

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3426

Appeal PA14-412

Ministry of Community and Social Services

November 27, 2014

Summary: The appellant submitted a request on behalf of her sister to the ministry pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of records relating to her sister compiled during the time period when she was a resident at the Southwestern Regional Centre. The ministry located records responsive to the request and provided access to them, with portions of the records withheld pursuant to the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. The appellant appealed the ministry's decision, claiming that the ministry had not conducted a reasonable search. The adjudicator upholds the ministry's search for responsive records as reasonable.

OVERVIEW

[1] The appellant's sister was a resident at Southwestern Regional Centre (the centre), a residential facility for individuals with intellectual disabilities, from approximately 1961 to 1972. When the centre closed in 2008, its records were sent to the Government of Ontario's off-site storage facilities. The appellant's sister died in 2013.

[2] The appellant submitted the following request to the ministry, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I am requesting a copy of any file records for [the appellant's sister], who resided at the [centre].... The time period below is about this time period. We don't have exact discharge dates or exact intake date...

Time period of the records

From 1961/08/01 To 1972 or Discharge date

[3] The ministry issued a decision indicating that it had not yet located records responsive to the request, but that it would continue to search for such records. The ministry subsequently issued a decision advising that it had located records and was providing partial access to them, with some information being withheld on the basis of the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. Twenty-seven pages of records were provided to the appellant.

[4] The appellant appealed the ministry's decision to this office on the basis that she believes that additional records exist, thereby raising the issue of the reasonableness of the ministry's search for records.

[5] During mediation, the mediator was advised that in 2011, after the centre closed, a class action lawsuit was brought against the province for deficiencies in the care provided to patients at the centre. The class action lawsuit was settled in December 2013. The settlement applies to individuals who resided at the centre between 1963 and 2008 who were alive as of December 29, 2008. Individuals may submit claims for payment from the settlement fund until November 30, 2014. The appellant advised that she is seeking the records in order to support a claim for payment from the settlement fund.

[6] The appellant advised the mediator that she believes that additional records exist and that the 27 pages of records released to her do not constitute her sister's complete residential file. She notes that that her sister was a resident at the centre for more than ten years.

[7] The ministry advised the mediator that it has conducted a full and thorough search and disclosed all records within its custody. The ministry also advised that the retention and disposal of government documents is governed by records schedules, which are developed by ministries and approved by the Archivist of Ontario in accordance with the *Archives and Recordkeeping Act, 2006*. The ministry noted that a records schedule specifies how long specific records should be kept, where they should be retained and by whom, and whether a record should ultimately be destroyed or preserved in the Archives of Ontario.

[8] The ministry referred to Records Schedule No. 270 and stated that this schedule stipulates that a Resident's/Client's Medical, Individual Assessment and Program files are to remain in the ministry's custody for 20 years, at which point select records are

transferred to the Archives of Ontario and the remainder are disposed of. The ministry further stated that if any documents are missing from the records, they were shredded by the centre prior to the centre's files being transferred to the ministry.

[9] As mediation efforts did not resolve this appeal, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the ministry and shared them with the appellant in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*. The appellant was given the opportunity to make representations, but did not do so.

[10] In this order, I uphold the ministry's search for records as reasonable.

ISSUE

[11] The sole issue in this appeal is whether the ministry has conducted a reasonable search for records.

DISCUSSION

[12] In the Notice of Inquiry, I asked the ministry to provide a written summary of all steps taken in response to the appellant's request for records. I also asked the ministry to provide a copy of "Records Schedule 270", the retention schedule to which it had referred during mediation, and to explain whether and how Schedule 270 (or any other applicable retention schedule) was applied to records relating to the appellant.

[13] I also asked the ministry to explain whether it has any knowledge of the Archives of Ontario having any client records from the centre, and in particular any records about the appellant. The ministry was asked to explain any arrangement that may be in place for records held at the Archives of Ontario to be included within the scope of requests for information made to the ministry regarding the centre's former residents, and whether the ministry asked the Archives of Ontario to search for records relating to the appellant's request.

[14] The ministry was also asked to address the appellant's concern that only twenty-seven pages of records were found despite the fact that her sister lived at the centre for over ten years. The ministry was asked to clarify whether and how Records Schedule 270 or any other applicable retentions schedule would provide for the disposal of some records in a resident's file and not others.

Ministry's representations

[15] The ministry has provided detailed representations on the extent of its search for records. In this case, quoting the ministry's submissions verbatim best captures the nature and extent of its search. The ministry submits:

An experienced employee knowledgeable in the subject matter

The Southwestern Regional Centre closed in 2008. In order to respond to FIPPA requests related to former residents of the Huronia, Rideau and Southwestern Regional Centres (the "facilities"), the [Ministry of Community and Social Services] established a dedicated team of FOI Analysts whose sole responsibility is to process FOI requests and review responsive records for possible redactions under the Act. This team worked collaboratively with Records Clerks at the Record Information and Security Management Unit ("RISM"), who are responsible for identifying responsive records and working with the Ministry of Consumer and Government Services' off-site storage facilities and the Archives of Ontario to retrieve those records.

Rather than 'an experienced employee knowledgeable in the subject matter' the Ministry employed a dedicated interdepartmental team of individuals with specific knowledge in both the processing of FIPPA requests (the staff at the Special Cases Unit) and file storage and retrieval (RISM). RISM's particular mandate is to maintain transfer documentation for all records that are currently maintained in the Government of Ontario's off-site storage facility. The Ministry submits that this is a team of staff with the particular expertise necessary to respond to the FIPPA request under appeal, being a team entirely dedicated to the task of processing and responding to FIPPA requests related to former residents of the facilities.

Reasonable efforts to locate records reasonably related to the request

In navigating the repositories of records related to the former Southwestern Regional Centre, the Ministry has made use of the transfer lists and box content lists created when the files were moved out of Southwestern to identify and recall records that may be responsive to the FIPPA requests received.

It should be noted that the Ministry expended considerable effort in the context of this initiative to identify and confirm the accuracy of inventories of over 3400 boxes of records, containing both

resident files and other records related to former residents of the facilities. The 3400 boxes were identified using records schedules to determine boxes that would contain resident files as well as files related to the care and treatment of former residents of the facilities. Further effort was expended by staff at the Archives of Ontario inventory [sic] records in their holdings.

This was a manual search undertaken by Ministry staff, and Ministry staff dedicated many hours to this exercise. The product of this undertaking was updated box content lists to allow the Ministry to locate responsive records with both greater facility and afford the Ministry greater confidence in the comprehensive nature of individual searches. These updated lists were cross-referenced against [the appellant's sister's] name and casebook number. Using this extensive search methodology, the Ministry was able to identify that responsive records existed at the Archives of Ontario relating to [the appellant's sister] and provide them to the appellant.

The Ministry submits that its search was reasonable within the meaning of section 24 of the Act. Staff that was responsible for carrying out the search were entirely dedicated to the task of processing FIPPA requests and locating responsive records. Staff responsible for file retrieval worked within the RISM, a Ministry department whose specific mandate relates directly to records management and storage. RISM worked collaboratively with staff at the Archives Ontario to encompass their holdings in the search. Not only did staff work with the existing file transfer and retention documentation (the transfer lists and box content lists), they also spent considerable time and effort to update that documentation through a comprehensive file inventory. The file inventory was a proactive initiative of the Ministry to give it the utmost confidence in its FOI search process...

The specific concerns raised by the requester and the IPC

The Ministry submits that "Schedule 913-270 (Revised)-91" is applicable to Southwestern client files and its application to resident files is set out at paragraphs 12-14 of the Ministry's affidavit. The Ministry cannot say definitively whether any files in the record have been destroyed pursuant to the schedule. In any event, whether or not any records were destroyed in accordance with the schedule, the Ministry submits that this should not have bearing on whether the search was reasonable in the circumstances. The Ministry's search has not given it any reason to believe that further records may exist, and the Ministry has done a thorough review of file transfer lists and box content lists for

records relating to [the appellant's sister]. The Ministry worked constructively with the Archives of Ontario and the responsive records in this case came from the Archives. Although the appellant has only received 27 pages of records in this instance, that fact in and of itself does not impugn the Ministry's extensive efforts to locate records responsive to the request. The Ministry has no reason to believe that further responsive records exist.

[16] The ministry also filed an affidavit in support of its representations. That affidavit, sworn by the ministry's Manager, Record Information and Security Management ("RISM") Unit, states in part:

Background of the Affiant

I am the Manager of the Recorded Information and Security Management unit ("RISM") within the Information Management and Architecture Branch of the Ministry of Community and Social Services ("Ministry"). RISM is responsible for developing, in consultation with the applicable Ministry department, records schedules in accordance with the *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Schedule A, and maintaining those schedules. It is also responsible for maintaining the authoritative copy of location metadata, that is data about the location of records, and transfer documentation for all records that are currently maintained in the Government of Ontario's off-site storage facilities.

As Manager of RISM, I oversee a team of staff that have been working in conjunction with other Ministry and government branches to respond to requests under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA" or the "Act") for records related to former residents of the Huronia, Rideau and Southwestern Regional Centres (the "facilities"). In particular, my staff is responsible for working with the staff of the Government of Ontario's off-site records storage facilities and the Archives of Ontario to provide responsive records to FOI Analysts within the Ministry's Special Cases Unit...

The Ministry's Retrieval of the Resident File

On July 23, 2014 the Ministry received a request under the Act, for any file records for [the appellant's sister] from the time she spent as a resident of Southwestern Regional Centre...

[T]his request was received by [a FOI Policy Analyst in the Special Cases

Unit of the Ministry]. The Special Cases Unit and its staff are responsible for processing FIPPA requests relating to records of former residents of the Huronia, Southwestern and Rideau Regional Centres and are responsible for processing requests and reviewing responsive records to determine the application of possible exemptions in accordance with the Act. The Unit was created to respond to the large volume of FIPPA requests received for files relating to former residents of the above noted facilities...

[An FOI Policy Analyst] ... cross-referenced the request with the class list and used this list to determine [the appellant's sister's] casebook number... The class list contains a list of former residents of the facilities that are "class members" as defined in the settlement agreements entered into between former residents of the Centres and the Crown. Each resident of one of the former facilities is assigned a casebook number, which was used for administrative purposes and constitutes a unique identifier for the resident.

Based on a review of the search notes, [a FOI Policy Analyst] made a request to RISM using individual's full name, date of birth, date of discharge and casebook number. These requests are made using an electronic tracking system...

[The FOI Policy Analyst's] request was processed by [a Records Clerk] at the RISM on August 12, 2014.

When a request for records relating to a former resident is received by RISM from an analyst at the Special Cases Unit, staff checks relevant records transfer lists and box content lists to determine the location of responsive records. These lists can be described as follows: records transfer lists that detail what records were transferred from the relevant facility upon its closing, in this case the Southwestern Regional Centre, to the Ministry of Government and Consumer Services' Information Storage and Retrieval (IS&R) offsite storage facility used by the Government of Ontario; box content lists that outline what records are contained in each box stored in the facilities; a list of Ministry holdings that document all the boxes in storage at the off-site storage facility and their contents; and, where applicable, archived resident lists covering client files for former facility residents that were transferred from interim storage warehouses to the Archives of Ontario. RISM has also been provided by the Archives of Ontario with verified lists of Archives' holdings as they relate to the Huronia and Southwestern Regional Centres which are also reviewed by RISM staff during the search process. The records transfer lists are arranged both by resident name and by

casebook number, and can be used to identify the range of boxes in which responsive records are located. The detailed box content lists can then be used to further determine and verify the box in which a responsive record is located. Box content lists detail the contents of individual boxes.

Where a review of the transfer list and Archives' holdings lists indicates that a file has been sent to the Archives of Ontario, staff at RISM or the Special Cases Unit request a copy of the file from the Archives of Ontario, and provides individual's full name, date of birth, date of discharge and casebook number, as well as any other relevant information to assist staff at the Archives in locating the file.

I have reviewed the files notes and can advise as follows: On August 12, 2014, [the Records Clerk] reviewed the records transfer lists and relevant detailed box content lists, using [the appellant's sister's] name and her casebook number, to determine the location of responsive records within IS&R's off-site storage facility. A review of the lists and Archives' holdings lists indicated that no client records were located at IS&R, but that client records had been transferred to the Archives of Ontario. The lists are reviewed electronically and then manually (ie. by reviewing each page)...

I am advised by [the FOI Manager] that the file was requested and received from the Archives of Ontario, and on September 30, 2014, a copy of the file was sent to the requester.

...

Detailed File Inventories Undertaken by the Ministry

In order to ensure the thoroughness of its searches, Ministry staff undertook an inventory of files from the former facilities of both resident files and other records related to treatment and care of residents that were generally kept independently of the resident file, to assist the Ministry in locating responsive records to FIPPA requests received by the Ministry. This involved an inventory of more than 3400 boxes of former facility files for the three facilities. Ministry staff manually reviewed the files to ensure that the box content lists were accurate (and that no files were misfiled) and to update them as necessary to allow them to be more easily cross-referenced with FIPPA requests. This inventory included a review of records held at the Archives of Ontario related to the three facilities by staff at the Archives.

For records generally kept independent of the resident file, Ministry staff reviewed the records schedules to identify those schedules that would likely contain information relating to former residents of the three former facilities. The records schedules represent classes of files that were generated by the facilities. Upon reviewing the records schedules relating to the three former facilities, the Ministry determined that the following records schedules could contain records about former residents and relied upon them to identify boxes of files that may contain responsive records:

- o 003 - Investigation Records
- o 278R- Training, Behaviour & Nursing Care Worksheets
- o 334 - Confidential & Sensitive Issues
- o 335 - Accident & Injury Report
- o 336 - Movement of Population & Statistical Reports (Closed Facilities)
- o 747 - Confidential/Sensitive Issues
- o 270 - Resident's Medical, Individual Assessment and Program Files - Huronia Regional Centre
- o 270 - Resident's Medical, Individual Assessment and Program Files – Rideau Regional Centre
- o 270 - Resident's Medical, Individual Assessment and Program Files - Southwestern Regional Centre
- o 333 - Master Resident/client Index Cards- Southwestern Regional Centre
- o 2736A - Discontinued - Control Records, Registers, Log Books, and Lists - Rideau Regional Centre
- o 2736A - Discontinued - Control Records, Registers, Log Books, and Lists – Southwestern Regional Centre

The inventory took place in two stages. The inventory of resident files

began on January 27, 2014 and was intensified with 10 additional staff hired to complete the inventory in a timely manner on May 20, 2014. The inventory was completed on July 8, 2014.

The inventory for records relating to former residents but stored separate from the resident file began on July 9, 2014 and concluded on August 29, 2014. The inventory did not produce any records relating to [the appellant's sister].

[17] The ministry appended a retention schedule as an exhibit to its affidavit. This schedule, Schedule 913-270 (revised) – 91 applies to the centre's resident medical, individual assessment and program files that were generated by staff at the centre. Under "Record Series Description", the schedule states:

Data on clients'/residents' identification, present location, *medical and social history, legal status, *admission and discharge summaries by various disciplines, medical treatment and education and programming information. May include some or all of the following data relevant to client/resident care and treatment:

[18] The schedule goes on to list several types and subtypes of records, under the headings Demographic, Medical, Nursing, Psychological, Educational, Social, Allied Health Services, Legal documents, and Correspondence. Some of the subtypes of records are marked with an asterisk, while others are not.

[19] Under "Retention Requirements", the schedule states 20 years after the date of last activity (or in the case of a person under the age of 18 years, 20 years after the date of last activity commencing on the 18th birthday). Under "Qualifying Factors/Archives Limitations", the schedule states:

Segregate asterisked documents from each file at end of retention period and transfer to Archives. Destroy remainder of files.

[20] The ministry's affidavit makes reference to this schedule as follows:

The Application of the Relevant Records Schedule to the Resident File

Schedule 913-270 (Revised) - 91 outlines the records retention schedules for Resident's/Client's medical, individual assessment and program files that were generated by staff at the Southwestern Regional Centre. The Schedule is applicable to resident files kept at the facility. The section on the schedule titled "Existing authority to dispose" outlines various record series revisions that are obsolete

versions of our current record series or obsolete versions of records series that closely relate to our current record series. A copy of this schedule is attached as Exhibit "C".

Staff at RISM consulted with staff at the Archives of Ontario, who interpret the schedule to mean that all records noted with an asterisk are required to be kept in the file that is ultimately sent to the Archives of Ontario. In contrast, records without an asterisk are to be destroyed 20 years after the date of last activity. My understanding of the accepted interpretation of "last date of activity" is that it refers to the last date the record was used for any operational purpose. Therefore, in the context of resident files, it would be 20 years after the file ceases to serve an operational purpose, such as the closure of the file where a resident is discharged from the facility or passes away. In this instance, the last date of activity would be 20 years from the discharge date of the resident.

Staff at RISM consulted with staff at the Archives of Ontario who advised that the practice of including Notice of Destruction Reports in files for which records had been destroyed in accordance with the applicable records schedule, only became consistent practice in the last 16 years. Records destroyed prior to that point in time may not have been noted by such a report. Therefore, it is not possible for me to conclude whether records in the file have or have not been destroyed in accordance with records retention schedules.

[21] As noted previously, the appellant did not file representations.

Analysis and findings

[22] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹ For the following reasons, I find that the ministry has conducted a reasonable search for records responsive to the appellant's request.

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.² From my review of the ministry's representations, including its affidavit, I find that the search was conducted by employees experienced in the subject matter of the request and that these individuals

¹ Orders P-624 and PO-2559.

² Orders M-909, PO-2469 and PO-2592.

expended reasonable efforts to locate responsive records. I rely in particular on the following:

- a. The ministry employed a dedicated interdepartmental team of individuals with specific knowledge in both the processing of FIPPA requests (the staff at the Special Cases Unit) and file storage and retrieval (RISM). In my view, this demonstrates the ministry's commitment to using its best efforts to respond to freedom of information requests made by the appellant and other former residents.
- b. I note that the search for records was undertaken in a systematic manner, using the appellant's sister's name, assigned "casebook number", transfer lists and box content lists to locate the box containing her resident file. This systematic approach would be likely to locate any records relating to a particular requester.
- c. The ministry also consulted with the Archives of Ontario to ascertain whether it was in possession of any records relating to the appellant's sister. In my view, this was a reasonable and necessary step in light of the possibility that records could have been sent to Archives pursuant to the applicable retention schedule. In fact, in this instance, the Archives of Ontario found responsive records.
- d. In addition to searching for and locating the appellant's sister's resident file, the ministry also reviewed other files that might contain records relating to the appellant's sister, as detailed in its affidavit.

[24] In my view, these factors demonstrate that the ministry took a systematic, reasonable approach to searching for records relating to the appellant's sister and expended reasonable efforts to locate responsive records.

[25] I now turn to the appellant's specific concerns with respect to the adequacy of the searches performed by the ministry. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³ In this case, the appellant is concerned that only twenty-seven pages of records were located despite the fact that her sister resided at the centre for over ten years.

[26] I understand that the appellant feels that there ought to be more records than what she has received. However, given that the appellant's sister left the centre in approximately 1972, it is possible that records were destroyed in accordance with the

³ Order MO-2246.

20-year rule set out in the applicable retention schedule. Further, it is always possible that some records that ought to have been retained were in fact destroyed, but I hasten to add that the material before me does not give me any reason to conclude that this occurred.

[27] In any event, while it may or may not be the case that additional records *ought* to exist, the appropriateness of the record-keeping practices of the centre and the ministry is not an issue before me, and further, does not have a bearing on whether the ministry's search was reasonable. My jurisdiction in this appeal is limited to deciding whether the ministry has conducted a reasonable search for records.

[28] Finally, it is possible that the records still exist but were not located by the ministry. In my view, given the ministry's evidence about the steps undertaken to locate records, this is unlikely to be the case. For the reasons stated above, I find that the ministry's search was reasonable.

[29] I recognize that my finding may be disappointing to the appellant, who is dissatisfied with the number of records pertaining to her sister that were located by the ministry, and who feels that there are, or should be, more records. However, I am unable to find that the ministry's search was unreasonable in the circumstances.

ORDER

I uphold the ministry's search as reasonable and dismiss the appeal.

Original Signed By:
Gillian Shaw
Adjudicator

November 27, 2014