Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4592

Appeal PA23-00235

Cabinet Office

January 21, 2025

Summary: Cabinet Office received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the GO Transit train service and the Milton line. Cabinet Office forwarded the request to Metrolinx under section 25(1) of the *Act*. Cabinet Office did so because it determined that, based on the wording of the request, it did not have custody or control of responsive records; it also reached out to Metrolinx and confirmed that it had custody or control of responsive records.

The appellant appealed Cabinet Office's decision and argued section 25(1) implicitly requires an institution to conduct a search before forwarding a request. In this order, the adjudicator finds that section 25(1) does not require an institution to conduct a search and that it was reasonable for Cabinet Office not to conduct a search before forwarding the request, in the circumstances. She upholds Cabinet Office's decision to forward the search under section 25(1) and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 10(1), 25(1), 25(2), 25(3), 25(4), and 57.

Case Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

OVERVIEW:

[1] This order is about whether an institution that received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) properly forwarded the request to another institution, under section 25(1) of the *Act*.

[2] Cabinet Office received a request under the *Act* for:

> Any records relating to the subject of:
>
> a) An increase of GO Transit train service on the route known as the Milton line;
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> b) Provincial funding in connection with an increase of GO Transit train service on the route known as the Milton line;
>
> c) A change in service to the GO Transit bus line known as Route 21 or Route 21D;
>
> d) Any matters connected to subjects (a)-(c).
>
> Timeframe: 2021/08/01 – 2023/04/09

[3] Cabinet Office issued a decision advising that the request had been forwarded to Metrolinx under section 25(1) (forwarded request) of the *Act*, noting that Metrolinx has custody and control of the records requested.

[4] The requester (now the appellant) appealed Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution. Cabinet Office shared a response to the appellant's concerns through the mediator.

[6] As mediation could not resolve the dispute, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry. In addition to reasonable search, the parties asked the mediator to include as a separate issue the preliminary question of whether an institution is required to conduct a search before forwarding a request.

[7] I conducted a written inquiry under the *Act* on the issues in the appeal and received written representations from the parties. I shared Cabinet Office's representations with the appellant. After reviewing the appellant's representations, I closed the inquiry.

[8] For the following reasons, I dismiss the appeal. I find that Cabinet Office was not required to conduct a search before forwarding the request, and that the request should have been forwarded to Metrolinx (as it was). Given these findings, it is not necessary to consider whether Cabinet Office conducted a reasonable search.

DISCUSSION:

[9] The only issue in this appeal is whether Cabinet Office should have forwarded the

request to Metrolinx, under section 25(1) of the *Act*.[1] In considering this, I discuss the parties' question about whether a search is required before claiming section 25(1).

[10] Section 25(1) of the *Act* says:

> (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the [person responsible for making the decision about the access request] shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.

[11] In other words, section 25(1) of the *Act* places obligations on an institution when it receives a request for a record that is not within its custody or control:

- The head must make all the necessary inquiries to determine whether another institution has custody or control of the record.
- If the head determines that another institution has custody or control of the record, the head must forward the request to that other institution within 15 days of receiving the request.
- If the request will be forwarded, the head must tell the requester that in writing, also within 15 days of receiving the request.

Cabinet Office's representations

[12] Cabinet Office submits that an institution is not required to conduct a search prior to forwarding a request.

[13] Cabinet Office says that the institution that initially receives a request must:

- make all necessary inquiries to determine if another institution has custody or control of potentially responsive records, and

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[1] The subject line of Cabinet Office's cover email attaching the decision letter used the term "transfer," though the body of the decision letter used the word "forward." The Notice of Inquiry described Issue B as "Should the appellant's request have been transferred to another institution under section 25 of the Act" and set all parts of section 25 of the *Act*, regarding both forwarding a request and transferring a request. This appeal only involves the forwarding of a request, under section 25(1) of the *Act*.

- forward it to another institution after reasonable efforts are made to determine that it has no responsive records in its custody or control.

[14] During IPC mediation, Cabinet Office shared the following with the appellant in response to his concerns shared by the mediator:

> Our office has checked with Cabinet Office Policy & Delivery Division and have received confirmation that Cabinet Office would not have any responsive records for this FOI [freedom of information] request. Cabinet office assists with managing policy coordination, implementing and delivering government priorities and provides administrative and protocol support. We provide advice on government's broader policy priorities and not the decisions that are under line ministry/agency purview.
>
> Based on the subject matter of the [freedom of information] FOI request, it was determined that Metrolinx would be the appropriate institution with custody and control of any potentially responsive records. Our office confirmed this with Metrolinx prior to forwarding the request to their FOI office.

[15] Cabinet Office submits that a search is not the only means of providing sufficient evidence that it does not have custody or control of a record. It submits that a reasonable effort can be demonstrated without a search having been performed. What is considered a reasonable effort should be determined in consideration of all the relevant circumstances.

[16] Cabinet Office explains that:

- Based on the subject matter of the request, Cabinet Office says that it was "patently obvious" to Cabinet Office's FOI Office that the requested records were outside the scope of Cabinet Office's operations.

- Cabinet Office also made inquiries of Metrolinx. In response, Metrolinx advised Cabinet Office that it would have custody and control of the records that were requested (as Cabinet Office stated in its decision letter).

- Despite these facts (the wording of the request and the steps involving Metrolinx), during IPC mediation, Cabinet Office's FOI Office also consulted the program area in Cabinet Office most likely to have responsive records – the Cabinet Office Policy & Delivery Division. This division confirmed to Cabinet Office's FOI Office that Cabinet Office would not have any responsive records based on the division's knowledge of the work they had been involved with. Cabinet Office explains that a search was not necessary to arrive at this confirmation because the request was related to the operations of the GO train service, which is a subject that would be outside the scope of Cabinet Office's operations.

[17] As a result, Cabinet Office submits that it made all necessary inquiries by identifying the program area, undertaking consultations, and reaching out to Metrolinx. Cabinet Office says that there was nothing to suggest that the program area in Cabinet Office or Metrolinx were not knowledgeable in the subject matter, or that there was any other reason not to rely on their expertise about their respective record holdings to warrant additional steps be taken prior to the request being forwarded. Therefore, Cabinet Office submits that the request was appropriately forwarded to Metrolinx under section 25(1) of the *Act*.

[18] Cabinet Office submits that after receiving confirmation from Metrolinx that it had custody or control of responsive records, the mandatory requirement to forward a request at section 25(1) applied to Cabinet Office.

The appellant's representations

[19] The appellant asserts that there is an "implicit" duty to conduct a search in section 25(1) of the *Act* and that interpreting it otherwise would undermine the general right of access in section 10(1) of the *Act*, removing any substantive meaning from it. The appellant submits that, "[a]s a logical construct, it would be impossible for the head of an institution to assert that the institution has no records when no search has been conducted." He also submits that "the duty" of a head to conduct a reasonable search has been repeatedly affirmed by the IPC, citing passages from reasonable search orders.[2]

[20] He also argues that in keeping with the Supreme Court of Canada's decision that a statute must be interpreted in harmony with the rest of the *Act* and that words should read in grammatical and ordinary sense,[3] the "only way to reconcile the policy objectives of the [*Act*] and the obligations that flow from them," is to interpret section 25(1) as meaning that a head, upon receiving a request, must conduct a reasonable search before resorting to section 25(1).

[21] The appellant also expresses his views about why he believes there is a "high likelihood" that Cabinet Office has custody of the records he requested. He notes that the public website of the Government of Ontario says that the Cabinet Office provides the Premier and their Cabinet with advice and analysis to help the government achieve its priorities. He states that in April 2022, the federal Minister of Transport "expressed surprise that Ontario had not committed any money in its budget to fund an increase of GO Train service on the Milton line," and included news articles about that. He asserts that the government has not publicly given any reason for refusing to provide any funding allocation in connection with an increase of GO Transit train service on the Milton line. He also asserts that there is a "clear connection between an increase in GO train service on the Milton line, the mandate of the Cabinet Office, and the province's decision to date to not provide provincial funding." He submits that Cabinet-level discussions and

[2] The appellant cites Interim Order PO-1954-I and Order PO-3423.
[3] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

deliberations are integral to forming the province's spending priorities and budget. He says that there "is a high likelihood that the Cabinet Office has custody of documents responsive to the request."

[22] The appellant says that the issue in this appeal is whether the head had jurisdiction to "transfer"[4] the request to Metrolinx and if so, whether she properly exercised her authority to do so. He submits that the head did not have the jurisdiction to "summarily transfer" the request, or, if she did, she did not make her decision to do so in good faith. He cites the Supreme Court of Canada at length on the importance of the right of access to the functioning of a democracy, and the meaning of exercising authority in good faith or bad faith.[5]

[23] The appellant submits that Cabinet Office's decision is invalid. He states that the decision did not contain reasons or "any parsing of the request or demonstrate that the head brought her critical faculties to bear on the records sought." He states that Cabinet Office's decision did not describe what steps (if any) it took to locate responsive records with Cabinet Office and argues that conducting a search is not a discretionary action. After receiving Cabinet Office's decision, he explains that he sent a "protest letter." Later, a representative of Cabinet Office's FOI office contacted him by telephone and tried to explain that the subject matter of the request was records in the custody of Metrolinx and not Cabinet Office. He asserts that this individual also "incorrectly claimed that the request related to fare prices on Metrolinx," though the request does not refer to fare prices. He states that the individual advised him that he could appeal Cabinet Office's decision if it was unsatisfactory to him.

[24] The appellant submits that the circumstances described above lead to the conclusion that "the head's determination that the institution had no responsive records was made carelessly or recklessly." He cites the Supreme Court of Canada saying that "recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed,"[6] and that this is an "actual abuse of power."[7]

[25] Considering the importance of the right of access and the principles regarding the exercising of power in good faith and not bad faith, the appellant argues that the head was "wrong in law to transfer the request and lacked authority to do so," that she "failed to act in good faith," and that she "failed to comply with the *Act* in transferring the request." He submits that the "hasty transfer" was "an inappropriate abuse of power."

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[4] See Note 1.
[5] He also cites IPC orders examining the issue of reasonable search, but reasonable search is no longer an issue in this appeal, given the discussion about whether a search was required before claiming section 25(1).
[6] *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 SCR 17, at para. 39
[7] *Ibid*.

Analysis/findings

[26] For the following reasons, I am persuaded that, in the circumstances, Cabinet Office was not required to conduct a search before forwarding the request under section 25(1) of the *Act*, and that it was required to forward the request to Metrolinx.

[27] The appellant argues that not reading section 25(1) as implicitly requiring a search would undermine the right of access under section 10(1) of the *Act*. However, I find this view to be unsupported.

[28] Section 25(1) is about requests for records that an institution does not have custody or control over ("Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, . . .").

[29] In contrast, section 10(1) is about the right of access to records that an institution *has* in its custody or control (". . . 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 . . .").

[30] As noted by the appellant, the Supreme Court of Canada has said that there is "only one principle or approach," to interpreting a statute (an Act), which is:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].[8]

[31] Applying this approach to the question of whether section 25(1) *requires* an institution to conduct a search, the importance of the language chosen by the Legislature is critical: section 25(1) does not contain a requirement to conduct a search to determine whether a requested record is in the custody or control of an institution. The Legislature could have chosen to include such an obligation in section 25(1), but it did not do so. Therefore, any interpretation of section 25(1) as including a duty to conduct a search before ever forwarding a request (that is, every time) is unsupported by the language used in the law itself.

[32] In addition, an institution knows its record holdings, but a requester will rarely be in a similar position;[9] section 25(1) of the *Act* is a way to possibly overcome this imbalance. By including section 25(1) of the *Act* in the law, the Legislature has helped requesters overcome this imbalance by requiring the institution that received the request to forward it to the institution with custody or control over the record (and to do so relatively quickly, within 15 days of receiving the request). The deemed date of the request remains the original date of the request, as further protection for the requester's

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[8] *Ibid*.

[9] The IPC recognizes this reality, and in the context of reasonable search appeals, says this: "Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist (Order MO-2246).

rights, under section 25(4) of the *Act*.[10]

[33] Given the institution's greater knowledge of its own record holdings (and understanding of its mandate), I reject the argument that it would be "impossible" to determine custody or control without conducting a search. Rather, I agree with Cabinet Office that a search may not *always* be required to determine whether a record is in the custody or control of an institution. This does not mean that a search will never be required. However, the wording of the request may make it clear to an institution that it does not have custody or control of the requested record. To conduct a search in such circumstances would unnecessarily use limited resources that could be used to process other requests under the *Act*.

[34] For these reasons, I do not accept the argument that section 25(1) of the *Act* must be read with an implied duty to conduct a search before a determination of custody or control can be made.

[35] Turning to the question of whether the request should have been forwarded to Metrolinx, I find that it should have (as it was).

[36] The *Act* distinguishes between two actions:

- forwarding a request – which is mandatory, under section 25(1) of the *Act*, if certain conditions are met, and
- transferring a request – which is discretionary, under sections 25(2) and 25(3) of the *Act*, meaning an institution may choose to transfer a request or not transfer a request, if certain conditions are met.

[37] Cabinet Office's decision was made under section 25(1) of the *Act*, an action that must be taken (not one that is discretionary, where it would have had a choice in keeping the request to process it itself). Since section 25(1) is mandatory, questions about jurisdiction and exercising authority in good faith or bad faith are not relevant in this appeal.

[38] I also disagree that Cabinet Office's decision lacked reasons: Cabinet Office cited section 25(1) and indicated that Metrolinx had custody and control over responsive records.

[39] The appellant speculates that there is a "high likelihood" that Cabinet Office has responsive records, based on his views about details he believes would have been discussed by Cabinet Office. However, this speculation is not a basis for finding that the mandatory requirement to forward the request did not apply. I am not persuaded to

[10] Section 25(4) of the *Act* says, in part: "Where a request is forwarded . . . under subsection (1) . . ., the request shall be deemed to have been made to the institution to which it is forwarded . . . on the day the institution to which the request was originally made received it."

accept this speculation over Cabinet Office's explanation of how it responded to the request and its greater understanding of its own record holdings.

[40] I find that Cabinet Office sufficiently explained why the mandatory requirement to forward the request applies in the circumstances. I accept Cabinet Office's explanation that the wording of the request made it clear that Cabinet Office would not have any responsive records because it does not deal with the subject matter of the request. I find that it was reasonable for Cabinet Office to identify its program area that would most likely have responsive records, if any, to ask them if they did – and to decide that there would be no reason to conduct a search based on the answer they received from that program area. In addition, given the wording of the request, Cabinet Office determined that Metrolinx was the appropriate institution that could have responsive records, and it took steps to communicate with it about the request before forwarding it to Metrolinx. In the circumstances, I find that Cabinet Office fulfilled the requirements of section 25(1) of the *Act*.

[41] As I have already discussed, Cabinet Office was not required to conduct a search before claiming section 25(1) in these circumstances. Therefore, I will neither examine the question of reasonable search nor order Cabinet Office to conduct a search.

ORDER:

I uphold Cabinet Office's decision and dismiss the appeal.

Original Signed by: January 21, 2025

Marian Sami
Adjudicator