

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4362-F

Appeal PA20-00470

Human Rights Tribunal of Ontario

March 15, 2023

Summary: This final order disposes of an appeal from a decision of the Human Rights Tribunal of Ontario (the HRTO) relating to an access request for all emails that contain the appellant's name and/or any of his three HRTO file numbers for a specified date range. In Interim Order PO- 4320-I, the adjudicator found that the HRTO had failed to conduct a reasonable search in response to the appellant's request and she ordered it to conduct further searches. The HRTO conducted further searches, provided affidavits and representations in support of its further searches and issued a new access decision for new records located. In this final order, the adjudicator upholds the HRTO'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 Considered: Orders P-724 and PO-4320-I.

OVERVIEW:

[1] This final order follows on Interim Order PO-4320-I (the interim order), in which I ordered the Human Rights Tribunal of Ontario (the HRTO) to carry out further searches for responsive records.

[2] By way of background, the HRTO, currently part of the Social Justice Division (SJD) of Tribunals Ontario, received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all emails that contain the appellant's name

and/or any of his three HRTO file numbers (the HRTO files) between a specified date range.

[3] The HRTO issued a decision granting partial access to certain records. The appellant appealed the HRTO's decision to the Office of the Information and Privacy Commissioner (the IPC).

[4] As explained in more detail in the interim order, during mediation, the appellant took the position that additional records should exist, including correspondence sent between the HRTO and the respondents to the HRTO files (the respondents), without the appellant being copied, and correspondence that took place on a specific date with the Social Justice Tribunal of Ontario (SJTO)¹ and the Premier of Ontario regarding the HRTO files. In response, the HRTO advised the mediator that no additional responsive records exist and no further searches were conducted.

[5] The appeal proceeded to the adjudication stage of the appeals process, where I decided to conduct an inquiry and received representations from the parties.

[6] In Interim Order PO-4320-I (the interim order), I found that the HRTO had not conducted a reasonable search and I ordered it to carry out further searches, provide affidavits of the steps taken to carry out its further searches and issue a new access decision for any new records located by its further searches.

[7] The HRTO conducted further searches, which it says yielded additional responsive records, and issued a new access decision. It also provided two affidavits to explain the steps that it took to carry out these further searches. I provided the appellant with an opportunity to respond to the HRTO's submissions.

[8] In this order, I find that the HRTO has conducted a reasonable search and I dismiss the appeal.

DISCUSSION:

[9] The only remaining issue in this appeal is whether the HRTO carried out a reasonable search, following the issuance of the interim order.

[10] 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 The *Act* does not require the institution to prove with absolute certainty that further records do not exist.³

¹ The HRTO was part of Social Justice Tribunals Ontario (SJTO) before being incorporated into Tribunals Ontario under the Social Justice Division (SJD).

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

Representations

[11] The HRTO has now carried out further searches, issued a new access decision and provided two affidavits to describe its search efforts and the results.

HRTO's further searches generally

[12] Generally, the HRTO advises that, as a result of its further searches, it disclosed additional records to the appellant on January 31, 2023, in addition to the disclosure of adjudicative records on December 28, 2022 and January 20, 2023.⁴ It also issued a new access decision on January 31, 2023 for the newly located records.

[13] The HRTO provides the affidavits of two employees, who coordinated the further searches, which provide details about the different employees who conducted the further searches and the specific places they searched, and the specific steps they took to coordinate the further searches, including comparing all of the responsive records to those listed in appendix 1 of the appellant's original representations during my inquiry (the appellant's chart).

[14] As outlined in the HRTO's affidavits, it conducted further searches of internal and external communications responsive to the request without narrowing its scope. It explains that it searched "all documents included in the electronic files for the application[s] on the HRTO case management system, including covering emails, where documents were submitted as attachments to an email." It also explains that it searched for *ex parte* communications from the respondents to the HRTO for the HRTO files that were not originally provided to the appellant.

[15] It also provides comparison charts of the additional records located by the further searches, the records originally located by the initial search and the documents listed in the appellant's chart.

[16] In response, the appellant acknowledges that the HRTO has now provided a more complete disclosure of his records.⁵

Email between the HRTO and SJTO about the appellant's May 2019 complaint email

[17] The interim order specifically asked the HRTO to address the following concern:

⁴ Copies of adjudicative records and related communications were disclosed to the appellant pursuant to the *Tribunals Adjudicative Records Act, 2019* (TARA) on December 30, 2022, with updated copies provided on January 20, 2023. It states that these records are not subject to the *Act*.

⁵ While the appellant asks me to address why such a large number of records was missed by the HRTO in its initial search, the *Act* does not contain such an authority. He also asks me to award any monetary or non-monetary remedies, if I have jurisdiction. However, the IPC does not have the requisite authority to make an award of costs (see Order P-724) or order any non-monetary and public interest remedies in access request appeals.

While I am willing to accept that there is no email between the HRTO and the Premier's Office, it seems reasonable that there exists an email between the HRTO and the SJTO, which led to the HRTO's response to the appellant's complaint, both of which were not disclosed to the appellant.

[18] In response to this specific concern, the HRTO's affidavit indicates at paragraphs 30-32 that:

In the Appellant's Chart included in Appendix 1 of his January 14, 2022 submissions, he alleged that the HRTO had not provided a May 31, 2019 email regarding his complaint to the HRTO about the handling of his file [specific file number]. I located the HRTO's May 31, 2019 response to his May 24, 2019 complaint in the HRTO's file for that application (provided to the Appellant on December 28, 2022 and January 20, 2023.)

On January 25, 2022, I asked [specific employee name] to see if he could find any records showing whether the Appellant sent a follow-up email after receiving the May 31, 2019 response from the HRTO. I also asked staff in the Tribunals Ontario Executive Office to search their records for any communications related to complaints to the HRTO filed by the Appellant. [Specific employee name] was unable to locate any further records.

Staff in the Executive Office provided me with a June 3, 2019 email from Tribunals Ontario mailbox TO-TDO. [name of record]. They also provided a May 24, 2019 email from Tribunals Ontario mailbox TO-TDO. [name of another record], both of which ... were disclosed to the Appellant with the January 31, 2023 access decision.

[19] In response, the appellant submits that the following issue remains outstanding:

[The HRTO has] disclosed the May 31st, 2019 email...but they still refuse to provide all the correspondence around this email. The e-mail attached shows that on May 24th, 2019, I sent a complaint to the STJO regarding the HRTO's process. The complaint did not go directly to the HRTO but rather it was forwarded to the HRTO by the SJTO. The forwarded e-mail from the SJTO was not included in their disclosures in its entirety. Therefore, I believe that the HRTO should be ordered to perform further searches regarding this issue...

[20] To clarify its comments about the appellant's May 2019 complaint email, the HRTO submits that:

At the start of 2019, the Social Justice Tribunals Ontario (the SJTO), the Environment and Lands Tribunal and the Safety, Licensing Appeals and

Standards Tribunal were joined to form Tribunals Ontario. Over several months in 2019, the various administrative processes of these organizations were amalgamated to create Tribunals Ontario administrative processes. In May of 2019, the SJTO Complaints email address was in the process of being transitioned to a Tribunals Ontario email address, TOTDO.feedback@ontario.ca.

When the Appellant sent his May 24, 2019 email with his complaint about the HRTO, although he sent it to the SJTO Complaints email address, as part of the transition process described above, this email also became associated with the TOTDO.feedback email address. The Appellant's email was forwarded to the HRTO by a former Tribunals Ontario staff member [specific employee name]. The address of the sender (either the TO-TDO Feedback email address or the SJTO Complaints email address) depends on who opens the email. That is, while there appear to be two e-mails, as a result of the transition process, there is only one e-mail which is associated with two different email addresses. Attached are two versions of the same email, one opened by [the affiant of one the HRTO's affidavits], and another opened by [specific employee name] (one of the original recipients of the email).

There are no additional emails exchanged on May 24, 2019 related to the Appellant's complaint.

[21] In response, the appellant advises that he does not have any further representations with respect to the HRTO's further searches.

Analysis and findings

[22] 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.⁶ 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

[23] I am satisfied that the HRTO conducted a reasonable search and that further searches will not yield any responsive records. I have reached this conclusion for the reasons below.

HRTO's further searches generally

[24] The HRTO has now conducted further searches and provided representations, addressing my concerns surrounding the HRTO's initial search outlined above from

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2246.

paragraphs 56-61 of the interim order. I note that the appellant acknowledges that the HRTO has provided a more complete disclosure of his records.

[25] Based on the evidence provided, I am satisfied that the HRTO has now conducted further searches without narrowing the scope of the appellant's request. I am also satisfied that the HRTO has now provided the appellant with access to responsive records not located by its initial searches that address my concerns outlined in the interim order. Its evidence demonstrates that it consulted the appellant's chart to verify that its further searches located the records highlighted by the appellant as missing from the HRTO's initial searches.

Email between the HRTO and SJTO about the appellant's May 2019 complaint email

[26] In the interim order, I expressed concern that the HRTO had not provided the appellant with a copy of its response to the appellant's complaint, which the appellant had in his possession. More troubling was that the HRTO did not provide a record or an explanation of how the appellant's complaint, sent to the SJTO, resulted in a response from the HRTO. Because it was reasonable that an email between the HRTO and the SJTO exists, which had not been disclosed to the appellant, I concluded that the HRTO had not conducted a reasonable search.

[27] The HRTO has now provided the appellant with a copy of the HRTO's May 31, 2019 response to his May 24, 2019 complaint. It has also provided the appellant with a copy of internal emails coordinating the response, as well as an explanation for how the appellant's complaint sent to the SJTO, resulted in a response from the HRTO. I accept this explanation and find that it addresses my concern outlined in the interim order. I also accept that there is no evidence to suggest that there are additional emails exchanged on May 24, 2019 related to the appellant's complaint.

Conclusion

[28] Considering the additional further searches undertaken and the representations provided by the HRTO in response to my concerns in the interim order, I find that the HRTO has now conducted a reasonable search for records responsive to the appellant's request.

ORDER:

I uphold the HRTO's further searches and I dismiss the appeal.

Original signed by: _____

Valerie Silva
Adjudicator

March 15, 2023