Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4185

Appeal PA20-00474

Human Rights Tribunal of Ontario

September 16, 2021

**Summary:** The appellant alleges that the Human Rights Tribunal of Ontario (HRTO) failed to conduct a reasonable search for responsive records. HRTO took the position that it conducted a reasonable search for responsive records in compliance with its obligations under the *Freedom of Information and Protection of Privacy Act*. The adjudicator finds that HRTO conducted a reasonable search for responsive records and dismisses the appeal.

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

## OVERVIEW:

[1] The Human Rights Tribunal of Ontario (HRTO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to:

> […] all documentation held by HRTO that states or mentions that in [identified HRTO reported decision], I filed an application against the [named entity] and the [named entity] was listed as a respondent in [identified HRTO reported decision]. I am requesting all [records] maintained by Ontario Human Rights Tribunal of Ontario with this information. The Ontario Human Rights Tribunal made a decision that was made a record to the public stating that I made an application, specifically an application [identified HRTO reported decision], against the [named entity] and the respondents were the [named entity]. Please provide all information maintained in [identified HRTO reported decision] in regards

> to the [named entity] that was used to make a record to the public. Please let me know which records to the public list that in [identified HRTO reported decision], I made an application against [named entity] and that the [named entity] were respondents in citation: [identified HRTO reported decision] and also named File number [identified HRTO file number].

[2] The HRTO identified responsive records and issued an access decision. The access decision provided as follows:

> 1. Information related to [identified HRTO file number]
>
> Records related to [identified HRTO file number] were provided to you on September 20, 2018 along with copies of other requested HRTO applications, and as such, we are not providing an additional copy.
>
> 2. Records referencing [named entity]
>
> You have requested all records that mention that in decision [identified HRTO reported decision] (application [identified HRTO file number]) you filed an application against [named entity]. The two HRTO decisions in the table below are responsive to the request, and are attached with this letter:

| **HRTO reconsideration decision [identified HRTO reported decision]** | |
|---|---|
| **Application file number** | [identified HRTO file number] |
| **Respondents** | 1. [named entity]<br>2. [identified law firm] |
| **Disposition of application** | The HRTO dismissed the application |
| **Reference in decision that identifies the [named entity] as the respondent in HRTO decision [identified HRTO reported decision] (application [identified HRTO file number])** | Paragraph [...]: sets out that you had filed a previous application against the [named entity] that was dismissed in decision [identified HRTO reported decision]. |
| **HRTO final decision [identified HRTO reported decision]** | |
| **Application file numbers** | 1. [identified HRTO file number]<br>2. [identified HRTO file number]<br>3. [identified HRTO file number] |
| **Disposition of applications** | The HRTO dismissed the applications |

| | |
|---|---|
| **Reference in decision that identifies the [named entity] as the respondent in HRTO decision [identified HRTO reported decision]** | Paragraph […]: quotes paragraph […] of [identified HRTO reported decision] (see above). |

[3] The requester (now the appellant) appealed the HRTO's access decision.

[4] At mediation, the appellant asserted that there should be additional responsive information with respect to her request for access to records referencing the named entity. Accordingly, the reasonableness of HRTO's request for responsive records became an issue in the appeal. The appellant also advised the mediator that she was seeking a scanned or electronic copy of the responsive records that related to an identified HRTO file number.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] I commenced my inquiry by sending a Notice of Inquiry to the HRTO setting out the facts and issues in the appeal. The HRTO provided responding representations. In its representations, the HRTO advised that it is willing to provide the appellant an additional electronic copy of the responsive records that related to the identified HRTO file[1]. I then sent the appellant a Notice of Inquiry along with a copy of HRTO's representations. The appellant provided representations in response.

[7] In this order, I find that the HRTO has demonstrated that its search for responsive records is in compliance with its obligations under the *Act*. Accordingly, I conclude that the HRTO conducted a reasonable search for responsive records. The appeal is dismissed.

## DISCUSSION:

[8] 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.[2] 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.

[9] The *Act* does not require the institution to prove with absolute certainty that

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[1] As this matter is no longer at issue I will address no further the issue of access to an electronic copy of the responsive records pertaining to the identified HRTO file.
[2] Orders P-85, P-221 and PO-1954-I.

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.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[10] 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.[5]

[11] 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.[6]

[12] 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.[7]

**HRTO's representations**

[13] In its representations the HRTO explains that there were a number of HRTO applications filed by the appellant and her relative. It states that although the applications were not completely identical, the underlying circumstances that led the appellant and her relative to file these applications all related to court proceedings. They submit that the overlap between the various applications made searching for responsive records a complicated and time-consuming task.

[14] HRTO adds that the request was further complicated because the appellant was incorrect in her assumption that a decision referred to by the HRTO in some adjudicative decisions was an application file. The HRTO states that this was a decision dismissing an application as abandoned and not another application file.

[15] HRTO submits that despite the above complications, it provided a complete response to the request explaining that all institutional records (internal communications) were searched and no additional responsive records were identified. The HRTO points out that that two adjudicative records were identified and disclosed to the appellant. The HRTO added:

> Notably, the appellant sought records in which the HRTO stated that the [named entity] was named as the respondent in her HRTO application [identified HRTO file number] (resolved by HRTO decision [identified

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[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

> HRTO reported decision]). The appellant named the Law Firm [identified law firm] as a respondent in this application. The [identified HRTO reported decision] identified [identified law firm] as the respondent. Despite this, the HRTO issued two decisions with respect to other HRTO applications filed by the appellant that erroneously set out that the respondent named in HRTO decision [identified HRTO reported decision] was the [named entity] … .

[16] The HRTO states that that its Freedom of Information Coordinator was responsible for searching for records in response to the appellant's access request. She sets out in the representations that she has dealt with previous access requests and appeals by this appellant and that she is familiar with the appellant's HRTO files as well as the concerns the appellant has raised with respect to those files.

[17] In addition, she sets out the following steps that were taken to conduct a search for responsive records:

> As described below, I consulted HRTO Team Lead [named individual] from time to time with respect to the both the initial search for records and for this appeal. [The HRTO Team Lead] is an experienced HRTO staff member. She is familiar with the applicant's HRTO files and identified HRTO records for me in response to previous access requests by this appellant.
>
> September 2, 2020: I asked [HRTO Team Lead] to search for internal records related to the appellant (for both this appeal and another by this appellant that I was working on concurrently).
>
> September 10, 2020: I located electronic copies of the appellant's internal HRTO records and I indicated to [the HRTO Team Lead] that I did not require her to continue her search.
>
> September 10, 2020 - September 14, 2020: I determined that it was reasonable to search files for the five applications the appellant submitted between [specified years] for responsive records. The appellant indicated that she was seeking public HRTO decisions that stated that the [named entity] was the respondent named in [identified HRTO reported decision]. Although this was not a *FIPPA* request, but a request for adjudicative records, I reviewed each decision issued by the HRTO with respect to the five applications carefully. The [named entity] was not a respondent to file [identified HRTO file number] or named as a respondent in the decision [identified HRTO reported decision]. I nonetheless located two HRTO decisions that were responsive to the request - They included references stating that [named entity] was the respondent named in HRTO decision identified HRTO reported decision].

> The appellant already received her internal HRTO records in response to a previous access request [identified access request]. Despite this, I reviewed the appellant's internal records before responding to the appellant so that she received as complete a response as was possible.
>
> September 29, 2020: the […] office sent the response to request [the request at issue before me] to the appellant, enclosing the two HRTO decisions referred to above.
>
> November 2, 2020: I received the IPC's Notice of Mediation related to this appeal.
>
> December 9, 2020: The Mediator, [named mediator], asked me whether it is possible that the HRTO has additional records related to the appellant and the [named entity]. I asked [the HRTO Team Lead] whether there was any likelihood that there were additional internal records that relate to the [named entity], the appellant and her HRTO files.
>
> January 19, 2021: [the HRTO Team Lead] confirmed that, to her knowledge, the HRTO had provided all internal records related to the appellant's files.
>
> […]
>
> While preparing these submissions, I reviewed the appellant's internal HRTO records again. I reviewed the HRTO decisions issued with respect to the appellant's [specified number] HRTO applications. I also reviewed the HRTO's decisions issued with the respect to the [specified number] interrelated HRTO applications filed by the appellant's [relative]. I did not locate additional responsive records.

[18] The HRTO submits that knowledgeable staff members made a reasonable effort to locate records reasonably responsive to the request and that search included all areas reasonably likely to contain responsive records.

[19] The HRTO adds:

> The challenges associated with processing and making decisions with respect to [specified number] interrelated applications raises the risk that details such as file numbers, citations and respondent names could be confused or cited incorrectly. Confusion of this nature likely contributed to the HRTO issuing two decisions that referred to the [named entity], not the [identified law firm], as being the respondent in [identified HRTO reported decision] (these two decisions were disclosed in response to the access request subject to this appeal). Given this confusion, there was a reasonable basis to conclude that additional records where the HRTO identified the [named entity] as the respondent in [identified HRTO

> reported decision] could exist. However, Tribunals Ontario made several searches for responsive records and located only those two decisions. The appellant may believe that the HRTO has additional records related to the appellant and the [named entity], but she has not provided a reasonable basis to conclude the records exist.[8]

**The appellant's representations**

[20] The appellant provided wide-ranging representations setting out her concerns about the conduct of the HRTO, including the manner in which her applications were used in an HRTO proceeding, the conduct of two named HRTO adjudicators and the manner in which the HRTO responded to her requests for information. She maintains that HRTO did not conduct a reasonable search for responsive records.

[21] With respect to the HRTO's submissions in support of its position that it conducted a reasonable search for responsive records, the appellant states that:

> It seems like HRTO is trying to show the reason for the [named entity] being a respondent was resolved many years before since they state I had my application intermingled with my [relative]. If this was the case [her relative] never filed an application against the [named entity] in [specified year]. Instead [her relative's] application of [identified HRTO reported decision] had stated about [identified law firm] being a respondent not the [named entity]. Therefore, the HRTO cannot say that they wrote that in [identified HRTO reported decision] I had the [named entity] as a respondent and it was intertwined with [her relative's] this makes no sense.
>
> The [named entity] being a respondent in [identified HRTO reported decision] was used in multiple decisions. In [identified HRTO reported decision] there is no mention of the [named entity] being the respondent for [identified HRTO reported decision], but for the reconsideration of [identified HRTO reported decision] the decision states the reason for losing my reconsideration request was that in [identified HRTO reported decision] I filed an application and the [named entity] was a respondent.
>
> Therefore the fact that HRTO states that I made an application in [identified HRTO reported decision] and it was only an application, then why did HRTO state that that the [named entity] was a respondent in [identified HRTO reported decision] in multiple decisions which means that [identified HRTO reported decision] and the respondent being the [named

[8] The HRTO references Orders PO-3061-F at paragraph 38, PO-3661 at paragraph 32, and MO-2246 at page 5.

> entity] was not just an application it was a decision that was made by HRTO and this decision was made over and over in multiple decisions to the public.
>
> In [identified HRTO reported decision], HRTO used their decision that in [identified HRTO reported decision] that I had the [named entity] as a respondent there is no way that this false fact could appear in so many decisions of HRTO unless HRTO made a decision that this is correct and this means that to date HRTO has not done a reasonable search and they have still not provided me with all documentation to show how they made a decision that in [identified HRTO reported decision] the [named entity] was a respondent.
>
> HRTO has sent me some documents in regards to [identified HRTO reported decision] and they failed to attach all the decisions that have listed the [named entity] as a respondent in [identified HRTO reported decision]. In the case direction of [specified date], it mentions the decision [identified HRTO reported decision] which is 2 years after the decision of [identified HRTO reported decision]. HRTO states the following "However, it is also clear that the applicant had filed an earlier Application against the [named entity] making the essentially the same allegations as are made in this application. That earlier Application was dismissed in Decision [identified HRTO reported decision], therefore if the adjudicator in [identified HRTO reported decision] was so clear that I filed an application against the [named entity] in [identified HRTO reported decision], then this information still exists and it seems that HRTO is hiding this information or did not do a reasonable search.
>
> […] This means that HRTO must still provide me with this documentation since there is no way an adjudicator would just make up that [identified HRTO reported decision] had the [named entity] listed as a respondent unless this information exists somewhere and I am still waiting for this information […]

[22] The appellant submits that "HRTO maintenance of documentation is a mess" and its record keeping practices need to be investigated.

**Analysis and finding**

[23] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. In all the circumstances, I find that the HRTO properly interpreted the scope of the request and its searches were extensive and wide-ranging. I also find that, based on the searches it conducted, the HRTO has made a reasonable effort to locate records responsive to the request. In that regard, I accept the HRTO's evidence that it issued

two decisions with respect to other HRTO applications filed by the appellant that erroneously set out that the respondent named in the identified HRTO reported decision was the named entity. A circumstance that may unfortunately have led to the appellant's belief that additional records should exist.

[24] Accordingly, in all the circumstances, I find that the HRTO has conducted a reasonable search that is in accordance with the requirements of the *Act*.

## ORDER:

1. I uphold the reasonableness of the HRTO's search for responsive records.

2. The appeal is dismissed.

Original signed by
Steven Faughnan
Adjudicator

September 16, 2021