

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 167-1997
June 6, 1997**

INQUIRY RE: The adequacy of the Ministry of Education, Skills and Training's search for records requested by the applicant and its compliance with the duty to assist

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 30, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a public body's decision that no further records could be located that were responsive to an applicant's request. The applicant believes that the Ministry of Education, Skills and Training (the Ministry) did not comply with its duty to assist him under section 6 of the Act.

2. Documentation of the inquiry process

On November 27, 1996 the applicant submitted a request to the Ministry for copies of notes from telephone conversations between five Ministry personnel and the applicant. The telephone conversations took place between August 1, 1995 and November 27, 1996. On December 18, 1996 the Ministry provided access to the notes made by two employees and advised the applicant that the other personnel reported that they made no notes of the telephone conversations in question. The applicant believes additional notes exist, (including notes from a phone conversation of April 23, 1996 with one employee), specifically handwritten notes used to create a typed record that he received.

On January 14, 1997 the applicant requested a review of the Ministry's response. The request for review was opened on January 30, 1997 as an adequacy of search issue.

3. Issue under review at the inquiry and the burden of proof

The issue under review in this inquiry is whether the Ministry conducted an adequate search for the records that the applicant requested. The relevant section of the Act is as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Section 57 of the Act, which establishes the burden of proof on the parties in this inquiry, is silent with respect to the issue of adequate search. Since the public body is in a better position to address the adequacy of a search, I have determined in a number of previous cases that the burden of proof should be placed on the public body.

4. The records in dispute

The records in dispute relate to alleged records of telephone conversations between the applicant and five Ministry employees during the period from August 1, 1995 to November 27, 1996.

5. The applicant's case

I have discussed below the relevant specifics of the applicant's submission.

6. The Ministry of Education, Skills and Training's case

The Ministry's position is that it has made "every reasonable effort to identify the records responsive to the requests. It is submitted that the evidence presented by the Public Body in this inquiry establishes that it has discharged its obligation to conduct a reasonable search." (Submission of the Ministry, paragraph 4.04) I have discussed below the Ministry's description and affidavit evidence in support of its actual search efforts.

7. Discussion

The applicant continues to pursue issues involving the Vancouver School Board and the Carnegie Learning Centre that have been outlined in a number of other Orders. His reflections on such controversial matters are not relevant to this inquiry. (Reply Submission of the Applicant, pages 3-5)

The adequacy of the Ministry's search for records

I have reviewed the Ministry's detailed description of its efforts to locate responsive records, and I find them to be adequate under the Act. (Submission of the Ministry, paragraphs 4.05-4.09, and Affidavit of Allan Carlson)

The applicant has questioned the Ministry's policy on note taking and the retention of such records, given his impression that those he spoke with on various occasions were taking notes. (Reply Submission of the Applicant, paragraphs 1, 3) If employees of the Ministry in fact created "records" as defined under the Act, they would be under an obligation to retain them for a period of time if the records were used to make a decision under the Act. But, as I note from my own practice on such matters, one often starts to take notes on a matter that turns out to be of no particular substance, leading to a decision that transitory rather than permanent records have been created. This is the case with many transactions conducted by e-mail, such as organizing the date and time for a meeting. There is no requirement under the Act for public servants to make notes of telephone conversations, even if it might be prudent to do so on a variety of occasions.

Procedural objections

The applicant raised some objections about being required to make initial submissions in this inquiry when the burden of proof was not on him. (See Submission of the Applicant, paragraph 6.01) In several exchanges of communications, the Registrar of Inquiries for my Office explained our procedures to him and how they have changed over time. I have approved these policies and procedures. They were created, and are amended as necessary, to ensure a high level of procedural fairness for all applicants.

8. Order

I find that the Ministry of Education, Skills and Training has met the burden of proof to show that it conducted a reasonable and adequate search as required by section 6(1) of the Act and has made every reasonable effort to assist the applicant. On that basis it has discharged its duty under section 6(1) of the Act. I therefore find under section 58(3)(a) of the Act that the Ministry is not obligated to respond further to the particular information requests which are the subject of this Order.

David H. Flaherty
Commissioner

June 6, 1997