

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3838

Appeal PA16-28

Ministry of Community Safety and Correctional Services

May 9, 2018

Summary: The appellant seeks access to all records created during a specific time period that relate to him. The ministry located responsive records and granted the appellant partial access to them. The appellant appealed the ministry's decision. Relevant to this order, the appellant claimed that additional responsive records ought to exist. In this order, the adjudicator upholds the ministry's search as reasonable and dismisses the appeal.

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

OVERVIEW:

[1] The appellant, an officer of the Royal Canadian Mounted Police (RCMP) previously seconded to the Ontario Provincial Police (OPP), submitted an access request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought access to records relating to him. The appellant identified a number of categories of records, including call logs, officers' notes, reports, files, meeting minutes and various forms of correspondence, produced or received by any OPP employee that mention the appellant or identify him in any way. The appellant advised the ministry that he seeks access to records created during a specific time period.

[2] After locating responsive records, the ministry issued a decision to the appellant denying him access to the responsive records. The ministry advised the appellant that the records were excluded from the scope of the *Act* under section 65(6) (employment

or labour relations). Accordingly, the ministry took the position that it was not required to disclose the records to the appellant.

[3] The appellant appealed the ministry's decision to this office.

[4] During the intake stage of the appeals process, the ministry agreed to conduct an additional search for records "unrelated to [the appellant's] employment with the OPP." The ministry located additional records and issued a supplemental decision to the appellant granting him partial access to them. The ministry withheld portions of the records under the discretionary exemptions in sections 49(a), read with sections 14(1)(d) (confidential source of information) and (l) (facilitate commission of an unlawful act), and 49(b) (personal privacy) of the *Act*. The ministry referred to the presumption in section 21(3)(b) and the factor weighing against disclosure in section 21(2)(f) to support its section 49(b) claim. The ministry also advised the appellant it withheld certain information as non-responsive to his request. The appellant confirmed that he pursues access to the information withheld from disclosure in the ministry's supplemental decision.

[5] The appeal was then moved to the mediation stage of the appeals process. The appellant identified certain specific records that he believed should exist at the ministry. The appellant also identified a specific ministry employee who, he believed, created the records that he believes exist. The ministry conducted a further search for responsive records but confirmed that it did not locate any other records. The appellant maintained his position that further records responsive to his request should exist.

[6] The appellant also confirmed his interest in pursuing access to all of the information withheld by the ministry, with the exception of the non-responsive information.

[7] No further mediation was possible and the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] Following the issuance of the mediator's report, the ministry issued a second supplemental decision letter. The ministry advised the appellant that it relied on sections 14(1)(a) (law enforcement matter), (b) (law enforcement investigation) and (f) (right to fair trial) in addition to the exemptions previously claimed to withhold certain portions of the records. The adjudicator reviewed the decision letter and began the inquiry by inviting and receiving representations from the ministry. In its representations, the ministry clarified that it no longer claims the application of the exclusion in section 65(6) of the *Act* to any of the records. As such, section 65(6) is no longer at issue in this appeal.

[9] The adjudicator then sought and received the appellant's representations. The ministry filed representations in reply. The adjudicator then invited and received sur-reply representations from the appellant. The parties' representations were shared with one another in accordance with the IPC's *Practice Direction 7* and section 7 of the *Code of Procedure*.

[10] The appeal was transferred to me to complete the order. In this order, I uphold the ministry's search for responsive records as reasonable and dismiss the appeal.

PRELIMINARY ISSUE

[11] At the start of the inquiry, there were twelve pages of records at issue. These records include one page of officer's notes, eight pages of instant messages, one page of emails and two pages of Blackberry messages.

[12] As stated above, the adjudicator sought representations from the ministry on the application of the exemptions claimed. The ministry submitted representations. The ministry's representations were shared with the appellant and the appellant was invited to submit representations. In his representations, the appellant states as follows:

I am not interested in obtaining information that may compromise the identity of an informant, unless it is pertinent to my request. It is my understanding, based on the information provided to me by the Ministry, and my experience, that the vetted information referred to by the ministry is in fact a text conversation that I was a part of. This is not the type of information I sought although I understand that the scope of my request led to its discovery.

The purpose of my request to the Ministry was to determine if any Ontario Provincial Police (OPP) employees had received or disseminated my personal health information.

I reviewed the records at issue, specifically Records 5, 14-21, 25, 30 and 31, in light of the appellant's statement regarding the information he does not pursue access to. I find that the appellant does not pursue access to the remaining information the ministry withheld from disclosure. Accordingly, the information withheld from disclosure is no longer at issue in this appeal. I will not consider whether the ministry was entitled to exempt portions of the records from disclosure and will only consider whether the ministry's search for responsive records was reasonable.

DISCUSSION:

Did the ministry conduct a reasonable search for records?

[13] Where a requester claims that additional 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 Where I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's decision. Otherwise, I may order further searches.

¹ Orders P-85, P-221 and PO-1954-I.

[14] 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 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.³

[15] I will order the ministry to conduct a further search if it 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.⁴

[16] Although a requester will rarely be in a position to indicate precisely which records the institution did not identify, the requester must provide a reasonable basis for concluding that such records exist.⁵

Representations

[17] The ministry submits that its search for records responsive to the appellant's request was reasonable. The ministry provided an affidavit sworn by an OPP Sergeant (the Sergeant) who conducted the search.

[18] The Sergeant states that she works in the Provincial Operations Intelligence Bureau (the Bureau) of the OPP. The Sergeant has worked with the Bureau since December 2012. The Sergeant confirms she is knowledgeable with respect to the requirements and procedures for responding to requests made under the *Act*.

[19] The Sergeant states that she notified the Inspector of the section of the Bureau the appellant was a member of. The Sergeant prepared an email that the Inspector sent to all staff members to search for and forward all responsive records to the Sergeant. The Sergeant submits that since the appellant was a member of the staff of that section during the period identified in his request, the Sergeant submits that there was no reason to believe that responsive records would be located elsewhere with the OPP. The Sergeant forwarded the records to the Freedom of Information Coordinator for processing and disclosure.

[20] The Sergeant submits that the search was conducted in a diligent and thorough manner and that she contacted all relevant staff.

[21] As stated above, the appellant states that the purpose of his request is to determine whether any OPP employees received or disseminated any of his personal health information. The appellant submits that additional responsive records exist, due to the following:

² Orders P-624 and PO-2559.

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2185.

⁵ Order MO-2246.

- In April 2016, the appellant met with two named OPP officers to provide a statement regarding a complaint he filed against a third named OPP officer for disseminating his personal health information;
- An OPP officer advised the appellant that another OPP officer disseminated his personal health information during a management meeting in May 2015;
- Based on his experience as a police officer, the appellant submits it is unreasonable to believe that there are no records related to the management meeting referred to above; and
- It is the appellant's understanding that the OPP did not conduct hard copy searches and relied solely on electronic record searches.

The appellant also raises a concern that emails existed at the time of his request, but that the OPP or ministry has since purged them.

[22] In its reply representations, the ministry maintains that the OPP conducted a comprehensive search for records, as described by the affidavit sworn by the Sergeant. The ministry states that the Sergeant contacted the three officers named in the appellant's representations who, the appellant alleged, may have knowledge about the additional records identified in his representations. The Sergeant advised the ministry that the officers confirmed they do not have the records identified by the appellant nor do they know about them. The ministry concludes that its search was reasonable and in accordance with the *Act*.

[23] The appellant did not provide any additional representations regarding the ministry's search in his sur-reply representations. The appellant raises issues with the searches conducted by another institution, but these arguments are not relevant in this appeal.

Analysis and Findings

[24] As stated above, 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 demonstrate that it made a reasonable effort to identify and locate records *reasonably related* to the request.⁶ 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 reasonably related to the request.⁷

[25] I find that the ministry conducted a reasonable search for responsive records. I find that the Sergeant is an experienced employee knowledgeable in the subject matter of the request. I find that she expended a reasonable effort in locating records responsive to the appellant's request. The Sergeant contacted all staff members from the OPP section the appellant was a member of during the period identified in the

⁶ Orders P-624, PO-2554 and PO-2559.

⁷ Orders M-909, PO-2469 and PO-2592.

appellant's request and requested that they provide her with copies of all responsive records.

[26] When the appellant identified individual officers who may have custody or knowledge of additional records, the Sergeant contacted the officers for further clarification. The OPP officers confirmed that they do not have custody or knowledge of any additional records. The ministry's reply representations were shared with the appellant and he did not raise any additional concerns or provide any further evidence to support his belief that additional responsive records ought to exist. Based on my review of the parties' representations, I find that the ministry provided me with sufficient evidence to establish it made a reasonable effort to locate records responsive to the appellant's request.

[27] In conclusion, I uphold the ministry's search as reasonable.

ORDER:

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

Original signed by: _____

Justine Wai
Adjudicator

_____ May 9, 2018