

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3888-F

Appeal PA16-671

Ministry of Community Safety and Correctional Services

October 12, 2018

Summary: An inmate appealed the search decision of the ministry. In Interim Order PO-3825-I, the adjudicator ordered the ministry to conduct a further search for responsive records. In this order, the adjudicator finds that the ministry's further search for records is reasonable and dismisses the appeal.

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

Related Cases: Orders PO-3825-I and PO-3867-R.

OVERVIEW:

[1] The appellant submitted a request under the *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] In Interim Order PO-3825-I, I found that the ministry's search for the responsive record was not reasonable and ordered it to conduct a further search and provide me with a sworn affidavit outlining its search efforts.

[3] The ministry subsequently made a request for reconsideration, claiming Interim Order PO-3825-I contains fundamental defects. The ministry's reconsideration request was denied in Reconsideration Order PO-3867-R in which I upheld my decision in Order

PO-3825-I.

[4] The ministry subsequently conducted a further search for the responsive record and provided an affidavit to this office outlining its search efforts. The ministry's further search did not locate the requested record. The appellant was provided with a copy of the ministry's affidavit and given an opportunity to provide representations in response. I did not receive a response from the appellant.

[5] In this order, I find that the ministry's further search for the responsive record is reasonable and dismiss the appeal.

DISCUSSION:

[6] The sole issue to be determined is whether the ministry's further search for the responsive record is reasonable. The further search I ordered in Interim Order PO-3825-I directed the ministry to make inquiries about its 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.

[7] As noted above, the ministry's further search did not locate the requested record. However, the affidavit the ministry submitted describing its further search confirmed that the ministry took the following steps to locate the responsive record:

- On August 15, 2018, the Records Manager obtained the appellant's paper file from Archives.
- The Records Manager searched the paper file but did not locate the responsive record. The Records Manager requested that two record clerks each review the file to locate the responsive record. However, neither record clerk located the responsive record.
- The Records Manager reviewed the ministry's record maintenance policies and confirmed that the record should be in the appellant's paper file and that it was not scheduled for destruction.

Decision and Analysis

[8] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹

[9] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.² A further search will be ordered if the institution

¹ Orders P-624 and PO-2559.

² Orders M-909, PO-2469 and PO-2592.

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.³

[10] 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.⁴ In Interim Order PO-3825-I, I found that the appellant provided a reasonable basis for concluding that the property list he requested should exist. The appellant provided evidence, which was not contradicted by the ministry, that while he was incarcerated at a provincial institution managed by the ministry he received a letter from the Court of Appeal which enclosed copies of transcripts.

[11] In Interim Order PO-3825-I, I ordered a further search taking into account the unique circumstances of this appeal. In that order, I stated:

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.

[12] Though the ministry's further search did not locate the responsive record, I am satisfied that its further search remedied the deficiencies outlined in Interim Order PO-3825-I. Namely, that evidence was provided about the ministry's record maintenance policy along with confirmation that the record was not scheduled for destruction. I also took into account that the record was created approximately 10 years before the *Act* was amended to require institutions to take measures to ensure the preservation of records.⁵

[13] I am also satisfied that the ministry's further search was directed and conducted by an experienced employee, knowledgeable about the subject-matter of the request.

[14] As stated above, the *Act* does not require the ministry to prove with absolute certainty that the requested record can be located even in cases where the record maintenance policy indicates that the record was not destroyed. Instead, the ministry

³ Order MO-2185.

⁴ Order MO-2246.

⁵ Section 10.1 states:

Every head of an institution shall ensure that reasonable measures respecting the records in the custody or control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or record retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

must demonstrate that it has made a reasonable effort to identify and locate the record.

[15] Having regard to the above, I find that the ministry's further search remedied the deficiencies set out in Interim Order PO-3825-I.

ORDER:

I find that the ministry's further search for responsive records is reasonable and dismiss this appeal.

Original Signed by: _____
Jennifer James
Adjudicator

_____ October 29, 2018