Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4367

Appeals PA20-00153, PA20-00253, PA20-00254, PA20-00255 and PA20-00256

Ministry of Labour, Immigration, Training and Skills Development

March 21, 2023

Summary: The appellant made five requests 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 information relating to five labour-related and grievance arbitrations. The ministry issued five decisions stating that it did not have responsive records, and later, a supplementary decision in one of the five appeals granting partial access after locating responsive records. The appellant appealed the ministry's decisions to the IPC claiming that records responsive to each request exist and that the ministry did not conduct reasonable searches for them. In this order, the adjudicator upholds the ministry's searches as reasonable and dismisses all five appeals.

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

Orders Considered: Order PO-3702.

OVERVIEW:

[1] This order is about the reasonableness of searches conducted by the Ministry of Labour, Immigration, Training and Skills Development (the ministry) for records responsive to five requests the appellant made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to five specific labour arbitrations.

[2] All five requests involved grievance arbitrations and matters subject to collective bargaining agreements, as follows:

- records from January 2000 "to present"[1] relating to a Toronto Police Association complaint about union representation (appeal PA20- 00153)
- records from January 2014 "to present" relating to an arbitration involving an individual and the Ontario Public Services Employees Union (OPSEU) (appeal PA20-00253)
- records from January 2014 "to present" relating to five grievances under the *Colleges Collective Bargaining Act, 2008* involving OPSEU and Sheridan Institute of Technology & Advanced Learning (appeal PA20-0254)
- records from January 2014 to the date of the request involving the appellant's three OPSEU grievances (appeal PA20-00255)
- records from January 2000 to the date of the request relating to an arbitration involving the City of Ottawa, the Civic Institute of Professional Personnel and an individual (appeal PA20-00256).

[3] While the specifics of each request vary somewhat, broadly, the appellant sought access to the following types of records or information in each about the proceedings and the arbitrators:

- letters of appointment and information about arbitrator remuneration, arbitration fees and expenses claimed
- grievance forms files
- correspondence and notes, even if solicitor-client privileged
- briefing notes, meeting notes, faxes letters and other correspondence
- grievance forms
- emails, SMS and other mobile messages
- voicemails and phone and audio recordings and associated transcripts

[1] The ministry submits that it considered "to present" to mean the date of each of the appellant's requests. In his representations, the appellant submits that "present" should be defined as the date the ministry processed the requests. As the scope of the appellant's requests is not an issue that is properly before me in any of these appeals, I do not address the end date of any of the appellant's five requests at issue in this decision.

- all decisions/awards/orders and supporting evidence, including notes, briefing notes and minutes of settlement.

[4] The ministry issued decisions in response to each request stating that it does not have responsive records.

[5] The appellant appealed the ministry's decisions to the Information and Privacy Commissioner of Ontario (the IPC). Mediation took place in each appeal. The ministry maintained its position that it has no records that are responsive to the appellant's requests. The appellant maintained that responsive records should exist. The appellant also took the position that, if responsive records are held elsewhere, the ministry ought to have forwarded his requests to the appropriate institution for response, in accordance with section 25(1) of the *Act*.

[6] When mediation did not resolve the appeals, they were transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. I conducted an inquiry in which both the ministry and the appellant submitted representations that were shared with each.[2]

[7] Because the requests and the ministry's decisions are similar, I combined all five requests into a single inquiry. The appellant, however, submitted five sets of representations. Although I have reviewed all of the appellant's representations, I have only distinguished them where they contain information relevant to a discrete appeal that is not relevant to the other appeals. Otherwise, I have considered the appellant's representations as a whole because of the overlap in each set of representations.

Section 25(1) (forwarded requests) not at issue

[8] As noted above, the appellant raised section 25(1) as an issue during mediation.[3] Section 25(1) requires an institution that does not have records in its custody or under its control to make necessary inquiries to determine whether another institution does, and if it does, to forward the request to that institution. Section 25(1) imposes a mandatory obligation on an institution to determine where responsive records may be held and ensures that, where a request is submitted to an institution that does not have custody or control of responsive records, the request will be sent to the institution that does have custody or control, if such an institution exists.[4]

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[2] In accordance with IPC's *Practice Direction 7* on the sharing of representations.

[3] Specifically, after the conclusion of mediation, the mediator issued a report setting out the issues for adjudication. The appellant challenged the mediator's report, claiming that it did not accurately reflect the issues for mediation. Based on the appellant's correspondence, the appeals were returned to mediation and section 25(1) was added as an issue to all five appeals. I note that the appellant also challenged the mediator's report on the basis that it failed to include, among other things, alleged bad faith on the part of the ministry and other matters not related to an exemption or section under the *Act* and which are therefore not properly before me in these appeals.

[4] Order P-1400. See also Orders P-1278 and PO-4111-F.

[9] In his representations regarding each appeal, the appellant says that the ministry "is/was unable to forward the request to another institution because the requested records are under the custody and/or control of the [ministry]" and not another institution. The appellant submits that the ministry is "fully aware" that responsive records are in "one of the over twenty (20) known branches and divisions, and an unknown number of branches and divisions" within the ministry that perform work pertaining to labour relations and other arbitration services.

[10] I understand the appellant's representations to be further arguments in support of his claim that additional records ought to exist in the ministry's holdings, and not that the ministry ought to have forwarded the requests to another, unspecified, institution. In fact, there is no dispute that the appellant seeks access to records specifically held by the ministry, and the ministry's position that the request was for access to records within its holdings is consistent with the appellant's representations.

[11] Because the appellant does not assert that the requests ought to have been transferred under section 25(1), there is no need to consider that issue further, although (as discussed below) I will consider this as part of the appellant's overall argument about why records ought to exist.

[12] In this order, I uphold the ministry's searches for responsive records in each appeal as reasonable and dismiss all five appeals.

DISCUSSION:

[13] 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*.[5] 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.

[14] 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.[6]

[15] 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;[7] that is, records that are reasonably related to the request.[8]

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Order MO-2246.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.

[16] 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.[9]

Representations

The appellant's representations

[17] The appellant submits that the ministry's searches were not reasonable because they did not include all relevant ministry branches or divisions, and, in particular, did not include a division called the "Division of Arbitration Services." The appellant says the ministry's failure to include this division in its searches, and its failure to even identify it as an active part of the ministry providing arbitration services reveals the ministry's bad faith and demonstrates that the ministry has departments and branches that operate clandestinely and deliberately out of public view.

[18] The appellant claims that the ministry has responsive records in its holdings because arbitrators must file their decisions with the ministry, including relevant exhibits, notes, briefing notes and other documents that the ministry must then make available to the public, but does not.

[19] As noted above, the appellant argues that the fact that the ministry did not forward the requests to another institution is evidence that responsive records are within the ministry's custody or under its control.

[20] The balance of the appellant's representations claims bad faith on the part of the ministry in processing his requests, systemic secrecy, and challenges the authority of ministry employees who conducted the ministry's searches. The appellant argues that the ministry is hiding relevant branches from the public and therefore shielding them from public scrutiny, and alleges unprofessional conduct on the part of the individual arbitrators. Although I have reviewed the appellant's representations in their entirety, I have only summarized those portions of his representations that are relevant to the issues that are properly before me in this appeal, namely those to which the *Act* applies.

The ministry's representations

[21] The ministry says that the appellant submitted 18 access requests between 2019 and 2021 and that, in the course of responding to each, the ministry provided the appellant with information about its role in respect of labour arbitrations, as well as access to resources about collective bargaining and arbitration matters. The ministry says that it took a liberal interpretation of the five requests at issue, and that it conducted extensive and broad searches commensurate with the nature of the requests that were informed by the ministry's prior interactions with the appellant.

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[9] Orders M-909, PO-3649 and PO-2592.

[22] The ministry says it searched all of its branches and divisions for responsive records. The ministry says that, in doing so, it discovered an administrative error after its decision was issued in respect of the fifth request (in appeal PA20-00256), with some records having been located but not provided to a previous program advisor. As a result, the ministry says it issued a supplementary decision granting partial access to responsive records in that appeal.[10]

[23] According to the ministry, its searches of all of its branches and divisions revealed that the most likely program areas to have responsive records would be the Labour Relations Solution Division (LRSD), and, in particular, the Dispute Resolution Services Branch (DRSB). The ministry says that, if an arbitrator submits an award or order or other materials to the ministry (as the arbitrator did for the arbitration that is identified in appeal PA20-00256), those records would be held in the LRSD.

[24] With its representations, the ministry provided affidavits of a manager in the LRSD's Labour Relations Collective Bargaining Program Administration unit, and a program advisor in its FOI office.[11] Each describes their respective positions and knowledge of the access requests and areas to be searched, as well as the searches themselves.[12]

[25] The LRSD manager's affidavit identifies six staff members who conducted searches, and their roles. These were: a director and deputy director of the DRSB; a director of the Ministry Strategic Initiatives Branch; a manager and a supervisor in the Labour Relations/Collective Bargaining Program Administration unit; and a senior legislative advisor in the Dispute Resolution Services branch. According to her affidavit, each searched their emails as well as the case management system, computer drives, shared or network drives, physical files, and the grievance arbitration awards portal for "any and all documents or files pertaining to the requests."

[26] According to the FOI program advisor's affidavit, she spoke with staff involved in the ministry's initial search, with the result that the LRSD was determined to be the primary source for responsive records. The program advisor's affidavit states that there, she located records responsive to the request in appeal PA20-00256 that the arbitrator filed with the ministry and that were then partially disclosed to the appellant by way of the ministry's supplementary decision.[13]

[27] Regarding the appellant's concerns about the "Division of Arbitration Services,"

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[10] Dated December 21, 2021. According to the ministry, there were delays in sending this decision to the appellant due to restrictions associated with the COVID-19 pandemic, so that the decision was not sent until during these inquiries.

[11] Freedom of Information office.

[12] The affidavits provided to the IPC contain electronic signatures. When these documents were combined to create a package to be printed and couriered the appellant with a Notice of Inquiry, the electronic signatures were removed. The affidavits submitted by the ministry are signed and commissioned.

[13] See footnote 10, supra.

the ministry submits that there is no such division. It says that, in or around 2010, a number of former branches and divisions "merged to form the current [LRSD], which includes the Strategic Initiatives branch, Collective Bargaining Information Services, and the Dispute Resolution Services branch."

[28] Finally, the ministry says that arbitrators are independent of the ministry and, while they may be appointed by the Minister in certain circumstances, they are not employed by the ministry. It submits that in certain instances, arbitrators are required to file awards with the Minister,[14] who in turn is required to publish those awards that are filed. The ministry says it does not have records relating to individual arbitrations in its record holdings unless the arbitrator files them with the ministry.

Analysis and findings

[29] I am satisfied that the ministry's searches for records responsive to all five of the appellant's requests were reasonable and that the ministry complied with its obligations under section 24 of the *Act*.

[30] As I have noted 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.

[31] I find that staff knowledgeable in the subject matter of the requests made reasonable efforts to search for responsive records in the appropriate and relevant program areas. The ministry's representations demonstrate that experienced employees, including a program advisor and a manager in the LRSD, directors, deputy directors and advisors, knowledgeable in the records related to the appellant's five requests, made reasonable efforts to locate responsive records. The ministry has described the units and divisions searched, the records repositories searched, and has provided a reasonable explanation where no responsive records exist. Where the employees who conducted the original searches are no longer at the ministry, the ministry's representations demonstrate that current employees made efforts to speak to them regarding their searches.

[32] The appellant relies on IPC Order PO-3702 to support his claim that the ministry's failure to search the "Division of Arbitration Services" is demonstrative of a failure to search all relevant divisions of the ministry and therefore evidence of an inadequate search.

[33] In Order PO-3702, the adjudicator addressed a request made to the Ministry of Labour for access to information about a particular arbitration. The adjudicator ordered the ministry to disclose some information, but upheld the ministry's decision to deny

[14] For example, in arbitrations under the *Labour Relations Act, 1995* (*LRA*), pursuant to Ontario Regulation 94/07 made under the *LRA*.

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).[15]

[34] The appellant does not rely on any of the findings or analysis in Order PO-3702 (which, in any event, I find are 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).[16] The appellant argues that, by not searching this (no longer existent) division and by denying its existence altogether, the ministry is being "less than truthful" and that this conduct is part of the ministry's overall attempt to obfuscate and delay the processing of the appellant's requests.

[35] The ministry has explained that the division of Arbitration Services no longer exists, after a number of branches merged in 2010 to form the current LRSD (and whose manager provided the above-noted affidavit describing the ministry's searches). I accept ministry's explanation that there is no longer a division of Arbitration Services. I am satisfied on the ministry's representations that the relevant branches of the ministry were searched, including relevant current departments that replace former divisions or branches that would have included records previously held there.

[36] I am also satisfied on the ministry's representations that where arbitrators filed materials with the ministry, as in the case of the arbitration that is the subject of the appellant's request in appeal PA20-00256, these would have been held in the LRSD where records filed by the arbitrator were located, and which was among the divisions and branches the ministry searched.

[37] In the circumstances, and based on the representations before me in all five appeals, I am not persuaded that further searches would yield more responsive records. I therefore find that the ministry's searches for responsive records were reasonable and I uphold them.

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[15] 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 refuse requester's own information), read with section 13(1) (advice or recommendations).

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

ORDER:

I uphold the ministry's searches as reasonable and dismiss appeals PA20-00153, PA20-00253, PA20-00254, PA20-00255 and PA20-00256.

Original signed by: March 21, 2023

Jessica Kowalski
Adjudicator