

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3829-R

Appeals PA14-245 and PA14-245-2

Ministry of Community Safety and Correctional Services

March 22, 2018

Summary: Interim Order PO-3791-I arose from a request for records relating to a search executed by the Ontario Provincial Police (the OPP) at the appellant's residence on a specific date. The ministry granted the appellant partial access to the responsive records. The appellant appealed the ministry's exemption claims and argued that additional responsive records ought to exist. In Interim Order PO-3791-I, the adjudicator upheld the ministry's decision, in part. Regarding the ministry's search for responsive records, the adjudicator upheld the ministry's search as reasonable with the exception of three records and ordered the ministry to conduct another search for those three records.

Both the ministry and the appellant requested a reconsideration of Interim Order PO-3791-I with respect to the findings on reasonable search. In this reconsideration order, the adjudicator denies both requests for reconsideration of Interim Order PO-3791-I.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of *record*) and 24

Orders and Investigation Reports Considered: PO-3562, PO-3791-I

OVERVIEW:

[1] Both the appellant and the Ministry of Community Safety and Correctional Services (the ministry) asked me to reconsider my findings in Interim Order PO-3791-I in relation to the issue of reasonable search.

[2] Interim Order PO-3791-I arose from the appellant's request to the ministry under

the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a search executed by the Ontario Provincial Police (the OPP) at his client's residence on an identified date. In the order, I referred to the appellant and his client as the *appellant* because the appellant filed the request on his client's behalf and provided his client's consent to obtain access to his personal information. I will also refer to the appellant and his client as the *appellant* in this reconsideration order.

[3] The ministry located a number of responsive records and issued a decision to the appellant granting him partial access. The ministry advised the appellant it applied a number of exemptions to withhold portions of the records.

[4] The appellant appealed the ministry's decision and the IPC opened appeal file PA14-245. In his appeal letter, the appellant challenged the ministry's application of the exemptions and claimed that additional responsive records ought to exist.

[5] During the inquiry of Appeal PA14-245, the ministry conducted another search and located additional responsive records, specifically officers' notebook entries. The ministry issued a supplementary access decision granting the appellant partial access to the officers' notes. The ministry claimed the application of a number of exemptions to withhold portions of the records.

[6] The appellant appealed the ministry's supplementary access decision and Appeal PA14-245-2 was opened. The appellant challenged the ministry's exemption claims and continued to take issue with the ministry's search for responsive records.

[7] During the mediation stage of Appeal PA14-245-2, the appellant confirmed that he is satisfied with the ministry's search for officers' notes. However, the appellant continued to take issue with the ministry's search for the other types of records identified in his representations for PA14-245.

[8] Following an inquiry, I upheld the ministry's search for responsive records as reasonable, with the exception of three records. I ordered the ministry to conduct another search for these three records and to provide an affidavit sworn by the individual who conducts the search describing the search conducted.

[9] The appellant and the ministry now seek a reconsideration of this aspect of Interim Order PO-3791-I. Both parties claim section 18.01(a) of the IPC's *Code of Procedure* applies and there was a *fundamental defect in the adjudication process*. The appellant also claims that section 18.01(c) should apply in the alternative. The appellant argues that I failed to consider all relevant evidence before me on the issue of search and should have ordered the ministry to search for more than the three records identified in the order. The ministry submits that the order "does not contain a logical rationale, which justifies ordering the ministry to conduct a further search."

[10] I shared the ministry's and appellant's reconsideration's requests with each other, with the parties' consent. Both parties submitted additional comments.

[11] In the discussion that follows, I find neither party established any basis upon which I should reconsider Interim Order PO-3791-I. Accordingly, I deny the ministry's and the appellant's reconsideration requests.

DISCUSSION:

Reasonable Search

[12] As stated in Interim Order PO-3791-I, where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24 of the *Act*.¹ If, after conducting an inquiry, the adjudicator is satisfied the institution carried out a reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the adjudicator may order further searches.

[13] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be *reasonably related* to the request.³

[14] 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 that are reasonably related to the request.⁴ An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[15] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁶

Interim Order PO-3791-I

[16] The appellant took issue with the ministry's search for records responsive to his original request. During the inquiry, the ministry was invited to submit representations in response to a Notice of Inquiry. The ministry submitted representations. The appellant was then invited to make representations in response to the Notice of Inquiry and the ministry's representations. In his representations, the appellant identified a number of concerns regarding the ministry's search and described the types of records

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

he believed ought to exist. The appellant's representations on search were shared with the ministry and the ministry submitted representations in reply. In addition, the ministry conducted another search for responsive records and located additional records, specifically officers' notes.

[17] I upheld the ministry's search as reasonable, in part, in Interim Order PO-3791-I. I reviewed the parties' evidence and found that the ministry conducted a reasonable search for records responsive to the appellant's request, with one exception. Specifically, at paragraph 116 of the order, I stated,

In his representations, the appellant identifies three records that he submits ought to exist. The appellant described these records as follows:

1. The briefing package" detailing the search of the appellant's residence referred to in page 11 of the records.
2. The "summary of activity" prepared by the OPP officer for the purposes of briefing other OPP officers referred to in page 15 of the records.
3. The "report in relation to this investigation" prepared on February 22, 2007 referred to in page 15 of the records.

The ministry did not address the existence or non-existence of these specifically identified records in its representations. I reviewed the records at issue. I find there is a reasonable basis to believe that these three reports ought to exist. In the absence of any representations from the ministry addressing these reports, I find the ministry did not conduct a reasonable search for these records. Therefore, I will order it to conduct another search for these specific reports identified in the records.

[18] At paragraph 117, I stated, "I reviewed all of the appellant's [other] submissions on search and find they do not establish a reasonable basis to believe additional responsive records ought to exist." I proceeded by identifying the different categories or types of records the appellant identified in his submissions and made a finding for each category. I will not reproduce my analysis and findings in this reconsideration order, but refer the parties to paragraphs 118 to 127 of Interim Order PO-3791-I.

Reconsideration process

[19] The IPC's reconsideration process is set out in section 18 of the IPC's *Code of Procedure*. The relevant portions of section 18 read as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;

- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The appellant's reconsideration request

[20] The appellant argues that I failed to consider "all relevant evidence" before me in deciding that

- (1) the appellant failed to demonstrate there was a reasonable basis for his belief that additional responsive records relating to the provision of information by the OPP to the CRA (Canada Revenue Agency) exist; and
- (2) the appellant failed to provide sufficient evidence to demonstrate that there is a reasonable basis for his belief that records relating to meetings and telephone conversations between CRA and OPP members ought to exist.

The appellant reproduced the evidence he submitted in his original representations. In particular, the appellant refers to various records that, he submits, "indicate" that particular events (such as meetings or conversations) occurred. Additionally, the appellant refers to portions of the records that "indicate that the CRA was aware of the OPP investigation", indicate that the CRA investigation "originated from a lead from the OPP" or "indicate that a CRA audit of [the appellant] resulted from a referral from the OPP".

[21] I confirm that, in deciding Interim Order PO-3791-I, I considered the evidence the appellant submitted during the inquiry. I did not dispute that the evidence indicated that the events identified by the appellant may have taken place. However, based on my review of the evidence, I found that there was insufficient evidence to demonstrate that the ministry's search for records that may have been created to document these events was not reasonable.⁷

[22] Based on the information provided by the appellant in his reconsideration request, it appears that the appellant simply disagrees with my decision. This is not a valid ground for reconsideration.

[23] I reviewed the appellant's reconsideration request. I find that none of the

⁷ I refer the appellant to Order PO-3562, in which the adjudicator stated, "To the extent that these records refer to or arise from other communications, I am satisfied that these may well have arisen from or resulted in face-to-face meetings or telephone conversations, for which no additional documentation was created."

grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure* are established. I find that there was no fundamental defect in this office's adjudication process, per section 18.01(a). In addition, I find there is no clerical error, accidental error or omission or other similar error in Interim Order PO-3791-I, per section 18.01(c). Finally, I find there is no other jurisdictional defect in the order, per section 18.01(b). Therefore, I find that the appellant's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

The ministry's reconsideration request

[24] The ministry argues that section 18.01(a) of the *Code of Procedure* applies to Interim Order PO-3791-I and there was a *fundamental defect in the adjudication process*. The ministry argues there are three *fundamental defects* in the order, namely,

1. The ministry conducted a thorough search for records, in full compliance with the direction set out in the Notice of Inquiry. There was no basis upon which to order a further search for records.
2. The ministry has been ordered to conduct a search on the basis that it "did not address the existence or non-existence" of "records" and "reports" which were not identified in the Notice of Inquiry.
3. The three records and reports the ministry is required to search for may be neither *records* or *reports*.

The ministry further submits that Interim Order PO-3791-I is "contradictory" and "does not contain a logical rationale, which justifies ordering the Ministry to conduct a further search." The ministry also argues that Order Provision 5 does not provide the ministry with sufficient direction to conduct a search. Finally, the ministry is concerned that an additional search will require the ministry to "redeploy critical policing resources, for no discernible reason." I will address each of the ministry's arguments below.

Alleged Defect #1

[25] The ministry submits it followed the direction set out in the Notice of Inquiry by providing a written summary of the steps it took to search for responsive records. The ministry submits that it provided "detailed representations of its search". The ministry takes the position that its representations contained more than *sufficient evidence* that it made more than a *reasonable effort to identify and locate all responsive records* within its custody or control. Accordingly, the ministry argues there was no basis upon which to make a finding that their search was unreasonable.

[26] The ministry refers to paragraph 122 of Interim Order PO-3791-I, in which I stated that I was "satisfied [the ministry] searched the relevant locations for responsive records." Given this finding, the ministry submits I should not require it to conduct an "identical search" in these locations.

[27] I disagree with the ministry's claim. While I found that the ministry searched the relevant locations, I found at paragraph 116 that the ministry did not adequately address whether the records identified by the appellant exist or do not exist. In addition, I found that the appellant provided me with a reasonable basis to believe that the three records described at paragraph 116 exist. Accordingly, I ordered the ministry to conduct another search for the records identified in paragraph 116.

[28] I find the ministry has not established any fundamental defect based on this argument.

Alleged Defect #2

[29] The ministry submits that the appellant identified the three records for the first time in his February 17, 2015 representations. Upon review of the records and the parties' representations, I stated, "in the absence of any representations from the ministry addressing these reports, I find the ministry did not conduct a reasonable search for these records."⁸ The ministry submits that the Notice of Inquiry did not direct it to address specific reports and records in conducting the search. The ministry asks whether it was "supposed to expressly mention the three records and reports as part of their reasonable search representations." The ministry submits it is "effectively being unfairly penalized for not doing something which it was not asked to do in the Notice of Inquiry."

[30] In addition, the ministry states it conducted the search for records "in or prior to October, 2014, months prior to the three 'records' and 'reports' even being identified by the appellant in his representations." The ministry questions how it was supposed to address the records identified in paragraph 116 of the order when the appellant did not identify these records "until long after our search was conducted." The ministry further submits there was no authority to expand the scope of the search after the Notice of Inquiry was issued.

[31] Finally, the ministry submits it expressly referred to the types of records the appellant seeks access to in its representations. The ministry submits that paragraphs 119, 121, 123 and 124 of the order refer to the records identified in the appellant's request and the Notice of Inquiry and upholds the ministry's searches for them. As such, the ministry submits I did not have the authority to order it to search for records outside the scope of the appeal.

[32] The appellant specifically identified the three records listed in paragraph 116 for the first time in his February 17, 2015 representations. The ministry is correct. However, the adjudicator who conducted the inquiry reviewed the appellant's representations and "decided that they raise issues in response to [the ministry's] representations to which [the ministry] should be given an opportunity to reply."⁹ Therefore, even though the Notice of Inquiry dated October 22, 2014 did not

⁸ Interim Order PO-3791-I at para 116.

⁹ See Letter dated August 14, 2015 from Adjudicator Frank DeVries to the ministry.

specifically identify these records, the ministry was provided with an opportunity to respond to the appellant's representations on search. The ministry submitted representations on September 25, 2015. The ministry did not respond to the appellant's representations on search in its reply representations except for responding to the appellants' representations regarding the officers' notebook entries. I reviewed the appellant's representations on search and found that there was a reasonable basis for his belief that the three records identified in paragraph 116 of the order exist. In the absence of representations from the ministry, I ordered the ministry to conduct another search for these records.

[33] I note that the ministry conducted another search for responsive records in 2015 and located officers' notebook entries. The ministry issued a revised access decision on December 8, 2015 granting the appellant partial access to the newly located records.

[34] In Interim Order PO-3791-I, I upheld the ministry's search for specific types of records, including records relating to the OPP and the CRA's working relationship, records relating to the applications relating to section 490(15) of the *Criminal Code* and materials relating to meetings and telephone conversations between any member of the CRA and any member of the OPP. Even though I upheld these particular aspects of the ministry's search, I found that the appellant demonstrated there is a reasonable basis for his belief that the *specific* records identified in paragraph 116 of the order exist and the ministry did not properly address this aspect of the appellant's representations. Therefore, I ordered the ministry to conduct another search for these specific records.

[35] Finally, I note the ministry did not raise the issue of scope in relation to these three records even though it was provided with the opportunity to reply to the appellant's representations. The ministry could have raised this issue in its reply representations. It did not do so.

[36] I find the ministry did not establish any fundamental defect based on this argument.

Alleged Defect #3

[37] The ministry submits that the manner in which the *records* or *reports* are identified in paragraph 116 of Interim Order PO-3791-I is inconsistent and confusing. The ministry submits the "inconsistency in the use of terminology especially confuses" it and creates a paragraph "entirely lacking in clarity and direction insofar as it applies to what we are being ordered to do."

[38] The ministry submits that paragraph 116 of the order describes what I ordered it to search for alternately as "specifically identified records" and "specific reports". However, the ministry submits that the records are likely neither *specific* nor *records* nor *reports*, which makes them "impossible to search for".

[39] Order Provision 5 of Interim Order PO-3791-I requires the ministry to search for the following *records*:

- a. The "briefing package" detailing the search of the appellant's residence referred to in page 11 of the records.
- b. The "summary of activity" prepared by the OPP officer for the purposes of briefing other OPP officers referred to in page 15 of the records.
- c. The "report in relation to this investigation" prepared on February 22, 2007 referred to in page 15 of the records.

Regardless of any confusion that paragraph 116 may have caused the ministry given the use of the words *record* and *report*, I am confident Order Provision 5 describes the records the ministry is required to search for in a sufficiently detailed manner.

[40] I note that section 2(1) of the *Act* defines the term *record* as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and,

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of the institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution

Based on this definition of *record*, I am confident that the records I identified in Order Provision 5 are *records* as that term is defined in section 2(1).

[41] I find the ministry did not establish any fundamental defect based on this argument.

[42] Additionally, I reviewed the ministry's arguments regarding the negative impact the order will have on its policing resources. These arguments do not establish that there was a fundamental defect in the adjudication process that resulted in Interim Order PO-3791-I.

Conclusion

[43] On my review of all of the ministry's arguments, I find that they do not persuade me that there was a fundamental defect in the adjudication process, per section 18.01(a) of the IPC's *Code of Procedure*. In addition, I find there is no other jurisdictional defect in the order, per section 18.01(b). Finally, I find there is no clerical error, accidental error or omission or other similar error in Interim Order PO-3791-I, per

section 18.01(c). Therefore, I find that the ministry's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

Summary

[44] I deny both the appellant's and the ministry's requests for reconsideration and uphold Interim Order PO-3791-I. The compliance date for Interim Order PO-3791-I has passed. Accordingly, I will establish a new compliance date for the ministry to adhere to in the order provisions below.

ORDER:

1. I uphold my findings in Interim Order PO-3791-I.
2. I lift the interim stay granted on January 3, 2018 with respect to Order Provisions 5 and 6 of Interim Order PO-3791-I.
3. I order the ministry to comply with Order Provision 5 **within 30 days of the date of this Reconsideration Order.**
4. I reinstate Order Provision 6 of Interim Order PO-3791-I.

Original signed by _____

Justine Wai
Adjudicator

_____ March 22, 2018