Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3818

Appeal PA13-441-2

Ministry of Community and Social Services

February 27, 2018

Summary: A request was submitted to the Ministry of Community and Social Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to cardholder activity reports for an identified Ontario Disability Support Program office. The ministry issued a decision granting partial access to the information, severing information in accordance with the mandatory personal privacy exemption at section 21(1) of the *Act*. The ministry advised that the fee to receive photocopies of the reports would amount to $277.50 and the fee to receive the reports on a USB stick would amount to $47.50. The requester appealed the ministry's decision to withhold portions of the record pursuant to section 21(1) as well as the ministry's fee for preparing the record for disclosure. The requester also took the position that additional records responsive to his request ought to exist and the issue of reasonable search was included in the appeal. In this order, the adjudicator upholds the ministry's decision to sever portions of the record pursuant to section 21(1) of the *Act.* She also upholds the ministry's fee for preparing the record for disclosure and she upholds the ministry's search as reasonable. Accordingly, the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "personal information"), sections 17, 21(1)(f), 21(2)(f) and (g), 54(1), and section 6 of Regulation 460.

Orders Considered: Orders PO-3612-I and PO-3634-F.

Cases Considered: *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403.

OVERVIEW:

[1] This appeal results from Orders PO-3612-I and PO-3634-F in which this office found that cardholder activity reports were in the custody and control of the Ministry of Community and Social Services (the ministry) and ordered it to issue a decision on access to those records.

[2] The initial request to the ministry filed under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was a multi-part request for information relating to an identified Ontario Disability Support Program [ODSP] office. Parts five and six of the request, which are again at issue in the current appeal, were for the following:

> 5. A cost estimate for the printout of the Card Holder Activity Report for the ODSP office at [identified address] from December 2, 2009 to present; please provide a breakdown indicating the periods of time available from December 2, 2009 to the present;
>
> 6. A cost estimate for providing an electronic copy of the Excel file containing the data in the Card Holder Activity Report for the ODSP office at [identified address] from December 2, 2009 to the present; please provide a breakdown indicating the period of time available from December 2, 2009 to the present.

[3] The ministry responded to the request by issuing several decisions, addressing the different components of the request. With respect to parts five and six of the request, which sought cardholder activity reports, the ministry located records responsive to the request but claimed that they were out of its custody or control.

[4] The requester, now the appellant, appealed the ministry's decisions, including the decision related to parts five and six of the request.

[5] Following an inquiry into the issues arising out of the ministry's decisions, Adjudicator Cathy Hamilton issued Orders PO-3612-I and PO-3634-F. With respect to the records sought in parts five and six of the request, in Order PO-3612-I Adjudicator Hamilton found that the ministry had custody or control of the cardholder activity reports and ordered it to issue an access decision to the appellant with respect to those records.

[6] This appeal addresses the ministry's interim access decision issued in compliance with Order PO-3612-I, responding to parts five and six of the request and setting out a fee estimate of $277.50 for the processing of the request. The fee was broken down into the amounts for search time, preparation time, and photocopying. The appellant appealed the fee estimate decision.

[7] During mediation, the appellant advised that his request was for a fee estimate for both a hardcopy of the records and an electronic version of the records. He noted the ministry did not issue a fee estimate for an electronic copy of the records.

Accordingly, the ministry issued a second interim access decision with a fee estimate of $47.50 for providing the records to the appellant on a USB stick. Again, the fee was broken down into the amounts for search time, preparation time and the cost of the USB stick.

[8] The appellant advised that he does not object to the fee for search time and the cost of a USB stick however, he believes that there should be no charge for severing the records as the information removed would be information about individuals performing their professional responsibilities and not personal information. As a result, the appellant takes the position that the information should not be severed and there should be no severing charge.

[9] The appellant also noted that the decision did not identify the specific exemptions that might apply to the severed information.

[10] The ministry issued a final decision, confirming the fee estimate and advising that the portions of the records containing employee card numbers and the associated employee names would be severed from the record in accordance with the mandatory personal privacy exemption at section 21(1) of the *Act*. The ministry advised that as the records consist of over 3000 pages, the ministry provided the appellant (and this office) with a representative sample of the records.

[11] The appellant advised that he continues to appeal the ministry's decision to withhold the employee card numbers and the associated employee names under section 21(1) of the *Act*. He also continues to appeal the decision to charge a preparation fee for severing the records. He does not dispute the other portions of the fee.

[12] In addition, the appellant noted that in the representative sample that was provided to him, there are no records dated between September 10, 2013 and April 14, 2015. As a result, he requested that the reasonableness of the ministry's search be added as an issue on appeal.

[13] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry into this appeal, I sought and received representations from first the ministry, and then the appellant. The ministry's representations were shared, in their entirety, with the appellant. I decided that it was not necessary to share the appellant's representations with the ministry.

[14] In this order, I uphold the ministry's decision to sever portions of the record pursuant to section 21(1) of the *Act*, I uphold the ministry's fee for preparing the record for disclosure and I uphold the ministry's search as reasonable. My reasons follow.

RECORDS:

[15] The records at issue in this appeal are "Card Holder Activity Reports" for February 12, 2009 to September 9, 2013 and April 15, 2015 to March 17, 2017. The ministry has indicated that there are approximately 3371 pages of responsive records and has provided this office with a representative sample for the purposes of this appeal.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

C. Did the ministry conduct a reasonable search for records responsive to parts five and six of the request?

D. Should the ministry's fee estimate be upheld?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*. The portions of the definition that might be relevant to this appeal are the following:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > …
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.[1]

[18] Sections 2(3) and (4) also relate to the definition of personal information, addressing information that appears in a professional capacity:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[19] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2]

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

Representations

[20] The ministry explains that the information in the Excel chart that makes up the responsive record is composed of: the date of access, the time of access, the door used, the card number that accessed the door, the first and last names of the employee associated with the card and, in some of the earlier records, whether access was granted as a result of scanning a card or whether the person requested access from the receptionist. The ministry explains that some of the entries are not tied to specific individuals because access was granted by reception or because a temporary card (that is, a card not assigned to a particular employee) was used.

[21] The ministry submits that although it understands that the appellant takes the position that the information the record is not personal information because it is about the individuals' professional responsibilities, the ministry takes the position that the information at issue is personal information within the meaning of the *Act*. It submits that the card numbers and the cardholder names have been severed because the card number is an identifying number or symbol assigned to an individual as set out in

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

paragraph (c) of the definition of personal information at section 2(1) of the *Act*.

[22] The ministry submits that "[t]he information that is not severed – namely the dates of access, time of access, the door used, and whether access was granted or requested – is information about an identifiable person." The ministry submits that severing both the names and card number is required to de-identify the other personal information in the chart. It submits that after receiving the results of a past request, "an ineffective physical severing of the names of employees allowed him to connect the names of some individuals to their card numbers" and "[i]f only the names of individuals were severed form the records, at least some of the individuals might be identified from their card numbers alone."

[23] The ministry submits that the information is not the name, title, contact information or designation of an individual in a business, professional or official capacity as set out in section 2(3) of the *Act*. It submits that "while information about an individual in a professional, official or business capacity will not be considered personal information, such information may still qualify as personal information if the information reveals something of a personal nature about the individual." Specifically, the ministry submits that:

> The information in question is about the precise arrival times of employees of the office, to the minute. The period of the request is from December 2, 2009 to March 17, 2017. The information in question is not about the hours of operation of the a place of work, or even the hours of work of a particular employee, rather it is a detailed listing for each and every employee of the workplace, and their arrival times for over seven years. The effect the request is to provide information about each individual employee on a daily basis. It may also capture breaks and excursions that involve re-entry. The information is about the precise time of arrival about identifiable individuals. It reveals, in part, intimate patters of behavior of each employee with a card number. It may also indirectly reveal patterns of behavior otherwise only subject to the attention of the management.
>
> In the ministry's submissions, the information in question is undeniably information about individuals, specifically the employees, and it reveals details of a personal nature about those individuals, namely when those individuals enter and possibly re-enter the office, and the precise times when these events occur. The information does not identify the individual in a business professional or official capacity.

[24] The appellant takes the position that the information at issue is not personal information. He explains that he understands that the rationale behind the cardholder system is that each employee is issued a card and will use that card when entering the building, thereby creating a record identifying arrival times for each employee. However, he submits that in practice, the record that it creates is incomplete and does not necessarily reflect the activities of the cardholders themselves because there are

alternative manners by which an employee can enter the building without scanning their card. Some examples that he provides are:

- groups of employees entering at the same time enter on the card of the first employee;
- employees entering through the reception area who are let in by the receptionist and therefore their entry is not captured by the system;
- employees who forget their cards can borrow temporary cards not assigned to any specific individual; and,
- employees who forget their cards can borrow cards of fellow employees thereby giving a false reading of the identity of the individual who is actually entering the office.

[25] Due to these alternative scenarios, the appellant submits that he disagrees with the ministry's claim that "the information about the precise time of arrival about identifiable individuals" or "reveals, in part, intimate patterns of behaviour of each employee with a card number." He submits that as one cannot establish with certainty that the specific person to whom the card is assigned is the person who used the card in any specific instance, the record "is nothing more than a collection of data" that "cannot be associated with any certainty to an identifiable individual." He submits that, as a result, it is not reasonable to expect that an individual may be identified if their name and access card number are disclosed and therefore that such information cannot be described as "recorded information about an identifiable individual" as required for information to be considered to be "personal information."

[26] The appellant also submits that the employee's name and access card number is information about the individual in a business capacity as its existence is due to the fact that the person is an employee of the ODSP office.

Analysis and finding

[27] I have reviewed the records and find that the information at issue, the employees' names and access card numbers, amounts to the "personal information" of the individuals to whom they relate.

[28] As set out above, paragraph (c) of the definition of "personal information" includes an identifying number assigned to an individual. The access card numbers are clearly identifying numbers assigned to individuals, as contemplated by paragraph (c), which, given that they can be linked back to specific employees, amount to recorded information about identifiable individuals. Therefore, I find that the access card numbers consist of information that falls clearly within the scope of paragraph (c) of the definition of "personal information."

[29] I also find the employees' names, amount to personal information as they consist

of "the individual's name where it appears with other personal information, or where the disclosure of the name would reveal other personal information about the individual" as contemplated by paragraph (h) of the definition in section 2(1). In my view, the employees' names, together with the other information, the dates, times and locations of their entry, would reveal other personal information about them.

[30] I acknowledge the appellant's argument that due to the way in which the access system functions, disclosure of the employee names and access card numbers together with the other information contained in the record, does not reveal with any certainty when a cardholder enters a building. However, in my view, circumstances where a cardholder's usage of an access card that is not their own is the exception rather than the norm. As a result, I accept that the disclosure of the document as a whole (or the information that the ministry is prepared to disclose together with either the names or the card numbers alone), would reveal patterns of behavior of individual employees and, therefore, personal information about them.

[31] I also acknowledge that the appellant takes the position that because the information relates to and was recorded by the employees' workplace the information is better characterized as professional information. In this respect, I have considered the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*[5] in which the Court found that sign-in logs which indicated the name, identification number and signature of employees who entered and left a work place over a weekend constituted the personal information of those individuals.

[32] In *Dagg* the Court found that information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them in their employment is "personal information" and information relating to their position, function or responsibilities, or information of the kind disclosed in a job description is "professional information." The Court found that the information in the sign-in logs was not information about the nature of a particular position. It stated that while it may give the appellant a rough, overall picture of weekend work patterns and activities of a specific individual that may or may not be work-related, it provided no specific, accurate information about any specific employee's duties, functions or hours of work. The Court went on to state that even if the logs can be said to record an employee's overtime hours accurately, such information is "personal information" as the specific hours worked by individual employees reveals nothing about either the nature or quantity of their work.

[33] I accept the reasoning of the Court and find that it is relevant to the current appeal.

[34] Similar to *Dagg*, in the case before me I accept that the disclosure of the employees' names and access cards numbers is not information relating to their professional position, function or responsibilities. The disclosure of the severed information would reveal the dates, frequency and times of day in which identifiable

[5] [1997] 2 S.C.R. 403 (Dagg).

employees enter the office which, in my view, does not amount to accurate information about that specific employee's professional responsibilities. Moreover, the information at issue in this appeal does not amount to the type of information set out in section 2(3) of the *Act* detailed above, which describes certain information identifying an individual in a professional capacity as an exception to personal information, nor does it amount to information that might be provided in a job description.

[35] Accordingly, I find that in the circumstances of this appeal the employee names and access card numbers consist of the "personal information" of the individuals to whom they relate, as that term is defined in section 2(1) of the *Act*.

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[36] Where an appellant seeks the personal information of another individual, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In this case, the only applicable exception to the mandatory exemption at section 21 is 21(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[37] In applying section 21(1)(f), the factors and presumptions in sections 21(2), (3), and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. In the circumstances of this appeal only section 21(2) appears to be relevant.

Section 21(2)

[38] In particular, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).

[39] In this case, the ministry submits that the factors listed at sections 21(2)(f) and (g) apply. From my review it also appears that section 21(2)(i) might apply. Those sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

…

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

…

(i) The disclosure may unfairly damage the reputation of any person referred to in the record.

Section 21(2)(f) – highly sensitive

[40] The ministry submits that the personal information in question is highly sensitive as contemplated by section 21(2)(f). The ministry submits that the records detail employees' exact times of arrival which reveals "the intimate patterns of an individual's life." It submits:

> To have such personal information disclosed is not just a matter of inconvenience or embarrassment, but of intrusion. To release this personal information is to allow the surveillance of employees. It is reasonable to expect that the disclosure of this intimate personal information would cause significant personal distress to the individuals in question.

[41] The appellant submits that if disclosing the employee names and access card numbers would cause embarrassment, the ministry should provide an explanation to the public if it thinks the information is being misunderstood.

[42] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[6] While I agree with the ministry that the disclosure of the information could reasonably be expected to cause the individuals to whom it relates some distress, I am not convinced that in all circumstances that distress could be considered significant. However, I can accept that where there are situations in which the widespread disclosure of an individual's patterns of behavior in their workplace might reveal something more personal about circumstances going on in their lives, the disclosure could reasonably be expected to cause their distress to be significant in nature. As a result, I find that this factor weighing against the disclosure of the personal information at issue is somewhat relevant to the determination of whether that disclosure amounts to an unjustified invasion of their personal privacy.

Section 21(2)(g) – unlikely to be accurate or reliable

[43] The ministry submits that the information is unlikely to be reliable "for the purposes intended." The ministry clarifies that it does not assert that the entries are not

[6] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

accurate, but that "taken as a whole, they do not represent a complete picture." The ministry points to Order PO-2614 in which Adjudicator Diane Smith considered the release of settlement information about harassment complaints and determined that a misleading picture would be presented by disclosure. In that order, Adjudicator Smith stated that "the records on their fact would not provide a complete picture of the circumstances giving rise to the complaint." The ministry acknowledges that although the nature of the records in the current case are very different, Adjudicator Smith's reasoning is applicable because "the disclosure of the records would present an incomplete and potentially misleading picture of the individuals' habits." The ministry explains:

> [T]he records only capture individual who arrived using their own security card. They do not capture those who entered with a colleague, those who were using a temporary card, or entered in any other way. It also does not capture the exit of individuals, as that a picture of hours worked cannot be determined on the basis of this information alone. For example, even if an individual arrived at what appears to be an irregular time, for instance, some minutes after a full hour, it does not follow that they did not make up that time after their scheduled departure. The result is that the records cannot provide an accurate picture of anything other than when some individuals use their card.

[44] The appellant disagrees with the ministry and submits that the records are accurate in the sense that they reveal which card was used and when. He acknowledges that one cannot prove that the card was used by the person to whom it was issued. He disagrees that the logs represent a correct log of the arrival times of employees.

[45] While I agree with the ministry that disclosure of the information at issue could present an inaccurate or unreliable picture of an individual's habits, I accept the appellant's argument that the information itself is unlikely to be inaccurate or unreliable, which is what is to be considered by the factor at section 21(2)(g). The record reflects a computerized or automated system that tracks cardholder access through entryways. There is no evidence before me to suggest that it is tracking such information in an inaccurate manner or that the system itself is unreliable. Accordingly, I find that the factor at section 21(2)(g) is not relevant to the determination of whether the disclosure of the information would amount to an unjustified invasion of the personal privacy of the individuals to whom the information relates.

Section 21(2)(i) – unfair damage to reputation

[46] The ministry's argument above setting out that the disclosure of the information could present a misleading picture of their work habits are, in my view, more applicable to the possible application of the factor at section 21(2)(i) which contemplates whether disclosure may unfairly damage the reputation of the employees to whom it relates.

[47] In the circumstances, I accept that the disclosure of the information at issue

could present a misleading picture of an employee's work habits that would damage or harm their reputation. Previous orders have established that the applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.[7] With this in mind, in the circumstances of this appeal I accept that any damage or harm to the employee's reputation that might result from the disclosure of the information at issue would be "unfair" to the individual involved given that it could reasonably be expected to be based on an incomplete or misleading picture of their individual work patterns. Accordingly, I find that the factor at section 21(2)(i) is somewhat relevant to the determination of whether the disclosure of the information at issue would amount to an unjustified invasion of the personal privacy to whom the information relates.

Finding

[48] I have found that the factors set out in both section 21(2)(f) and (i) are somewhat relevant to the determination of whether the disclosure of the information at issue would amount to an unjustified invasion of personal privacy of the individuals to whom it relates. These factors weigh against disclosure of the information. I have also found that the factor weighing against disclosure at section 21(2)(g) is not relevant, as the information is likely to be accurate and reliable. However, the appellant has not provided evidence that at any of the factors weighing in favour of disclosure might apply and my review does not indicate that any such factors are relevant in the circumstances.

[49] In the absence of any evidence or argument on relevant factors weighing in favour of the disclosure of the employee names and access card numbers, the exception at section 21(1)(f) has not been established. Therefore, I find that the disclosure of the access card numbers and employee names would amount to an unjustified invasion of the personal privacy of the individuals to whom they relate and they are exempt from disclosure under section 21(1) of the *Act*.

C. Did the ministry conduct a reasonable search for records responsive to parts five and six of the request?

[50] The ministry asserts that it conducted a reasonable search for and has located all records responsive to parts five and six of the request. The appellant takes the position that additional responsive records, specifically records between September 10, 2013 and April 14, 2015, should exist. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[8] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. A further search will be ordered if the institution does not provide sufficient evidence to

[7] Order P-256.
[8] Orders P-85, P-221 and PO-1954-I.

demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[9]

Representations

[51] The ministry submits that it conducted a reasonable search for records responsive to parts five and six of the request as it was conducted by an experienced employee knowledgeable in the subject matter who expended a reasonable effort to locate records reasonably related to the request. In support of its position that it conducted a reasonable search, the ministry provided an affidavit sworn by the ODSP Administrative Officer for the ministry at the office identified in the request.

[52] The ODSP Administrative Officer submits that her responsibilities include assisting in responding to freedom of information requests, which in some cases includes searching for records. She submits that, as a result, she has knowledge of the information management practices of the ministry.

[53] Specifically, the ODSP Administrative Officer confirms that she conducted two searches with respect to this appeal for the Card Holder Activity Report from a specified ODSP office from December 2, 2009 to March 17, 2017. She explains that the Northern Alarm System is the vendor that provides the specified office with its security system which contains data related to the swipe card pad and that she is the employee in the office with access to this system.

[54] She submits that for her first search, which was conducted prior to September 2013, she received assistance from the vendor to complete it. She explains that the search involved inputting the dates that had been provided to produce a report. Her second search, which she submits was conducted in March 2017, also involved inputting the dates that had been provided to produce a report. She submits that the date parameters that she searched at that time were from December 2, 2009 to March 17, 2017.

[55] With respect to the gap in the records from September 10, 2013 and April 14, 2015 she submits that the security system that provided security card services (Protector Server) was updated and replaced by a new system (Pro-Acc). She submits that records from the previous system, Protector Server, are no longer available to the ministry and that it is her understanding the vendor does not keep backed up copies of that information.

[56] In its representations, the ministry submits that the affidavit demonstrates that the search was reasonable because:

- The employee who conducted the search was knowledgeable and where the search was unfamiliar to her, she inquired about the steps she needed to take to perform the search.

[9] Order MO-2185.

- The search was conducted on the relevant servers where the information could be found.

- The search was based on the time periods set out in the appellant's request.

[57] The ministry also submits that the apparent gap in the records can be explained by the change in the security system. It submits that the first search was conducted in 2013 and that information was retained by the ministry. It further submits that when the second search was conducted in March 2017, the older records were no longer available because the security system had changed. The ministry submits that the result of the two separate searches yielded the records identified as responsive to the request.

[58] The appellant submits that he has obtained Card Holder Activity Reports from the ministry before and there were issues with missing data with no explanation provided. He submits that in the present case, there was an active freedom of information request when the security system was changed and steps should have been taken to preserve the records.

[59] The appellant attached to his representations, a copy of the Ontario Public Service Physical Security Operating Policy which, he submits, speaks to he necessity for the ministry ODSP offices to have a Building Physical Security Plan. He questions whether regular reviews of electronic card access reports were conducted as, he submits, "red flags [were] raised about the practices of sharing cards, tailgating in a door behind another employee and not swiping one's card, or entering through the reception area." The appellant enclosed an excerpt of an email from a ODSP manager advising employees not to use the reception door as an entrance.

Analysis and finding

[60] Having carefully reviewed the evidence before me, I am satisfied that the search conducted by the ministry for records responsive to parts five and six of the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[61] 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.[10] To be responsive, a record must be "reasonably related" to the request.[11] 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.[12]

[62] In the circumstances of this appeal, I find that the ministry has provided sufficient evidence to demonstrate that it expended a reasonable effort to identify and

[10] Orders P-624 and PO-2559.
[11] Order PO-2554.
[12] Orders M-909, PO-2469 and PO-2592.

to locate responsive records. I acknowledge that the searches were conducted by an experienced employee who was knowledgeable in the subject matter and that she consulted with the vendor of the system to confirm that her searches were being conducted in the proper manner to capture the records sought by the appellant.

[63] 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.[13] In my view, I have not been provided with a reasonable basis to conclude that additional records exist.

[64] I acknowledge that the appellant is concerned that records from between September 10, 2013 and April 14, 2015 were not retained. In this regard, I note that the initial request sought records "to the present" which, at that time, would have been the date of the request, July 10, 2013. From the affidavit provided to me in this appeal it is clear that the ministry searched for and located records responsive to parts five and six of the request at the time of the request in 2013, despite taking the position that it did not have custody or control of them. The appellant appealed that ministry's decision on that, as well as several other issues. While the appeal of that initial decision was being processed, the ministry retained copies the records identified as responsive (if the ministry was deemed to have custody or control over them).

[65] In Order PO-3612-I Adjudicator Hamilton found that the records responsive to parts five and six of the request were within the custody or control of the ministry. She ordered it to issue an access decision with respect to those records, stating in her order provisions that the ministry should treat the date of the order, July 21, 2016, as the date of the request. The appellant has interpreted this order provision to mean that his request is now for an expanded timeframe and that he is now entitled to responsive records beyond those from the date of his original request. The appellant appears to take the position that he is entitled to records up until the date of Order PO-3612-I, more than three years past the date of his request.

[66] I do not agree with the appellant' interpretation of Order PO-3612-I. Order provision 2 of that interim order addresses records responsive to items 5 and 6 of the request, and reads:

> I find that the ministry has custody or control of the records listed as items 5 and 6 and I order the ministry to issue a decision letter to the appellant with respect to these records, treating the date of the order as the date of the request.

[67] I interpret order provision 2 of Order PO-3612-I, which requires the ministry to issue a decision letter to the appellant with respect to "these record," as referring specifically to the records which were responsive to the original request, including only the time period covered by that request. This is not a situation where there was a request for "continuing access" or which suggested in any way that the ministry was

[13] Order MO-2246.

responsible for records not covered by the original request. I interpret Adjudicator Hamilton's reference to "treating the date of this order as the date of the request" to mean that the ministry, in providing an access decision on the *requested records*, was to consider the date of the order as the date on which the statutory requirements of responding to and processing a request set out in sections 24 to 30 of the *Act* are triggered. Such requirements would include, for example, issuing a decision on access within thirty days of the order.

[68] I acknowledge that the ministry has also interpreted Order PO-3612-I in the same manner as the appellant and has conducted a search for all responsive records beginning from the date specified in the original request to the date of the final order, with a gap for the records that were not retained when the system was updated. However, I find that it was not obliged to interpret the request in this manner. In my view, the ministry's obligation was to retain the records responsive to the original request, meaning records from the date stipulated in the request to the date of the request itself.

[69] As a result, I find that while the ministry properly retained the records that it had originally located as responsive up to the date of the appellants' request, barring any relevant retention schedules that are not before me in this appeal. In my view, for the purposes of the current appeal it was not obliged to retain all responsive records up until the termination of the appeal period. Therefore, I accept that the fact that it does not have any responsive records from the previous access card system for the period of time between September 10, 2013 and April 14, 2015 has no bearing on the reasonableness of the ministry's search for responsive records in response to the portions of the request at issue, as such records fall outside of the scope of the current appeal.

[70] Despite my finding that the ministry was not obliged to locate responsive records beyond the date of the original request, it is not precluded from providing those records that it has already located, to the appellant. Additionally, the appellant is not precluded from filing a new request under the *Act* for similar records covering a more updated timeframe.

[71] In conclusion, in the circumstances of this appeal, I am of the view that the ministry has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and locate records responsive to the request. On that basis, I uphold its search and dismiss the appeal.

D. Should the ministry's fee estimate be upheld?

[72] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[73] More specific provisions regarding fees are found in sections 6, 7, and 9 of Regulation 460. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Fee estimate

[74] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)]. Where the fee is $100 or more, the fee estimate must be based on either:

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[14]

[75] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[15] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[16]

[76] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[17] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Representations

[77] At issue in this appeal is the ministry's fee estimates of $277.50 for a hard copy of the records and $47.50 for the records on a USB stick. Specifically, the appellant disputes the $30.00 preparation fee that the ministry has charged in both instances. The ministry's fee estimates for the records in both forms were broken down as follows:

1) Hardcopies of records

Search time:	.25 hour @$30.00/hour	$ 7.50
Preparation time:	1 hour @$30.00/hour	$30.00
Photocopying:	1200 pages @ $0.20/page	$240.00
Total Cost:		**$277.50**

2) Records on a USB stick

Search time:	25 hour @$30.00/hour	$ 7.50

[14] Order MO-1699.
[15] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[16] Order MO-1520-I.
[17] Orders P-81 and MO-1614.

Preparation time:	1 hour @$30.00/hour	$30.00
Photocopying:	1200 pages @ $10.00 USB	$10.00
Total Cost:		**$47.50**

[78] In its representations, the ministry submits that it has met its statutory requirements for the fee estimate. It submits that the appellant disputes the costs of preparing the records for disclosure because he disputes that the information should be severed. The ministry submits that the information that it intends to sever is properly characterized as personal information and that it must be severed in accordance with section 21(1) of the *Act*. Therefore, it submits that the fee estimate for the preparation of the records is in accordance with the *Act*.

[79] In his representations, the appellant submits that the amount of the fee is correlative to the determination of whether the names and identifying numbers must be severed from the record. The appellant reiterates that it is his position that the records do not contain personal information and therefore, that no severing is required and no preparation fee should be charged.

[80] The appellant submits that, if the information at issue is determined to be personal information, it does not take much effort to sever the columns in the reports that set out the employee names and cards numbers. He argues that the ministry's estimate of one hour to make these severances is well in excess of the actual time it would take to prepare the records for disclosure.

Analysis and finding

[81] In mediation, the appellant confirmed that he does not object to the estimate fees charged by the ministry for search time and for providing the records on a USB stick. The appellant also does not appear to dispute the ministry's photocopying fee for producing hardcopies of the records. My review of these charges reveals that they have been calculated in accordance with the fee provisions set out in the *Act* and Regulation 460, and, in my view, the search time appears to be reasonable in the circumstances.

[82] As a result, with respect to the reasonableness of the fees in this appeal, what remains for me to determine is whether the ministry's fee for preparing the records for disclosure is reasonable and is calculated in accordance with the *Act*.

[83] The appellant's position is that as the records do not contain personal information, they do not require severances. Therefore, he argues that the ministry is not entitled to charge any fees for preparing the records for disclosure.

[84] Earlier in this order I found that the information at issue, the employee names and access card numbers that have been severed from the records, not only qualify as "personal information" within the meaning of the definition of that term at section 2(1), but are exempt under the mandatory personal privacy exemption at section 21(1) of

the *Act*. Therefore, I find that the ministry is entitled to charge fees for severing the records in preparation for disclosure as set out in section 6(4) of Regulation 460 at $7.50 for each 15 minutes.

[85] The ministry's position is that to prepare the records for disclosure in either format, hardcopy or on USB, it would take 1 hour at $30.00 per hour. The ministry provides no detail as to how it arrived at this amount, however, it indicates that the responsive records consists of more than 3000 pages. The appellant's representations suggest that, in his view, if information at issue is found to amount to "personal information", he believes that an hour amounts to more time than required for severances and therefore, that the fee is excessive.

[86] Previous orders of this office have generally accepted that it takes an average of 2 minutes per page to make severances.[18] The ministry has identified over 3000 pages of records as being responsive to the request. Applying the two minute accepted standard to the record, the estimated 1 hour at $30.00 claimed by the ministry for severing the record at issue is well under what it would be entitled to charge.

[87] From my review of the records themselves, which amount to tables with columns indicating information such as the date, the time, the entry accessed by card, the employee name and access card number and whether access was granted, it does not appear that severing the records for disclosure would be particularly time consuming. From the face of the records, severing involves only blocking out two or three distinct columns of information (for access card numbers and employee names) set out adjacent to each other in the table. However, as there are more than 3000 pages of responsive records and the ministry has only charged for 1 hour of severances, I accept that the ministry's estimated preparation fee of $30.00 is reasonable and I uphold it.

ORDER:

1. I uphold the ministry's decision not to disclose the employee names and access card numbers.

2. I uphold the ministry's search for responsive records as reasonable.

3. I uphold the ministry fee estimate for preparing the records for disclosure.

4. I dismiss the appeal.

Original Signed by: February 27, 2018
Catherine Corban
Adjudicator

[18] Orders MO-1169, PO-1721, PO-1834 and PO-1990.