Order 02-55

MINISTRY OF ATTORNEY GENERAL

Mark Grady, Adjudicator
November 7, 2002

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Summary: The applicant made a request to the Ministry for a copy of records pertaining to two investigations related to him. The Ministry's search for records was adequate and it met its s. 6(1) duty to conduct an adequate search.

Key Words: duty to assist – adequacy of search – respond openly, accurately and completely.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(1).

Authorities Considered: B.C.: Order 02-03, [2002] B.C.I.P.C.D. No. 3.

1.0 INTRODUCTION

[1] This matter relates to concerns raised by the applicant in the late 1990's about the conduct of court employees during the course of separate Small Claims Court and Supreme Court hearings. The applicant wrote to a number of individuals at the Ministry of Attorney General ("Ministry") and asked that they undertake investigations into these matters.

[2] Not satisfied with the response to his concerns, the applicant then submitted a request, on June 6, 2001, to the Ministry for records regarding these investigations. The applicant's request for records was made under the *Freedom of Information and Protection of Privacy Act* ("Act"). The Ministry responded, on August 9, 2001, by providing copies of responsive records in which some information was withheld under s. 13, 14 or 21 of the Act. The Ministry also provided some information in response to other issues raised in the applicant's request.

[3] On August 15, 2001 the applicant requested a review by this Office of the Ministry's response. In his letter, the applicant stated that, although the Ministry sent him mostly copies of correspondence he already had, it had not made all of the records available in response to his original request. During mediation, the Ministry disclosed more information in a few records that had already been sent to the applicant and, during the inquiry, it disclosed one more record.

[4] According to the Portfolio Officer's Fact Report, the Ministry's decision to sever information in the responsive records was also an issue in the request for review, but the issues surrounding the severing were resolved during mediation.

[5] Because the s. 6(1) matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[6] The issue in this inquiry is whether the Ministry fulfilled its duty, under s. 6(1) of the Act, to make every reasonable effort to assist the applicant in its search for records requested by the applicant.

[7] Previous orders have established that the burden of proof in such a matter rests with the public body.

3.0 DISCUSSION

[8] **3.1 Procedural Objections** – In his initial submission, the applicant raised three issues that he believed should also be considered in this inquiry. First, the applicant challenged the inclusion of an affidavit provided by the Ministry after the deadline for making submissions in the inquiry had passed. This affidavit primarily concerns matters that arose prior to the applicant making his request under the Act. It is, in any case, not necessary for me to consider this disputed affidavit in making my decision in this matter and I have not done so. Therefore, there is no need to address this objection further.

[9] Second, the applicant challenged the statement in the Portfolio Officer's Fact Report that the issue of severing of information in the responsive records was resolved during mediation. The applicant specifically mentions the Ministry's application of s. 21 of the Act as the reason for withholding certain information. I note that during the inquiry the applicant and the Ministry came to an understanding about the application of s. 21. The applicant also made a passing reference to "lawyer's privilege". The Ministry challenges the applicant's assertion that its decision to sever information is an issue in this inquiry. The Notice of Inquiry and the Fact Report sent to the parties confirm that the adequacy of the public body's search for records is the only issue to be addressed in this inquiry. Again, the Portfolio Officer's Fact Report confirms that the issues surrounding severing were resolved during mediation. I conclude that the adequacy of the Ministry's search for records is the only issue to be dealt with in this inquiry.

[10] Finally, the applicant referred to s. 25 of the Act as a matter that must be considered in this inquiry. This provision, commonly known as the public interest override, requires the head of a public body, without delay, to disclose certain information. The head must disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or the disclosure of which is, for any other reason, clearly in the public interest. Whether or not a request for access is made under the Act, this provision requires the immediate disclosure of information if one or more of the circumstances described above exist.

[11] The applicant writes that exposure of fraudulent behaviour within the justice system is a matter of public interest. In its reply submission, the Ministry says that s. 25 of the Act is only relevant to an inquiry where the issue under review is a challenge to the withholding of information by a public body. I agree with the Ministry's position. This inquiry is concerned only with the issue of the adequacy of the Ministry's search for records responsive to the applicant's request, not with the Ministry's decision to withhold certain information in the records disclosed to the applicant. Therefore, s. 25 of the Act is not relevant and I have not considered it.

[12] **3.2 The Ministry's Statutory Duty** – Section 6(1) of the Act requires the Ministry to "make every reasonable effort" to assist the applicant. This includes responding without delay "openly, accurately, and completely." It also includes a duty to conduct an adequate search for records responsive to the applicant's request.

[13] The standards for what constitutes an adequate search had been set out in previous orders. Commissioner Loukidelis outlined the standard in, for example, Order 02-03, [2002] B.C.I.P.C.D. No. 3, at para. 14:

> [14] **3.3 Adequacy of the Search for Records** – Section 6(1) of the Act requires the College to "make every reasonable effort" to assist an applicant by responding "openly, accurately and completely" to an access request. Although the Act does not impose a standard of perfection, it is well established that, in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that were not searched, with reasons for not doing so. The evidence should also indicate how the searches were done and how much time public body staff spent searching for records.

[14] I will apply these principles in assessing the adequacy of the Ministry's search for records responsive to the applicant's request.

Did the Ministry conduct an adequate search for records?

[15] The Ministry's investigation regarding the Small Claims Court hearing arose from the applicant's complaint that Court Services staff failed to include a letter that he had sent by fax in materials provided to the judge who heard the matter. According to the

applicant, the Ministry told him there are no records of the Court Services' investigation of his complaint. The applicant wrote, "Do the circumstances surrounding the unexplained temporary disappearance of the cancellation facsimile, not even rate the report. Are my rights so unimportant?" (para. 23, initial submission).

[16] The applicant's complaint about a Supreme Court hearing concerns the Ministry's failure, according to the applicant, to properly explain how an audiotape of the proceedings was erased in error or possibly not even created in the first place. Again, the applicant believes that it is unreasonable for the Ministry to say that there are no other records of its investigation of the applicant's concerns in this respect.

[17] The Ministry provided two affidavits with its initial submission. Lori Bird, Information and Privacy Analyst in the Ministry's Information and Records Section, deposed that, in June 2001, a request for production of records was sent to Beverly Clark, the information and privacy contact for the Court Services Branch in the Ministry. Ms. Bird deposed that, during mediation by this Office, she had asked Ms. Clark to conduct a further search for records after an e-mail record responsive to the request had been located.

[18] Beverly Clark deposed that she was responsible for co-ordinating the search for responsive records in the Court Services Branch. She asked a number of branch managers and staff to conduct a search for records responsive to the applicant's request. Some of these Ministry employees had been involved in the investigations of the applicant's complaints about the two court hearings. Ms. Clark confirmed that searches were made of the Ministry's correspondence-tracking database, its general correspondence files and in the Administration and Contracts program in the Court Services Branch headquarters office in Victoria.

[19] She also asked staff to conduct searches for responsive records at the Victoria court registry, where the Supreme Court hearing had been conducted, and at the Robson Square court registry, where the Small Claims matter was heard. Ms. Clark confirmed that, at Ms. Bird's request, she asked staff in the Victoria law courts to conduct a further search for records after the additional e-mail record had been found. She deposed that the only responsive records were found at both Court Services Branch headquarters and the Victoria law courts and that she sent all of these records to the Information and Records Section of the Ministry. Finally, Ms. Clark deposed that she does not believe there are any additional areas within Court Services Branch that could potentially have records relating to the request.

[20] In her affidavit, Ms. Clark also provides information or explanations as to why there are no further records about both investigations. Simply put, Court Services Branch managers conducted the investigations informally, through discussions with appropriate staff, and then wrote to the applicant about their conclusions. In effect, the letters to the applicant are the "investigation reports".

[21] The Ministry has provided me with evidence that it has identified all possible locations where responsive records could be held, has searched for records in those

locations (including by conducting a second search during mediation) and found and disclosed all relevant records (with portions of some of those records withheld under various exceptions to disclosure in the Act). The evidence also explains to my satisfaction how certain records may not have been created in the first place or why responsive records may no longer exist.

[22] I am satisfied, applying the search standards set out in earlier decisions and in light of the evidence provided by the Ministry, that the Minsitry has discharged its s. 6(1) duty to conduct an adequate search for records responsive to the applicant's request.

4.0 CONCLUSION

[23] Because I have found that the Ministry's search for records was adequate, it has fulfilled its duty to assist under s. 6(1) and, under s. 58(3)(a) of the Act, I confirm that the Ministry has performed its s. 6(1) duty.

November 7, 2002

ORIGINAL SIGNED BY

Mark Grady
Adjudicator