

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4569

Appeal PA20-00257

Ministry of Labour, Immigration, Training and Skills Development

November 7, 2024

Summary: The appellant made a request to the ministry for access to records about himself. The ministry determined that portions of four responsive records were not responsive to the request because they are not about the appellant. The appellant seeks access to the withheld information, challenges the reasonableness of the ministry's search for responsive records, and claims the ministry acted in a conflict of interest. The adjudicator finds that the information at issue is not responsive to the request and upholds the ministry's search as reasonable. She finds that the appellant's conflict of interest claim is not substantiated and dismisses the appeal.

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

OVERVIEW:

[1] 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* (*FIPPA* or the *Act*) for access to the following:

...from 01 January 2014 to present all records relating to [appellant's name].

The records should include but not [be] limited to the following:

- a) Briefing notes, meeting notes, meeting minutes, faxes, letters, reports, audits, inquiries, memoranda, corporate plans and intra-

Provincial Ministry correspondence including to/from all outside institutions, including but not limited to, OPSEU Union

b) Emails, SMS, PIN to PIN and other mobile messages, including Message-ID and full headers

c) Voice Mails, Phone Recordings, Audio Recordings and transcriptions and data of the same

d) Correspondence notes data and records in any form relating to [appellant's name]

e) Include Provincial Ministry Confidences and records subject to solicitor-client privilege

f) All other records already released under the Freedom of Information and Protection of Privacy Act by the Provincial Ministry on [appellant's name].

[2] The parties communicated with each other about the request, and, on September 1, 2020, the ministry issued a decision granting the appellant partial access to responsive records. The ministry denied access to some of the records based on the exemption in section 13 (advice or recommendations), and to those portions of the records that it determined to be non-responsive to the request.

[3] The ministry said in its decision that records from the Minister's Office covering the period from January 1, 2014 to June 29, 2018 had been transferred to the Ministry of Government and Consumer Services, Archives of Ontario (the Archives) as part of the 2018 change in government and associated transition; the ministry advised the appellant to submit any request for these records directly to the Archives, following direction from the Archives.

[4] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). The parties attempted mediation.

[5] During mediation, the ministry issued a revised decision in which it removed its section 13 claim over previously withheld records and granted access to those records in full. The ministry maintained its decision to not disclose records that it says are not responsive to the appellant's request.

[6] After receiving the ministry's revised decision, the appellant claimed that additional responsive records exist that were not disclosed; disputed the ministry's claim that the withheld portions of the records are non-responsive to his request; challenged the ministry's interpretation of the timeframe of his request (specifically, of the words "to present"); and asserted that a conflict of interest exists on the part of the ministry in its processing of the request. The scope of the request and conflict of interest were therefore

added as issues to the appeal.

[7] With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted a written inquiry during which I received representations from the parties that were shared between them in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[8] In this order, I find that the ministry did not narrow the scope of the request improperly, and I uphold its decision to deny access to the information at issue because it is not responsive to the appellant's request. I uphold the ministry's search for responsive records as reasonable. I also find that the appellant has not demonstrated that the ministry acted in a conflict of interest in processing the request, and I dismiss the appeal.

RECORDS:

[9] The records consist of four emails. At issue is access to those portions of the emails that the ministry withheld as non-responsive to the request.

ISSUES:

- A. What is the scope of the request? Was the ministry's search for responsive records reasonable?
- B. Has the appellant established a conflict of interest, or a reasonable apprehension of a conflict of interest or bias?

DISCUSSION:

Issue A: What is the scope of the request? Was the ministry's search for responsive records reasonable?

[10] For the following reasons, I find that the ministry properly interpreted the appellant's request to be for access to records about himself only, did not improperly narrow the request, and properly identified information relating to individuals other than the appellant as non-responsive. I also uphold the ministry's search for responsive records as reasonable.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to access requests. Section 24(1) states, in part, that a person seeking access to a record shall make the request in writing and provide sufficient detail to enable an experienced employee of the institution to identify the record upon a reasonable effort.

[12] Section 24(2) states that, if the request does not sufficiently describe the record sought, the institution must inform the requester of the defect and offer help in reformulating the request so that it complies with section 24(1).

[13] To be responsive to the request, records must “reasonably relate” to it.¹

[14] Where a requester claims that additional records exist beyond any located by the institution, the issue 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 ministry’s decision. Otherwise, I may order it to conduct another search for records.

[15] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records,³ that is, records that are reasonably related to the request.⁴

[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.⁵

Representations

The appellant’s representations

[17] The appellant says that, after he submitted his request in June of 2019, he participated in an October 2019 teleconference (the October 2019 call) initiated by the ministry during which he provided the ministry with significant detail about his request. He contends, however, that the ministry “did not make a reasonable effort with the sufficient details provided at their request” and that it wilfully and in bad faith limited the scope of the request.

[18] The appellant maintains that the ministry did not disclose all responsive records, and that certain records have been withheld or redacted. He has included copies of ministerial correspondence that he says was not disclosed to him in support of his claims that additional records exist.

[19] The appellant also argues in his representations for this appeal that more records exist in relation to another request he made to his former employer, a different institution that is not part of this appeal. He contends that the appeal to the IPC of that institution’s decision was prematurely closed and alleges that the IPC improperly facilitated the closure

¹ Orders P-880 and PO-2661.

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-264 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-3649 and PO-2592.

despite the existence of undisclosed records. I have not summarized the appellant's representations concerning that appeal, as that institution's decision is not before me.

[20] The appellant's representations also discuss various matters concerning his former employment, his communications with federal agencies regarding termination of that employment, termination and benefits payments, arbitrations before the Labour Relations Board (LRB), and allegations of corruption in the labour arbitration system. I have also not summarized those representations here as they are not pertinent to the issues in this inquiry. The appellant's representations do not discuss the information at issue or whether it is responsive to his request.

The ministry's representations

[21] The ministry states that the appellant's request was explicitly limited to records pertaining to himself. It says that any ambiguity related solely to which program areas of the ministry the appellant wanted to be searched.

[22] The ministry says that, following receipt of the appellant's request, its staff attempted to contact him for clarification, ultimately reaching out by mail. In response, the appellant indicated that he did not consent to email communication and specified his preferred method of contact. The ministry says that, in light of these circumstances and at its request, the October 2019 call was arranged to, among other things, clarify the request.

[23] The ministry maintains that there was no misunderstanding regarding the appellant's intent to access information exclusively concerning himself. It says it conducted its search efforts with this understanding and instructed staff across various program areas to adopt a broad approach to ensure that all relevant records within the specified timeframe were located.

[24] According to the ministry's representations, the program advisor with carriage of the file wrote to the appellant after the October 2019 call providing a list of program areas within the ministry and asking that the appellant check off those he wished the ministry to search. In his response, the appellant selected all program areas. The ministry notes that the program advisor also sent a letter to clarify the timeframe for the request, seeking confirmation of an end date. The ministry then set the letter's date as the end date before contacting the program areas, explaining that, without a defined end date, "the search for records responsive to the Appellant's request would never be completed."

[25] The appellant also requested records from the Minister's Office (MO) and Deputy Minister's Office (DMO). The ministry explains that a records retention schedule⁶ requires that a minister's records be transferred to the Archives immediately upon a change in government, which occurred in 2018. It says that the current ministry can only access

⁶ Government of Ontario Common Records Series: Ministers' Public Records, section 5.1, provided with the ministry's representations.

records from a previous administration in the same way as the public, and that, where a current minister seeks access to a former minister's public records, the retention schedule requires them to contact the DMO to determine access. The ministry submits that the program advisor with carriage of the file tried to forward the request or to obtain pre-2018 records from the Archives. It says that the Archives responded that this was not feasible because of the process for accessing records from a previous administration and advised that the appellant should submit a new request for records affected by the retention schedule. Based on advice from the Archives, the program advisor advised the appellant to submit a request directly to the Archives and collaborated with Archives staff to clarify the request.

[26] The ministry submits that it made reasonable efforts to locate responsive records by consulting staff across multiple program areas and providing clarification where necessary. It says custody and control issues only arose concerning pre-2018 records held by the Archives that were addressed in the manner advised by Archives staff. Submitted with the ministry's representations are numerous emails and communications with program areas searched, including communications and marketing, agency relations, legal services, finance, human resources, employment practices, operations, French language services, occupational health and safety, policy, corporate services and branches within corporate services. The ministry also provided copies of communications with the Archives.

[27] The ministry says that, based on the understanding that the appellant's request related to an arbitration matter, it also contacted the Dispute Resolution Services branch, which located responsive records that were disclosed to the appellant. The ministry says that only two program areas were not searched because they focus on the ministry's overall operational plans and manage statistics and data, so that there was no reason to believe these branches would hold arbitration records or records responsive to the appellant's request.

[28] According to the ministry, most of the program areas contacted had possession of their records from January 2014 to December 2019,⁷ and responsive records relating to the appellant were disclosed to him. The ministry also notes that searches of the MO and DMO located responsive records created after the 2018 change in government that were likewise disclosed to the appellant.

[29] Regarding the information deemed non-responsive (and at issue in this appeal), the ministry explains that this information falls outside the scope of the request because it is about unrelated matters involving individuals other than the appellant.

⁷ The extended timeframe based on the request.

Analysis and findings

The information at issue is non-responsive

[30] I find that the appellant's request is clear to the extent that it seeks access to records relating to himself only. I find no basis in the appellant's representations to support his assertion that the ministry limited his request, either during the October 2019 call or otherwise. The Mediator's Report issued at the end of mediation indicates that the issue of the request's scope – and what records are responsive to it – was added after the appellant challenged the ministry's interpretation of the term "to present" in his request, and the designated end date. The appellant's representations do not address this issue. The ministry's representations, however, provide justification for selecting an end date for the search period that I accept as reasonable. The date is later than the request, which was submitted in June 2019, and follows communication between the parties. In these circumstances, I find no basis to conclude that the ministry improperly narrowed or restricted the scope of the request by setting an end date that post-dates the request itself and after communication with the appellant.

[31] On reviewing the records and withheld information at issue, I am satisfied that the withheld information is indeed non-responsive to the request. The four records consist of emails containing summaries and updates on various matters. The ministry disclosed those portions of the emails that discuss the appellant. I find that the portions discussing other individuals and matters unrelated to the appellant do not reasonably relate to his request. Since this information pertains to other individuals and is not about the appellant, I find that it is not responsive to his request and must not be disclosed to the appellant.

The ministry's search for responsive records was reasonable

[32] The appellant maintains that additional records exist that the ministry has not identified or disclosed.

[33] Although a requester will rarely be in a position to indicate which records an institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁸ Here, the appellant refers primarily to records from a different institution relating to the termination of his employment, and arbitration records.⁹ He has not presented a reasonable basis for me to conclude that additional records exist in relation to the current request.

[34] I also find that the ministry acted reasonably in its efforts to locate records transferred to the Archives. Section 25(1) of the *Act* requires the ministry to "make all necessary inquiries to determine whether another institution has custody or control of [a] record." This section requires the ministry, within 15 days of receiving the request, to forward the request to the other institution and give notice to the requester that the

⁸ Order MO-2246.

⁹ Some of these arbitration records appear to relate to an earlier appeal. See Order PO-4357.

request has been forwarded.

[35] I am satisfied that the ministry fulfilled its obligations under section 25(1) in the circumstances. The ministry's evidence includes correspondence showing that the program advisor made inquiries to obtain responsive records from the Archives, attempted to forward the request, and liaised with Archives staff to facilitate processing of the appellant's request for those records that had been transferred to the Archives after the 2018 change in government. According to correspondence included with the ministry's representations, the program advisor was told that, to move forward with a request for access to documents affected by the records retention schedule and the post-2018 change in government, the appellant should be directed to contact the Archives directly. Included with the ministry's representations is an email advising the program advisor that the Archives would only conduct a search when it received a request from the appellant, and emails confirming the ministry's representations that its FOIP office liaised with the Archives, including to clarify the request.

[36] The appellant's representations also do not persuade me that additional responsive records exist within the ministry's custody or control, or that further searches would yield additional records. The appellant alleges that the ministry acted in bad faith in processing the request in part because it did not, in its representations in this inquiry, reveal the identity of a second program advisor who was involved in the file. I address this allegation under Issue C, below. However, to the extent that it relates to the reasonableness of the ministry's searches for responsive records, I find that the ministry acted appropriately by assigning carriage of the file to one program advisor to oversee and coordinate the searches. The ministry's representations demonstrate that the advisor with carriage of the request was an experienced employee, knowledgeable in the records related to the subject matter of the request, and that she made comprehensive and sustained efforts to locate responsive records, including coordinating with numerous program areas within the ministry and externally. Based on my review of the parties' representations, the request and the records, I find that the ministry's search was thorough, even extending to program areas that may have been unlikely to have responsive records but that were included at the appellant's request. In these circumstances, I uphold the ministry's search for responsive records as reasonable.

Issue C: Has the appellant established a conflict of interest, or a reasonable apprehension of conflict of interest or bias?

[37] The appellant claimed during mediation that the ministry, as a decision-maker, acted in a conflict of interest in the processing of his request, leading to the addition of this issue for adjudication.

[38] Based on information he provided to the IPC during mediation and described in the Mediator's Report,¹⁰ the appellant's position appears to be that the alleged conflict

¹⁰ The Mediator's Report sets out the issues for adjudication.

includes a failure by the ministry to meet its duty to assist, obstruction of the access request process, and bias related to the appellant's identity. As noted above, because of this latter allegation, the issue of bias was also added to the Notice of the Inquiry.

[39] As the party alleging conflict of interest or bias, the appellant bears the onus to demonstrate, on a balance of probabilities, that a conflict of interest or bias exists or that there is a reasonable apprehension of conflict or bias on the part of the ministry.

Representations

The appellant's representations

[40] In his representations submitted during this inquiry, the appellant asserts that the ministry intentionally withheld the "true role and/or title and/or function" of a program advisor who participated in the October 2019 call. The appellant's allegation arises in response to the ministry's representations in this appeal (rather than the appellant's claims articulated in mediation that were the basis for adding the appellant's claim of conflict of interest to the appeal). He claims that this was done with prejudice to conceal her actual role, and that her participation was then "scrubbed from the record" because she was not named in the ministry's representations. The appellant claims that the ministry misrepresented her role as merely a program advisor, when his own online search revealed her to be a *FIPPA* specialist.¹¹ The appellant also argues that the ministry disregarded information he provided during the October 2019 call, which he claims demonstrates unfair conduct and systemic prejudice.

The ministry's representations

[41] The ministry denies any conflict of interest, asserting that it took multiple steps to assist the appellant, including clarifying his request, waiving processing fees, and proceeding with the request despite delays and limitations imposed by the COVID-19 pandemic, without regard to the appellant's identity.

[42] In its reply representations, the ministry clarified that the advisor identified by the appellant was present during the October 2019 call, though not mentioned in its initial representations because her participation was peripheral. The ministry explained that her role was merely to support the program advisor who had carriage of the file, and who is named and identified in the ministry's representations as having conducted the call.

Analysis and findings

[43] The Notice of Inquiry invited the appellant to specify and substantiate his allegations, and contained guidance on relevant conflict of interest and bias standards. Questions concerning bias were included due to the appellant's claim at mediation that his identity influenced the ministry's handling of his request. The appellant's

¹¹ According to Info-GO, an online government employee directory.

representations, however, consist primarily of unsubstantiated assertions of bad faith. He has neither clarified the nature of the alleged conflict nor provided specific details or supporting evidence. Moreover, while the appellant made these allegations during mediation, his representations address issues that emerged from the ministry's representations in this inquiry, namely, the failure of the ministry to name the second program advisor in its representations.

[44] Given the appellant's failure to substantiate his allegations, I find that he has not met his onus to prove the existence of a conflict of interest, bias, or a reasonable apprehension of either relating to the ministry's processing of his request. I also find no evidence of a conflict of interest or bad faith arising from the ministry's decision not to name (in its initial representations) the second program advisor as a participant in the October 2019 call with the program advisor responsible for the file and who oversaw the ministry's searches. Both parties' descriptions of the call and its content align, with no discrepancy in the call's purpose, conduct or outcome. I find no basis to conclude that the ministry acted deliberately or maliciously to conceal the involvement or assistance of a staff member who supported the advisor handling the file and who, by the appellant's own account, identified herself during the call. I find that this does not constitute evidence of bad faith or conflict of interest.

[45] As noted above, the appellant's representations also devote substantial time to allegations of bad faith and impropriety rooted in matters other than this appeal, including issues relating to and following the termination of his employment, responses from federal agencies, and alleged misconduct involving the LRB and an arbitrator. The appellant's representations do not support a finding of impropriety in the ministry's processing of this request, and the appellant has not provided any particulars for me to find a conflict of interest, bias, or a reasonable apprehension of either. Accordingly, I find no basis to support claims of conflict or bias in the ministry's processing of this request.

[46] In summary, the appellant has submitted unsubstantiated assertions that I find fail to satisfy his onus. Consequently, I dismiss the appellant's claims of conflict of interest and bias, as well as the remainder of this appeal.

ORDER:

This appeal is dismissed.

Original Signed by: _____

Jessica Kowalski
Adjudicator

November 7, 2024