

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3825-I

Appeal PA16-671

Ministry of Community Safety and Correctional Services

March 9, 2018

Summary: An inmate appealed a decision of the Ministry of Community Safety and Correctional Services (the ministry) advising that it could not locate a property sheet accompanying the appellant's transfer between correctional institutions. In this order, the adjudicator orders the ministry to conduct a further search for the requested property sheet.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s.24.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for an itemized property sheet relating to his transfer between two correctional institutions in 2004.

[2] The ministry issued a decision letter to the appellant advising that no responsive records were located. The appellant appealed the ministry's decision to this office and a mediator was assigned to explore settlement with the parties. Mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry.

[3] During the inquiry, the parties provided representations in support of their positions.

DISCUSSION:

[4] The sole issue in this appeal is whether the ministry conducted a reasonable search for records which respond to the appellant's request.

[5] Where a requester claims that records should exist the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.¹ 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.

[6] 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.² To be responsive, a record must be "reasonably related" to the request.³

[7] 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.⁴

[8] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[9] 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.⁶ I have reviewed the submissions of the parties and am satisfied that the appellant has provided a reasonable basis for concluding that the requested property list should exist. The appellant advises that he has been in custody since 1999. He submits that in 2003, transcripts relating to a Court of Appeal matter was sent to him while he was incarcerated at a provincial institution managed by the ministry. In support of this claim, the appellant provided a copy of a letter from the Court of Appeal which enclosed the transcripts in care of the correctional institution managed by the ministry. The appellant advises that he was transferred to a federal institution in 2004 but that the federal authorities claim that the transcripts were not transferred with him. It appears that the appellant filed an access request for a copy of property list in an effort to advance his claim that one of the correctional institutions should reimburse him the costs of the transcripts.⁷

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.

⁷ In his submissions, the appellant asks that this office have the ministry "...either prove that said transcripts left ... prison with [him on specified date in 2004 or] replace the transcripts as [he] can not".

[10] The ministry does not dispute that a property sheet would have been created in the normal course of a transferring an inmate between institutions. However, the ministry submits that no such record could be located in the appellant's file. The ministry submits that "comprehensive" searches were undertaken by "qualified staff" and states:

- Upon its receipt of the request, the records manager at the provincial correction institution conducted a search in a shared correctional records database and confirmed that the appellant had been incarcerated at the institution during the relevant time period;
- He subsequently ordered the paper file from archives and manually searched the file but did not locate the requested record; and
- He also directed two record clerks to manually search the file and they confirmed that they also could not locate the requested record.

[11] In the affidavit provided by the ministry the records manager states:

I am not sure why the property sheet in question does not exist. If the record in question were to exist, it should be in the appellant's file, which we retrieved from Archives, but it is not. I do not know where else the record would be located, or if the record was destroyed.

[12] I have reviewed the submissions of the parties and have decided to order the ministry to conduct another search of its record-holdings. Though it appears that the ministry conducted a thorough search of the appellant's paper file, it adduced insufficient evidence to demonstrate that its search was expanded to other record holdings once it determined that the record was not in the appellant's file. This is despite the fact that the Notice of Inquiry sent to the ministry asked it to provide details of whether there was a possibility whether the record was destroyed. The Notice of Inquiry also invited the ministry to provide information about its record maintenance policies and practices, such as retention schedules.

[13] In my view, the circumstances of this appeal are unique. The appellant was incarcerated at a provincial institution managed by the ministry during the time he received a package from the Court of Appeal. He was subsequently transferred to a federal institution but the ministry advises that it cannot locate the related property sheet. In my view, a reasonable search under the circumstances of this appeal would have also included an investigation into the ministry's record maintenance policies and practices to determine whether a copy of the record could be located elsewhere or whether the original was scheduled for destruction. Accordingly, I order the ministry to conduct a further search for the responsive record.

ORDER:

1. I order the ministry to conduct a further search for an itemized property sheet created in 2004.
2. I order the ministry to issue an access decision to the appellant regarding access to any records located as a result of the search ordered in provision 1, in accordance with the *Act*, treating the date of this order as the date of the request.
3. I order the ministry to provide me with a copy of their decision rendered to the appellant in accordance with order provision 2.
4. The ministry shall send their representations on the new search referred in provision 1 and to provide me, by **April 3, 2018** , an affidavit outlining the following:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - c. the results of the search; and
 - d. details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

The ministry's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The ministry should indicate whether it consents to the sharing of their representations with the appellant.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original signed by: _____
Jennifer James
Adjudicator

_____ March 9, 2018