Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4357

Appeal PA20-00725

Ministry of Labour, Immigration, Training and Skills Development

February 28, 2023

Summary: The appellant made a request to the Ministry of Labour, Immigration, Training and Skills Development (the ministry) under the *Freedom of Information and Protection of Privacy Act* for access to all information that an arbitrator in a grievance arbitration under the *Colleges Collective Bargaining Act* considered in making an interim ruling. The ministry issued a decision stating that it did not have responsive records and that it does not have jurisdiction over private grievance arbitrations before arbitrators not appointed by the ministry. The appellant appealed the ministry's decision to the IPC because she believes records responsive to her request exist and that the ministry did not conduct a reasonable search. In this order, the adjudicator upholds the ministry's search as reasonable and dismisses the appeal.

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

Orders and Investigation Reports Considered: Order PO-3702.

OVERVIEW:

[1] The appellant was involved in a grievance arbitration under the *Colleges Collective Bargaining Act* (*CCBA*). After the arbitrator made an interim ruling requiring the appellant to produce evidence in support of an adjournment request, the appellant made a request to the Ministry of Labour, Immigration, Training and Skills Development (the ministry) for access to the information and evidence on which the arbitrator relied in making her interim decision.

[2] The appellant sought access to the following:

> …letters, notes, schedule of meetings, meeting notes, discussion notes, sound recordings, and any other materials provided by all parties, including but not limited to information, notes, minutes, documents, transcripts from the teleconference held on [a specific date], and used by [the arbitrator] in the writing of her interim decision.
>
> To be clear, the records should include, but not [be] limited to all proof, all documentation and all other records used by, and relied upon by [the arbitrator] in writing her decision, including but not limited to all medical evidence used by and relied upon by [the arbitrator].
>
> To be clear, the request is for all information which contributed to the decision and order of [the arbitrator on a specified date].

[3] The appellant attached a copy of the arbitrator's interim decision to the access request.

[4] The ministry transferred the request to the Grievance Settlement Board (GSB), believing it to have custody or control of responsive records. The GSB, however, responded that the appellant's arbitration was not within the GSB's jurisdiction because it was not a GSB, or a Public Service Grievance Board (PSGB), matter.[1]

[5] After the attempted transfer was refused, the ministry conducted a search. The ministry issued a decision stating that it did not locate any responsive records, and that the only records it holds with respect to an arbitrator's decision are the decisions themselves, which are filed by the arbitrators and posted online to a grievance arbitration awards portal.[2]

[6] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). The parties participated in mediation to explore resolution. During mediation, the appellant took the position that the ministry should have responsive records and that, if they are held elsewhere, the ministry should have forwarded the request to the appropriate institution in accordance with section 25(1) of the *Act*. The ministry maintained its decision and confirmed that it had forwarded the request to the GSB, who responded that the matter was not within its jurisdiction.

[7] The appellant maintained that the ministry has responsive records and that it had acted in bad faith in the processing of her request.

---

[1] The GSB and PSGB share a Registrar.

[2] The ministry wrote in its decision that decisions filed by arbitrators with the Minister from 2014 onward under the *Labour Relations Act, 1995* are posted online to a Grievance Arbitration Awards Portal.

[8] With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process for an inquiry on the sole issue of the reasonableness of the ministry's search for responsive records. I conducted a written inquiry during which both parties submitted representations.

[9] In this order, I uphold the ministry's search for responsive records as reasonable and dismiss the appeal.

DISCUSSION:

[10] The only issue in this appeal is whether the ministry conducted a reasonable search for records that are responsive to the request.

[11] Where a requester claims that additional records exist beyond any located by the institution, the issue is whether the ministry has conducted a reasonable search for records as required by section 24 of the *Act*.[3] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's decision. Otherwise, I may order the ministry to conduct another search for records.

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding such records exist.[4]

[13] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records;[5] that is, records that are reasonably related to the request.[6]

[14] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to identify and locate records which are reasonably related to the request.[7]

Representations

The ministry's representations

[15] The ministry submits that the appellant's request relates to a private grievance arbitration conducted under the *CCBA*.

[16] The ministry submits that, when it first received the appellant's request, the

---

[3] Orders P-85, P-221 and PO-1954-I.
[4] Order MO-2246.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2649 and PO-2592.

ministry erroneously believed it to be related to a GSB arbitration and transferred it to the GSB. The Registrar of the GSB (who is also the Registrar of the PSGSB) refused the transfer because the appellant's arbitration was not related to either a GSB or PSGSB grievance, and therefore not in the jurisdiction of either of those adjudicative agencies.

[17] The ministry says that, after it received the GSB/PSGSB's refusal of the transfer, its Freedom of Information and Privacy Office processed the request, which included identifying the appropriate branches within the ministry to be searched.

[18] The ministry says that its Strategic Initiatives Branch (SIB) is the sole repository of potentially relevant records, and that no other branch in the ministry has custody or control of records relating to grievance or interest arbitrations (under the *CCBA*). Where arbitrators authorized under legislation other than the *Labour Relations Act, 1995* (*LRA*) voluntarily submit their decisions to the ministry, those decisions are maintained on an internal shared drive within the SIB.

[19] According to the ministry, the SIB is part of the ministry's Labour Relations Solution Division (LSRD), and includes the Labour Relations/Collective Bargaining Program Administration unit (CPBA). The ministry says that the CPBA analyses and distributes information about active collective bargaining relationships in Ontario; maintains copies of collective agreements (that are required to be filed with the ministry under the *LRA*), and copies of awards/decisions filed with the ministry by arbitrators. The ministry says the SIB maintains an electronic repository of these agreements and awards which are available to the public, provides support services in the collective bargaining process, and processes requests for the appointment of arbitrators.

[20] The ministry says that there are only four potential repositories for responsive records within the SIB:

- an internal case management system;
- the SIB's internal shared drive;
- the branch email accounts; and,
- the public Grievance Arbitration Awards Portal, which contains arbitration decisions made under the *LRA* and other provincial legislation under which the *LRA* applies, and that have been filed with the ministry.

[21] With its representations, the ministry provided an affidavit sworn by the CBPA's manager, who oversees the CPBA's various administrative functions, and who says she searched all of these repositories but did not locate any responsive records.

[22] The CPBA manager states in her affidavit that, in cases in which the ministry has appointed arbitrators, it contacts those arbitrators for status updates about the progress of arbitrations and decisions. However, the ministry says it did not proactively follow-up

with the arbitrator in the appellant's case because it did not appoint that arbitrator.

[23] The ministry says that it may appoint arbitrators when specifically requested to do so by parties to an arbitration, but that these arbitrators have no other relationship, including no employment relationship, with the ministry; it says that arbitrators who conduct grievance and interest arbitrations under the *CCBA* pursuant to collective agreements are not employed by the ministry and have no connection to the ministry and that, in the appellant's case, the ministry was not asked to appoint the arbitrator.

[24] The ministry submits that the *CCBA* does not require arbitrators to submit their decisions or any other records relating to arbitrations over which they preside to the ministry. The ministry also says that the *CCBA* does not enable the ministry to compel arbitrators presiding over grievance or interest arbitrations under the *CCBA* to produce records to the ministry relating to those arbitrations and that any decisions or awards submitted to the ministry are submitted voluntarily by the individual arbitrators. The ministry says that these decisions are held by the SIB.

[25] In the appellant's case, the ministry says that the arbitrator voluntarily submitted her interim decision to it approximately two months after the ministry issued its access decision.[8]

The appellant's representations

[26] The appellant submits that the ministry did not conduct a reasonable search because it only searched in one division. Specifically, the appellant says that the search was limited because it "did not include all the departments, branches, divisions [and] services, within the Ministry." The appellant says that, in accordance with IPC Order PO- 3702, a reasonable search "must include the Division of Arbitration Services."

[27] The appellant argues that the ministry acted in bad faith in the processing of her request. The appellant submits that the ministry's affidavit does not detail a reasonable search and only asserts the affiant's "belief" that the ministry had no role in the appointment of the arbitrator. The balance of the appellant's representations simply challenges the ministry's claims in its representations, and sets out various questions about the ministry's authority and the authority of individual arbitrators as it relates to the conduct of arbitration hearings, including the arbitrator's authority to, among other things, "submit for publication an interim ruling requesting medical [evidence]" in the context of the grievance arbitration.

Analysis and findings

[28] For the following reasons, I am satisfied that the ministry's search for responsive records was reasonable.

---

[8] As noted above, the appellant included a copy of the arbitrator's interim decision with her access request.

[29] As mentioned above, the ministry is not required to prove with certainty that records do not exist in order to satisfy the *Act's* requirements. It must only show that it made a reasonable effort to locate responsive records. Based on the evidence before me, I find that it has.

[30] The ministry's representations demonstrate that an experienced employee, namely a senior employee in a managerial role, knowledgeable in the records related to the subject matter of the appellant's request, made reasonable efforts to locate responsive records. The ministry describes the databases and repositories of records that it searched, and has provided a reasonable explanation where no responsive records exist.

[31] The appellant was asked to provide support in her representations for her belief that additional responsive records exist. The appellant relies on order PO-3702 to argue that the ministry did not search all relevant departments for responsive records.

[32] In Order PO-3702, the adjudicator addressed a request made to the then-Ministry of Labour for access to information about a particular arbitration. The adjudicator ordered that institution to disclose some information, but upheld its decision to deny access to the remainder of the withheld information under the discretionary personal privacy exemption at section 49(b) and the discretionary exemption at section 49(a) (which allows an institution to deny access to a requester's own personal information in certain circumstances).[9]

[33] The appellant does not rely on any of the findings or analysis in Order PO-3702 (which, in any event, I find is not relevant to this appeal). Rather, the appellant cites the adjudicator's summary of the institution's representations where the institution described the role of a program area called the "Division of Arbitration Services" that was part of the then-Ministry of Labour (a predecessor of this ministry).[10] The appellant argues that a "reasonable search must include" that division.

[34] Based on the representations before me in this appeal, I am satisfied that the SIB is a relevant branch of the ministry whose decision is at issue in this appeal, and that the ministry searched relevant repositories of records within it for responsive records. In the circumstances, I am not persuaded that another search would yield responsive records or evidence or other information that was put before an arbitrator not appointed by the ministry during the course of a private grievance arbitration under

---

[9] Order PO-3702 involved a request to the ministry's predecessor, the Ministry of Labour, for access to information about an arbitration. The ministry denied access to some information that it believed to be privileged. The adjudicator found that some information was not privileged and ordered it disclosed, and upheld the Ministry of Labour's decision that the remainder of the withheld information was exempt from disclosure pursuant to the discretionary personal privacy exemption at section 49(b) and the discretionary exemption at section 49(a) (discretion to refuses requester's own information), read with section 13(1) (advice or recommendations).

[10] At paragraph [94] of Order PO-3702.

the *CCBA*.

[35] I therefore find that the ministry's search for responsive records was reasonable and I uphold it.

ORDER:

I uphold the ministry's search as reasonable and dismiss this appeal.

Original signed by: February 28, 2023
Jessica Kowalski
Adjudicator