

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3869-I

Appeal PA16-231

Health Professions Appeal and Review Board

July 27, 2018

Summary: The appellant made a 30-part request to the Health Professions Appeal and Review Board under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records pertaining to her case file. The board issued a decision granting full access to some records and claiming the remaining balance of the request to be frivolous and vexatious. The board also advised that it would not provide access to source code information and “unaltered” documents in the original archived digital file because doing so may reveal third party information within the meaning of section 17 of the *Act* or personal information under section 21 of the *Act*. During mediation, the board issued a revised access decision providing additional records and indicating that it was no longer relying on any exemptions in the *Act* to withhold information. The appellant maintained her position that additional records should exist. In this order, the adjudicator orders the board to conduct a further search for records.

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

BACKGROUND:

[1] The requester made a 30-part request to the Health Professions Appeal and Review Board (the board) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for documents pertaining to her case file. The requester asked that the records be provided to her “unaltered on a CD/DVD in their original archived digital file format.”

[2] The board issued a decision and index of records granting full access to some of the information requested, and found the balance of the request to be frivolous and vexatious within the meaning of section 10(1)(b) and 27.1 of the *Act*. The board also advised that it would not be providing access to source code information and “unaltered” documents on a CD/DVD in its original archived digital file format because in so doing it may reveal third party and/or personal information, within the meaning of sections 17(1) and/or 21 of the *Act*.

[3] The requester (now the appellant) appealed this decision.

[4] During mediation, the appellant clarified her outstanding issues on appeal with the mediator. The mediator conveyed these clarifications to the board. In response, the board subsequently issued a revised decision providing additional records to the appellant. The board explained in the revised decision that for the two responsive records that were not provided to the appellant, one was not retrievable and the other not retained. The board clarified that it was no longer relying upon the application of the frivolous and vexatious provisions of the *Act*. The board also confirmed that it was not relying upon any exemptions under the *Act*.

[5] The appellant confirmed receipt of the board’s revised decision and additional disclosure but maintained her position that additional records should exist. As a result, whether the board has conducted a reasonable search is the issue in dispute.

[6] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. I invited and received representations on the issues from the parties. Representations were shared in accordance with section 7 of the IPC’s *Code of Procedure* and Practice Direction 7.

[7] In this order, I do not uphold the board’s search as reasonable and I will order it to conduct another search for responsive records.

DISCUSSION:

[8] The sole issue in this appeal is whether the board conducted a reasonable search for records responsive to the appellant’s request.

[9] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.¹ 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.

¹ Orders P-85, P-221 and PO-1954-I.

[10] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[11] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[12] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

[14] I adopt the approach taken in the above-referenced orders.

Analysis and findings

[15] In this order, because of the number of records sought by the appellant and the detailed representations provided by the appellant for each record, I will include a summary of the representations along with my findings under each specific record. Where possible, I have grouped records together where the issue/analysis is similar.

[16] In its first set of representations, it is clear that the board was of the view that it had provided records responsive to 28 parts of the 30-part request to the appellant, noting that only its search in relation to Records 7 and 17 remained in dispute. The board attached an affidavit of its acting deputy registrar and manager, Health Boards Secretariat in respect of the various searches that were conducted.

[17] In the appellant's representations, she submits that 10 parts from her 30-part request remain in dispute. She notes that in the case of four parts of her request, the board provided the wrong items (Records 5, 16, 24 and 28,) and that in the case of five parts of her request, the reasons offered by the board for not providing the items are provably invalid/untrue (Records 6, 7, 17, 25 and 26). Further, in the case of part 30 of the request, the appellant submits that numerous identified items were not provided which she claims is evidence that a reasonable search was not conducted. As noted, the parties' specific comments for each record are set out below.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

Record 5

[18] The appellant identifies Record 5 as a PDF file of her application attached to the email sent to the board by her lawyer on August 1, 2014 at 2:13 p.m..

[19] In her representations, the appellant submits that the board provided her with a copy of a composite scanned PDF file on October 28, 2016 which was a document created by the board which is a different size than the original (4 MB vs. 186.0 KB) and bears a different file name. The appellant notes that the original PDF file can be retrieved from the board's email "downloads" archives of a specified employee identified as the recipient of her lawyer's email.

[20] The board addressed this record in its reply representations where it states that it provided the appellant with a scanned PDF file copy of the document requested. It states that it has conducted a search including consulting with the Ontario Public Service (OPS) IT service desk. It states that the electronic version of the document is not readily available to the board's Secretariat. It notes that the author of the email is no longer employed with the board's Secretariat and that the original email may have been deleted. The board submits that if the email was not deleted, it is not accessible, except for seeking approval of the assistant deputy minister to conduct searches of the digital archives which it states would be time consuming and may not yield any results. The board submits that it does not have the electronic version of the record and that it has already provided a copy of the hard copy of this record.

[21] According to the board, it has provided the appellant with a scanned copy of the PDF file and no longer has the electronic version of the document. I accept that in the board's search it located a copy of the document that it had in its file and also made efforts to locate the original electronic version once it was determined that the appellant was not satisfied with what she received. As a result of its searches, the board confirmed that it no longer has the electronic version of the record.

[22] As stated, the board does not have to prove with absolute certainty that further records do not exist; however, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In reviewing the affidavit of the deputy registrar and manager, I find that the search was conducted by an experienced employee knowledgeable in the subject matter. I note that throughout the mediation, this employee worked with the parties conducting further searches for records as more information was provided by the mediator. Therefore, since the board has provided a copy of the document found in its file and given my findings above, I find that it has met its obligation under the *Act* with regard to its search for this record.

Records 6, 17 and 25

[23] The appellant identifies Record 6 as the email source code confirming email with attached PDF file of her application sent to the board on August 1, 2014 at 2:13 p.m. by

her lawyer.

[24] The appellant identifies Record 17 as an email source code confirming email with attached PDF file of August 28, 2014.

[25] The appellant identifies Record 25 as the fax machine/fax software activity log or email source code, confirming that a letter with attachment was sent by the board to the appellant's lawyer.

[26] In its initial representations, the board referred to the source code issue stating that the source code does not exist for these records (the board was speaking specifically to Record 17). It submits that email source code information, showing pathways taken by email, is only retrievable in respect of incoming emails. Once the email has completed its path from sender to recipient, the details as to the pathway are available to the recipient as the "source code" including the identities of each computer using the internet protocol to communicate over a network.

[27] The board submits that the email pathway of an outgoing message cannot be accessed by the software system used by the "source," the sender. The board submits that as such the email's "source code" does not appear in the properties of the "sent" email and is not retrievable by the sender's software system (Outlook). The board also included the aforementioned affidavit, where the affiant swore that in the course of his search he made inquiries in respect of the email source code in relation to Record 17. During his inquiries he consulted with the board's dedicated system support analyst who in turn sought clarification from the OPS IT help desk as to whether the requested source code information was available. The deputy registrar swore that he was informed that the email source code requested by the appellant cannot be retrieved by the board for emails that are sent by the board, as opposed to emails which are received by the board. The deputy registrar also affirmed that he spoke with the senior technology/business systems administrator for the Health Board Secretariat who also confirmed that the requested email source code was not available.

[28] In her representations, the appellant clarifies that, with regard to Record 6, she is requesting the source code for an incoming email sent by her lawyer to the board. The appellant submits that despite the board initially indicating that it could provide this information, to date she has not received this record. With regard to Record 17, the appellant clarifies that this is a request for the source code of an outgoing email sent by the board to her lawyer (she attached the actual email). With regard to Record 25, the appellant submits that at the time of making her request she was unaware if this letter was sent by fax or email. She submits that the board confirmed that its letter with attachment was sent by email and that it provided the requested email that was sent to her lawyer. The appellant noted that her request is for the source code of this outgoing email.

[29] With respect to all of these records, the appellant submits that the board initially

refused to provide the source code information on the grounds that the request was frivolous and vexatious. Subsequently, the board denied the information on the basis that the section 17(1) (third party information) and/or section 21 (personal privacy) exemptions under the *Act*, which it later acknowledged did not apply to the information. The appellant notes that the board confirmed that it utilizes the same email platform that she used, Microsoft Outlook. The appellant submits that the information for this incoming email (Record 6), which she refers to as "source code" includes the email header, HTML email body and other content information, all of which is easily accessible and printable as a document in outlook. The appellant provided instructions on how to access this information for various versions of Outlook.

[30] In its reply representations, the board repeated and relied on its prior submissions with regard to source code information. With respect to Record 17, the board submits that since the appellant has a copy of the email she also has the HTML information which would be partly responsive to her request for the source code information.

[31] Based on my review of the parties' representations, I find that the board's response to the request for source code information is reasonable. An employee with knowledge of the records performed a search and within the confines of that search sought expert advice in order to determine if the requested information could be retrieved. The information technology contact indicated that the email source code requested by the appellant cannot be retrieved by the board for emails that are sent by the board, as opposed to emails which are received by the board. This was also confirmed by the senior technology/business systems administrator for the Health Board Secretariat. In my view, the person searching for records is entitled to rely on this type of professional advice.

[32] I accept that the board has made efforts to retrieve the source code information. I also accept that it relied on the advice of its IT specialist that this information is not retrievable for outgoing emails from the board. Further, while the appellant takes issue with the suggestion that the source code information is not available for outgoing emails, and provided a step-by-step instruction to retrieve this information, there is no evidence to suggest that the board is acting in bad faith. It is apparent that the board conducted further searches and provided some records that it located after reviewing the appellant's representations. In my view, there is no explanation provided as to why the board would withhold this source code information if it was located during its various searches. I find that the board has provided sufficient evidence to show that it expended reasonable efforts to locate this information in its searches. Therefore, I find that the source code information for Records 17 and 25 is not information that is available to the board and its inability to locate this information is not suggestive that its search was not reasonable.

[33] However, with regard to Record 6, the board did not specifically address its search for this record in its initial representations. In its reply submissions, the board

simply repeats and relies on its earlier submission. As stated, I accept that the board received advice from its IT department that source code information for outgoing emails is not available to it. However, the board did not comment specifically on the search for source code information of this email that was received by the board as clearly indicated by the appellant in her representations. In my view, the board cannot rely on the advice from its IT with regard to this incoming email and the board will be ordered to conduct a further search for the source code information for this record.

Record 7

[34] The appellant identifies Record 7 as the fax cover sheet and application re-submitted to the board by fax on August 1, 2014 at 2:14 p.m. by her lawyer.

[35] Regarding Record 7, the board submits that when it receives a duplicate copy of a document received by facsimile transmission, its staff will review the document to determine if it already exists in the file. If the document is determined to be a duplicate, it is discarded. The board explains this is what happened with respect to the duplicate document sent to it by the appellant's lawyer on August 1, 2014. Further, the board confirmed that its acting deputy registrar and manager along with other staff have searched for relevant files and confirm that no such duplicate was retained in any of the board's record holdings. In its reply representations, the board confirmed that it does not possess the requested fax cover sheet.

[36] The appellant notes that the board's position on this record has changed over time. According to the appellant, the board stated on April 8, 2016 that it had already provided this document in November 2014. Further, in the board's letter to her of October 28, 2016 and in its representations of March 2, 2017, it indicated that the request was refused because the records are duplicates and it does not retain duplicate documents. The appellant states that while it is true that the application is a duplicate of one previously faxed to the board, it is not true that the fax cover sheet was a duplicate. The appellant notes that the messages on the two fax cover sheets were different and therefore both cover sheets should have been retained by the board. The appellant also submits that the board's position that it does not keep duplicates is untrue and refers to duplicates of the application faxed to the board at other times which the board was able to provide.

[37] As indicated by the appellant, the fax cover sheet that she is seeking is not a duplicate of another fax sheet previously received by the board. During its search, the board was made aware that this was not a duplicate fax cover sheet, but it has continued to submit that it does not possess the requested fax cover sheet. In my view, the board's search for this responsive record was reasonable. The appellant confirmed that a duplicate application form was faxed to the board but the fax cover sheet was different than a previous fax cover sheet. The board submits that it discarded the second fax sheet as it determined that it was a duplicate. It is evident that the board is unable to locate the requested record. It acknowledges that the record may have been

discarded because an employee determined (albeit incorrectly) that it was a duplicate. I have insufficient evidence before me to suggest that a further search by the board would result in retrieving this fax cover sheet given the searches the board has already conducted. I therefore find that with regard to this record the board has provided sufficient evidence to show that it made a reasonable effort to locate the requested fax cover sheet and its search for this record is reasonable.

Record 26

[38] The appellant identifies Record 26 as a Microsoft Word file with a specified file name comprised of a section 26 request form faxed by the board to the College of Veterinarians of Ontario in August 2014.⁷

[39] The appellant submits that initially the request was refused by the board on the grounds that it had already provided her with the record. She submits that the board had only provided a hard copy of a related fax transmission report and completed form in November 2014.⁸ Subsequently, the appellant submits that the board indicated that it would provide the requested Word file but upon receipt of a CD of records she noted that it contained a completely different and unrequested Word document. The appellant submits that during mediation, she advised the board that the requested Word file was not included on the CD and the board emailed a PDF file, which contained the same fax transmission report and completed form that she has already received in November 2014.

[40] In its reply representation, the board submits that the senior manager and registrar of the board confirmed on May 19, 2017 that she had made further diligent searches for the electronic file and the board is unable to locate the requested record.

[41] The appellant included, with her representations, the record that the board provided to her in November 2014 which contains all of the information she indicated should exist on the requested record. It appears that the appellant continues to request the electronic copy of this record. However, after receiving the appellant's representations, the board indicated that a further search did not locate the electronic version of the record. I find that the board has conducted a reasonable search with regard to this record. I find that it has provided sufficient evidence to support that it has made a reasonable effort to identify and locate this responsive record which it was unable to locate.

Record 28

[42] The appellant identifies Record 28 as a fax received by the board from the College of Veterinarians of Ontario (the College) between August 21, 2014 and August

⁷ The reference to a section 26 request is in relation to the *Veterinarians Act*, RSO 1990, c V. 3.

⁸ According to the appellant she was provided with records in November 2014.

29, 2014, with fax header information clearly visible.

[43] In her representations, the appellant explained that this fax was a Microsoft Word file with a specified file name comprised of a section 26 request form. Despite the board's indication to her that it had already provided this record to her, the appellant submits the requested faxed "section 26 request" with fax header information clearly visible was not provided. She notes in November 2014, she received a hard copy of the board's fax transmission report that instructed the College to complete and fax back the attached "section 26 request" form to the board. As well, the appellant submits she was provided with a hard copy of a completed "section 26 request" form, however, there was no visible fax header information on the completed form that would indicate that it is the same one that was faxed by the board to the College or vice versa. The appellant also submits there was no fax covering sheet which would confirm that the form was faxed back to the board.

[44] The appellant notes the October 28, 2016 letter from the board indicates that she was being provided with the requested faxed form with fax header information clearly visible on an accompanying CD. However, the appellant submits the CD did not contain the requested faxed form and instead contained a scanned PDF file, created by the board on September 23, 2016, consisting of a completely different questionnaire that was faxed to the board by the College. The appellant indicates that she advised the board that the requested record was not contained on the CD. The board states that it was not in possession of the College's Word file (record #28) and that it has previously provided to the appellant a copy of the PDF file that the board was in possession of. According to the appellant, the board's response indicates that it did not read her email which clarified her request, nor did the board endeavour to locate the completed form with fax header information clearly visible.

[45] In reply, the board responds that it had previously provided this record to the appellant on a CD. This contradicts the appellant's position that the CD contained a scanned PDF file, consisting of a completely different questionnaire that was faxed to the board by the College. However, in the appellant's own representations, she submits that the board informed her, after she received the CD, that it was not in possession of the Word file from the College and that it had previously provided a copy of the PDF file that was in its possession. This did not satisfy the appellant as she is looking for header information which is not contained in the scanned version of the record.

[46] Similar to my finding for Record 5, the board does not have to prove with absolute certainty that further records do not exist; however, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Therefore, since the board has already provided a copy of the document found in its file, albeit without the fax header information, and has confirmed that no other copy can be found, I find that it has met its obligation under the *Act* with regard to its search for this record.

Records 16, 24, 30(b), 30(ii)

[47] The appellant identifies Record 16 as a PDF file sent to the board by her lawyer on August 2014. The appellant took issue with the scanned PDF file supplied by the board noting that it was created by the board and had a different file name.

[48] The appellant identifies Record 24 as a fax transmission report and corresponding document.

[49] The appellant identifies Record 30(b) as the original Word file for a letter and order sent by the board on September 18, 2014.

[50] The appellant identifies Record 30(ii) as Word files or fax software files for fax cover sheets from August 21, August 28 and September 18, 2014 addressed to the College; and August 28 and September 18, 2014 fax cover sheets addressed to her lawyer.

[51] In the board's reply representations, it indicates that it conducted a new search after reviewing the appellant's representations. The board confirms that it was able to locate the electronic original version of Records 16 and 24 and these would be provided to the appellant. With regard to Record 30(b), the board states it was also able to locate these documents in its search, and they would be provided to the appellant as well. Finally, the board stated for Record 30(ii), it was able to locate the Word copy of the fax cover sheets for August 28, and September 18, 2014 and would provide these documents to the appellant. The board states in its subsequent search it was unable to locate the fax cover sheet from August 21, 2014. The appellant was sent a copy of the board's reply representations and was specifically asked to comment on the further searches conducted by the board. The appellant did not provide sur-reply representations.

[52] In its reply representations, the board indicates that it was able to locate Records 16, 24, 30(b) and 2 of 3 parts of record 30(ii), after reviewing the appellant's representations and conducting a further search. The board provided these records to the appellant.

[53] After receiving the records, the appellant informed this office that none of the four PDF files sent to her actually correspond with any of the 10 outstanding files identified in her representations. The appellant submits that a PDF file sent to respond to Record 16 is actually a PDF file created on July 20, 2018 with a different file name which is comprised of various screenshot images. The appellant submits that she requested the original PDF file created on August 28, 2014 and not a screenshot image. The appellant provided suggestions for how the board could locate the requested file. With regard to Record 24, the appellant submissions are similar to those for Record 16, in that the board provided a PDF file that was created by the board on July 20, 2018 where her request for the original PDF file created on or before September 18, 2014.

Finally, the appellant submits that the two fax cover sheets that she received from the board in response to item 30(ii) were not requested and were, in fact, noted in her representations as being already provided. The appellant did not speak specifically to Record 30(b), however, clearly she did not consider any document received from the board responsive to any of the four items she requested.

[54] Therefore, since the board is of the view that it sent the requested records and the appellant has clarified that these were not the requested records, I will order the board to search for the specific requested records identified above, or provide a further explanation of its attempt to locate these records.

[55] With regard to the fax cover sheet from August 21, 2014, the remaining item from 30(ii), I find that the board has conducted a subsequent search and was unable to locate this record. As stated, the board does not have to prove with absolute certainty that this record does not exist and I find that it has provided sufficient evidence to show that it has made a reasonable effort to locate this record and therefore its search in relation to this record is reasonable.

The remaining records

[56] The remaining records under part 30 are identified by the appellant as any and all other documents pertaining to her specified file with the board including case worker notes, emails, mailed/couriered hard copy documents, phone logs, visitor logs, etc. In her representations, the appellant refers to 36 items under Record 30 which were not provided.

[57] Aside from Records for 30(b) and 30(ii), the board submits that the remainder of items under part 30 either fall outside of the scope of the appellant's request or are not in its custody or control. The board also submits that the appellant should have many of these records because they were either sent or received by her. Unlike the board's representations for all of the other parts of the request, it does not provide specific representations for each record identified by the appellant in part 30.

[58] In my review of the appellant's original request, I agree with the board that the appellant did not indicate in the request that this was for continuing access to records. Section 24(3) of the *Act* states as follows:

The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

[59] In my review of part 30 of the request, I agree with the board's position that many of the items listed by the appellant are for records that would post-date her request for records. The appellant did not comment on this issue despite being invited to provide representations. In examining the original request, I find that it was not for continuing access to records and therefore records that would have been created subsequent to the appellant's request are not responsive to the request and will not be

discussed further in this order. Therefore, I find that all items listed from 30(j) to 30(jj) (except for item 30(ii) which has already been dealt with) are outside of the scope of the original request for records.

[60] However, for items 30(a) to 30(i) (except for 30(b) which has already been dealt with) I find that this information is within the scope of her request as they would have been created prior to the date of the appellant's access request. I find that the board has not provided sufficient evidence to show that these records are not within its custody or control as it states generally in its reply representations.

[61] Accordingly, I find that the appellant has raised a reasonable basis to conclude that the board has not conducted a reasonable search for records responsive to her request. As a result, I will order the board to conduct a further search for responsive records and to provide a reasonable amount of detail to this office regarding the results of said search. Specifically, the board should search for records in relation to part 30 of the appellant's request, items 30(a) to 30 (i), except for Record 30(b).

ORDER:

1. The board is ordered to conduct a further search in response to the appellant's request relating to this appeal, in particular it should search for the records relating to part 6 and parts 30(a) to 30(i) of the request, except for part 30(b) of the request.
2. I order the board to provide me with an affidavit sworn by the individual(s) who conducts the search(es), by **August 29, 2018** deposing its search efforts. At a minimum, the affidavit(s) should include information relating to the following:
 - a. The names and positions of the individuals who conducted the searches
 - b. Information about the types of files searches, the nature and location of the search, and the steps taken in conducting the search, and
 - c. The results of the search.
3. If the board locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from item 1 of this order.

Original Signed by: _____
Alec Fadel

July 27, 2018 _____

Adjudicator