[40] The appellant submits that the current litigation between herself and the university creates a situation where it is not in the university's interest to conduct a reasonable search as it stands to lose these funds and incur additional costs should my complaint be successful in court. She states:

Based on my experience attempting to get my personal information from the university, I would strongly suggest that additional documentation did or does exist and that the university is unreasonably withholding it and/or has moved it around in a manner that offends the spirit of *FIPPA* to protect their own interests...

[The] university further states that it is "not suggesting that there are documents located outside the program and scope of the request" –



which is again neither a clear confirmation that there are not, nor a clear confirmation that there are further documents now or previously in the possession or control of the University or its faculty.

The process of the initial request, which was subsequently split, has shown that when pressed, the university can produce additional documentation. In this case the university has not provided a number of the types of documents requested, nor has it conducted a reasonably wide search.

[41] The appellant also asks that I require the university to clarify whether it has other documents that would otherwise be relevant to the request in other physical locations.

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

[42] Firstly, I re-iterate that the university is not obligated to search for records outside the scope of the clarified request. Therefore, the university is not required to search for records in other locations than those set out in this clarified request.

[43] I note that the appellant has raised the issue of the university, the professor and the director being in a conflict of interest position as she is the plaintiff in litigation against CIPPIC and the university. The appellant did not provide specific details about this litigation's actual relationship to any particular types of records not located by the university. Nor did the appellant even provide an indication of the documents she believes the university has not located due to this claimed bias.

[44] The appellant submits that the professor and the director's bias results from the litigation which concerns the university and CIPPIC's conduct and collection of funds as a result of work the appellant commenced as a student. She states that this work was supervised by the professor and the director.

[45] As per the university's April 22, 2016 index of records, the university located 146 responsive records. The university provided a copy of the email it sent to the director and the director's answers detailing the searches he conducted.

[46] 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>10</sup> I find that the foic,<sup>11</sup> the professor and the director are experienced employees knowledgeable in the subject matter of the records. I am also not satisfied that a conflict of interest exists in this appeal as regards to the individuals who conducted the searches.

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<sup>10</sup> Orders M-909, PO-2469 and PO-2592.

<sup>11</sup> Freedom of Information Coordinator.

[47] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision maker (see, for example: Order M-640).

[48] Relying on the findings in Order MO-1285, I find that I do not have enough evidence to conclude that the foic, the professor and the director have a personal or special interest in whether the records are disclosed.

[49] However, I find that the university has not conducted a proper search for all of the records responsive to the request as clarified, as set out above.

[50] In its representations, the university provided emails exchanged between the foic and the professor and the foic and the director. The foic asked the professor and the director the following questions:

Who conducted the actual search?

What places were searched (e.g., list all email accounts that were searched, filing cabinet...)?

What types of files were searched (e.g., emails, paper files, hand written notes...)?

What were the results of the search?

When was the search performed?

What are the key words used for the search?

[51] In response to the question about the results of the search, the director responded that:

The records we produced. The search also disclosed many, many privileged records. [emphasis added by me]

[52] The university provided an index of records listing the records located by it. None of the records listed in this index are claimed to be privileged as being exempt under

the discretionary solicitor-client privilege exemption in section 19. Nor does the decision letter indicate that the university has claimed this exemption. Section 19 reads:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[53] In addition, in his response to the foic, it is clear that the director unduly narrowed his search to the following records:

Email account of [the director], paper and digital files for the underlying legal matter, paper and digital administrative files relating to (1) the agreement with [appellant] and (2) the Consortium Agreement.

[54] In contrast, the request sought all records located in the CIPPIC and in the office of the professor (except for administrative document).

[55] The director indicated that he located "many, many privileged records." No records subject to the solicitor-client privilege exemption in section 19 have been identified by the university in its decision letter or index. As well, the director unduly narrowed the scope of his search for responsive records to his email account, files related to the "underlying legal matter" and digital administrative files relating to two agreements.

[56] Therefore, I will order the university to conduct another search of the director's and CIPPIC's records for information responsive to the entire request as clarified and to issue an access decision concerning the privileged records and any additional records it has not provided a decision letter on, as well as any records it locates during its new search of the records of the director and CIPPIC.

[57] Concerning the professor, in response to the question about what files were searched, the professor did not indicate that he searched his paper records. He only indicated that he searched his two email accounts and electronic files. Therefore, I will order the university to search the professor's paper records for responsive records.

**ORDER:**

1. I order the university to conduct the following additional searches for records responsive to the entire request as clarified:
  - of the director's and CIPPIC's paper and electronic records, and
  - of the professor's paper records.
2. I order the university to issue an access decision to the appellant in accordance with the *Act*, treating the date of this order as the date of the request. This access decision shall be for all records located during the additional searches set out in order provision 1, as well as for any privileged and other records not subject to previous decision letters.
3. In order to verify compliance with order provision 2, I order the university to send me a copy of the new decision letter on the same date it is sent to the appellant.

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

\_\_\_\_\_ June 27, 2017