

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-4219-I

Appeal PA19-00377

Ontario Power Generation

December 16, 2021

**Summary:** Ontario Power Generation (OPG) denied a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the “termination/severance allowance” for a former OPG employee. OPG took the position that the request was not for access to records but to information and, after this appeal was opened, OPG created a record it says contains the information to which the appellant seeks access. The appellant took the position that the record created by OPG is not responsive to the request. In this interim order, the adjudicator finds that the created record is responsive and that an inquiry may proceed on the application of the exclusions and exemptions claimed by OPG over the created record.

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

**Orders Considered:** Orders P-99, P-880 and PO-2648.

### OVERVIEW:

[1] Ontario Power Generation (OPG) received a request from a member of the media for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to information relating to a former employee. The request was for access to the following:

Please provide the classification, salary range and benefits, and employment responsibilities for [a named employee].

Please provide the termination/severance allowance for [the named employee].

I believe disclosure of this information would be in the public interest.

[2] OPG issued a decision to the requester containing the employee's job classification, salary range and benefits, and granting access to two job descriptions that contained the employee's employment responsibilities. However, OPG denied access to the termination/severance allowance, claiming that this information was exempt under sections 18(1)(c), (f) and (g) (economic interests of OPG) and 21 (personal privacy) of the *Act*. OPG also raised the application of the employment and labour relations exclusion in section 65(6), claiming that the *Act* does not apply to this information.

[3] The requester, now the appellant, appealed OPG's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore the possibility of resolution.

[4] Before mediation began, the IPC made a request to the OPG for documents, including responsive records. OPG responded by claiming specific records are not at issue in this appeal and that:

Instead, the appeal assesses the application of the exemptions to a particular piece of information requested: the amount of any termination or severance allowance paid to [the employee].

[5] Rather than providing the IPC with responsive records containing information about the amount of any termination or severance allowance paid to the employee, OPG created a Word document that it says contains the requested information. OPG called this Word document "Record 1" (the record) and further wrote that:

[Record 1] is not a record that was in OPG's custody at the time of [the] request. Rather, we have included the information requested in a Word document to facilitate the appeal.

[6] OPG provided the record to the IPC, and claimed the exclusion in section 65(6) and the exemptions in sections 21 and 18 over it. When during mediation the appellant raised an issue about verifying the veracity of the record's contents, OPG offered to provide a confidential attestation from its legal counsel confirming that the amount in the record is the accurate termination/severance figure for the named employee and maintained that the record is responsive to the request and sufficient for the appeal to proceed to a determination on. The appellant argued that she seeks access to the requested information as it appears in pre-existing responsive records, not the record created by OPG. Because the parties disagreed as to whether the record created by OPG was responsive, the scope of the request was added as an issue to the appeal.

[7] Also during mediation, the appellant confirmed that she was satisfied with OPG's response regarding the job classification, salary range and benefits and employment responsibilities of the employee. The appellant is now only seeking access to records related to the termination/severance allowance. The appellant also maintained that disclosure is in the public interest, so that the application of the public interest override in section 23 was also added as an issue.

[8] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[9] I decided to conduct an inquiry, which I began by asking the OPG to submit representations on the application of the exemptions and exclusions claimed in its decision. Because OPG provided the one record to the IPC, the Notice of Inquiry also included questions about OPG's non-production of other responsive records and the scope of the appellant's request.

### **Bifurcation of issues**

[10] After it received the Notice of Inquiry, OPG asked that the issues about the production of records and the scope of the request be addressed before questions relating to the application of the claimed exclusion and exemptions. OPG argued that it would be premature for the IPC to adjudicate all of the issues on appeal before determining whether the record – created for the purposes of the appeal – is responsive and sufficient to address all of the issues, as it claims.

[11] The appellant did not take a position on the bifurcation request. After reviewing the materials before me, including the access request and OPG's representations, I concluded that, before continuing with my inquiry into the application of the exclusion and exemptions to a particular record, it must first be clear what the record or records at issue is or are. In my bifurcation decision sent to the parties,<sup>1</sup> I wrote that I would have to first determine whether the record is responsive to the request and that, if I were to find it is not, OPG would be required to search for and produce responsive records.

[12] In this interim order, I find that the record created by OPG is responsive to the request and that I may review it to address the issues related to access to it. I find that the inquiry may continue on the potential application of the exclusion and exemptions claimed by OPG over the created record.

### **DISCUSSION:**

[13] The issues about OPG's refusal to produce records to the IPC and the scope of the request are both connected to the responsiveness of the record created by OPG.

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<sup>1</sup> Issued June 15, 2021.

Because these issues are interrelated, I will deal with them together for the purpose of this decision, both in summarizing the parties' representations and in my analysis and findings, below.

## **Representations**

### ***The appellant's representations***

[14] The appellant submits that her request was for responsive records containing the classification, salary range and benefits and employment responsibilities of a former employee as well as the termination/severance allowance for that employee. She says that OPG's creation of a new document for this appeal is "neither a responsive nor sufficient means of addressing the issues and served to delay resolution of this matter." She says that, by responding with the created record, OPG has not met its obligations under the *Act*.

[15] The appellant says that it is implicit that requests under the *Act* are inherently seeking access to records. She cites section 10 of the *Act*, which states that every person has a right of access "to a record or part of a record in the custody or under the control of an institution," unless certain exemptions apply. The appellant says that, while OPG relies on section 10 to argue that a portion or part of a record may be responsive to a request for information, the Word document that OPG created is not a part of a record that existed when she made her request; rather, it is a new record that OPG simply created for the purpose of this appeal.

[16] The appellant also says that the *Act* places a duty on institutions to assist requesters if the original request does not provide sufficient detail or sufficiently describe the record sought, and that past IPC orders have established that institutions should interpret requests liberally to best serve the purpose and spirit of the *Act*, with ambiguity to be resolved in a requester's favour.

[17] The appellant says that OPG did not contact her to clarify any ambiguity or details relating to the scope of the request, nor did it give assistance in reformulating the request to address any defect in the description of the records sought. She says that the OPG did not interpret her request liberally and did not inform her that it had unilaterally chosen to define, or explain how it was narrowing, the scope of the request.

[18] The appellant also says that this current request followed an earlier request in which the appellant explicitly stated that she was seeking records relating to the same individual's termination/severance pay. The appellant says that the OPG's decision (in this appeal) explicitly referred to a previous request that the appellant made for "records relating to the termination pay and/or severance pay," and included copies of two records in the form of job descriptions it had previously disclosed (also in response to the earlier request). The appellant submits that this is evidence that OPG should reasonably have interpreted the scope of this request to include records or, at a

minimum, contacted the appellant for clarification.

***OPG's representations***

[19] OPG maintains that the request is for access to information and not to specific records. OPG says it considered the request and determined that it would be more efficient to provide the requested information directly in its decision letter. OPG says that its decision did not say it was withholding any records. Rather, OPG says that because no records were actually requested, it released most of the information sought and applied "the relevant exemptions" to the termination/severance information.

[20] OPG says that the appellant did not take issue with OPG's disclosure of information about – rather than records relating to – the classification, salary range and benefits in its decision letter. Similarly, OPG says that its decision referred to the applicability of exemptions or the exclusion to the severance information requested, not any records containing that information. About access to the termination/severance allowance, OPG wrote in its decision that:

[the termination/severance allowance] information is withheld based on the exclusion under section 65(6) (employment and labour relations) and exemptions under sections 18(1)(c), (f) and (g) (economic interests), 21 (personal privacy).

[21] OPG submits that what is really at issue is not whether it failed to produce a record, but rather, whether the record it created is responsive to the request and sufficient to dispose of this appeal. It says that this record is responsive because it contains the requested information. OPG submits that the creation of a record is consistent with IPC- approved practices in other appeals, and better facilitates access to information in the circumstances of this case. OPG relies on Orders P-880 and PO-2248 to say that institutions are not always required to disclose full records in response to a request, and that creation of a responsive record has been endorsed by previous IPC orders.

[22] OPG argues that the *Act*, while it provides a general right of access to records under the control of an institution, does not require institutions to produce records in a specific way. OPG says that one way for institutions to comply with their obligations is to create a record with the information sought by a requester. OPG says that the record is an appropriate means of conveying the requested information, and that, in creating a responsive record to simplify and streamline the appeal, it has not only met but surpassed its statutory obligations.

[23] OPG also submits that, while institutions must liberally interpret the requests that they receive, there is no right of access to information that is not responsive to the request. OPG submits that in referring to the right of access to a record "or part of a record" in the custody or under the control of an institution, section 10(1) of the *Act*

recognizes that only portions of a document may be responsive to requests for general information, and that institutions may disclose part of a record, if only part of it contains responsive information.

[24] OPG submits that the requester sought information, “not information *as it appears* in OPG records,”<sup>2</sup> and that OPG was therefore under no obligation to produce full records, and the appeal can proceed on the basis of the created record.

[25] Finally, OPG submits that the request is unambiguous and that OPG interpreted its scope to include only the specific information sought. It says that the request provided sufficient detail for OPG to collect and create a record containing that information. OPG maintains that the request itself indicates that it is for access to information and not records, when the appellant writes, “I believe disclosure of this information would be in the public interest.”<sup>3</sup>

### **Analysis and findings**

[26] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to access requests. 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).

[27] To be considered responsive to the request, records must “reasonably relate” to the request.<sup>4</sup> Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively, and ambiguity in the request should be resolved in the requester’s favour.<sup>5</sup>

[28] Clarity concerning the scope of a request and what the responsive records are is a fundamental first step in responding to a request and, later, determining the issues in

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<sup>2</sup> Emphasis in OPG’s representations.

<sup>3</sup> Emphasis in OPG’s representations.

<sup>4</sup> Orders P-880 and PO-2661.

<sup>5</sup> Orders P-134 and P-880.

an appeal.<sup>6</sup>

[29] Previous IPC orders have confirmed the importance of properly determining the scope of a request as it relates to a determination of the relevance of records or information at issue. In Order P-880, Adjudicator Anita Fineberg stated that:

...the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness." That is, by asking whether information is relevant to a request, one is really asking what is "responsive" to a request.

[30] The adjudicator also stated that "the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request" and that, if "an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it."

[31] Order P-880 dealt with a request for "information on funding"<sup>7</sup> of a police investigation into municipal corruption known as Project 80. In Order P-880, the requester sought information, not records or documents. The request was not for an entire file or all of the information related to the particular subject matter. The appellant in that appeal also argued that because there were records that "contained information requested by the appellant, documents *in their entirety* must be considered to be responsive to the request."<sup>8</sup> In reviewing the institution's disclosure obligations and the issue of responsive information versus responsive records, Adjudicator Fineberg rejected the notion that "merely because responsive information is contained in a larger document, one must 'reinterpret' the request to find that the balance of the document is also responsive to the request." She rejected the argument that an entire document must be considered to be relevant when it contains some information which is responsive to the request. Adjudicator Fineberg concluded that, if a requester is not satisfied with the information disclosed, they can make submissions to the institution on that point or "submit another, more broadly worded request to capture the information or records which the [institution] has decided are not responsive to the request as currently framed."

[32] Previous IPC orders have also held that creation of a record may, in some circumstances, be consistent with the purpose and spirit of the *Act*. In Order 99, former

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<sup>6</sup> Orders MO-2863.

<sup>7</sup> By the Ministry of the Attorney General.

<sup>8</sup> Emphasis in original.

Commissioner Sidney Linden stated that:

While it is generally correct that institutions are not obliged to 'create' a record in response to a request, and a requester's right under the Act is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the Act, it also enhances one of the major purposes of the Act i.e., to provide a right of access to information under the control of institutions.

[33] Similarly, in Order PO-2248, the IPC accepted the creation of a record containing information in response to a request for employment-related information. There, the requester sought overtime hours and amounts paid to OPP officers who accompanied the Premier on trips to the United States. The Ministry of Public Safety and Security<sup>9</sup> created a one-page document for "administrative convenience in order to isolate the specific information requested by the appellant" under the *Act* because the source documents contained additional information that was not reasonably responsive to the appellant's specific request. While the scope of the request was not at issue in that appeal, the adjudicator accepted the institution's creation of a record containing only the information sought.

[34] I adopt the approaches described above and apply them to the circumstances before me in this appeal.

[35] In my view, the request in this appeal is clearly one for information as opposed to one for specified records or documents. The request does not seek access to certain or all documents in which information related to the severance may be contained. It merely states that access is sought to a particular amount, namely, the "termination/severance allowance" paid to former employee. I am not persuaded that, in circumstances such as these, where a request is made for information as opposed to one for specified records or documents,<sup>10</sup> the OPG has not complied with its obligations under the *Act* by creating a record containing the information sought.

[36] The appellant refers to the well-known principle that institutions ought to interpret requests liberally and that any ambiguity should be resolved in a requester's favour. However, I find that the request is not ambiguous. It states the information sought: a specific amount paid to a former employee in the form of a "termination/severance allowance." In the circumstances, where the request simply asks for an amount, it is not unreasonable for OPG to have interpreted the request literally and to have determined that no clarification was required, especially where the appellant concedes that her earlier request sought records that contained this

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<sup>9</sup> Now the Ministry of the Solicitor General.

<sup>10</sup> Order P-880.



information, not merely the dollar amount.<sup>11</sup>

[37] Having regard to the particular wording of the request, which I find to be clear and unambiguous, I am satisfied that the record OPG created is responsive to the request. As noted in Order P-880, it is open to the appellant to submit a new access request for other records containing the same information. However, I find that the record is responsive to the request as currently drafted and I therefore find that this inquiry may proceed with a review of the possible application of the exclusion and exemptions claimed by OPG to it.

**ORDER:**

1. I find that the record created by OPG is responsive to the request and that this inquiry may continue on the potential application of the exclusion and exemptions claimed by OPG over this record.
2. Within 30 days of the date of this order, the appellant shall notify me in writing whether she continues to seek access to the record created by OPG, or whether she intends to withdraw her current request and submit a new request to OPG.

Original Signed By: \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

December 16, 2021 \_\_\_\_\_

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<sup>11</sup> The parties refer to the fact of the appellant's earlier request for access to records containing this information. However, they have not made submissions on the outcome of that request and it is not before me in this appeal.