Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3942-I

Appeal PA17-164

Ministry of the Attorney General

March 26, 2019

Summary: The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for correspondence, memos, letters and emails sent and received by a specified employee where the appellant is mentioned or referenced. The ministry granted partial access to the records withholding some information pursuant to sections 13(1) (advice to government) and 14(1) (law enforcement) of the *Act*. During mediation, the appellant raised the issue of reasonable search, asserting that additional responsive records should exist. This order finds that the exemption at section 49(a) (discretion to refuse requester's own personal information) in conjunction with sections 13(1) and 14(1) does not apply and that the ministry has not completed a reasonable search. The adjudicator orders the ministry to provide the withheld information in the records to the appellant and to conduct a further search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a), 13(1), 14(1), 24.

OVERVIEW:

[1] A request was made to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> A copy of all correspondence, memos, letters and emails, sent or received by a specified employee of the Ministry of Attorney where the requester is mentioned and/or referenced from February 2015 until present.

[2] After conducting a search, the ministry issued a decision granting partial access

to the records, with some information withheld pursuant to sections 13(1) (advice to government) and 14(1) (law enforcement) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the course of mediation, the mediator had discussions with the ministry and the appellant about the issues on appeal. The ministry provided an explanation of the exemptions claimed, specifying that it is relying on section 14(1)(b) for the law enforcement exemption.

[5] The appellant raised the issue of reasonable search with the mediator, asserting that additional responsive records should exist.

[6] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations on the issues and once received, those representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] As the records appear to contain the personal information of the appellant, I added the possible application of section 49(a) (discretion to refuse requester's own personal information) as an issue in this appeal.

[8] In this order, I find that neither the exemption at section 49(a) in conjunction with sections 13(1) nor the section 49(a) exemption in conjunction with 14(1) applies to the withheld information and the ministry is ordered to disclose the information to the appellant. In addition, I find that the ministry has not conducted a reasonable search and order it to conduct a further search.

RECORDS:

[9] The records at issue consist of 2 emails, including page 7 (withheld in full) and page 8 (withheld in part).

ISSUES:

A. Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the records?

B. Does the discretionary exemption at section 49(a) in conjunction with section 14(1) apply to the records?

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the records?

[10] As the records at issue contain recorded information about the appellant, I find that they contain his personal information within the meaning of paragraph (h) of the definition of personal information in section 2(1) which states:

> "personal information" means recorded information about an identifiable individual, including,
>
> > 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;

[11] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[12] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[13] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[1]

[14] The ministry takes the position that section 13(1) applies to the withheld information.

[15] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

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[1] Order M-352.

[16] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[2]

[17] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[18] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[3]

[19] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[20] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4]

[21] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[5]

[22] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

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[2] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[3] See above at paras. 26 and 47.
[4] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[5] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

- factual or background information[6]
- a supervisor's direction to staff on how to conduct an investigation[7]
- information prepared for public dissemination[8]

Representations

[23] The ministry submits that the sender of the email on page 7 suggests a course of action to the recipients of the email and the later email, sent by one of the recipients of the first email, sets out that the course of action is accepted. The ministry submits that the Court of Appeal decision in *Ontario Ministry of Transportation v. Ontario (IPC)*[9] *and* the Divisional Court in *Ontario Ministry of Northern Development and Mines v. Ontario (IPC)*[10] provide that in order for an exchange to be exempt under section 13(1), the information contained in the record must suggest a course of action that will ultimately be accepted or rejected by the recipient.

[24] The ministry submits that the recommended course of action is contained in the record and that disclosure of the record would reveal the recommended course of action. The ministry confirms that both senders of each email are public servants.

[25] Finally, the ministry submits that before it took the positon that these portions of the records could be withheld under section 13(1), it reviewed the list of mandatory exceptions to the exemption set out in sections 13(2) and (3) and determined that none of the exceptions applies to the information.

Finding

[26] I have reviewed the emails the ministry claims are exempt under section 13(1). I find that the withheld portions of pages 7 and 8 are not exempt from disclosure under section 13(1) of the *Act* because they do not contain advice or recommendations. As stated, "recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" involves evaluative analysis of information.

[27] In my review of the withheld information, I am not convinced that the emails contain any advice or recommendations as contemplated under section 13(1). I do not accept the ministry's submission that the sender of the email on page 7 suggests a

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[6] Order PO-3315.
[7] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[8] Order PO-2677.
[9] [2005] O.J. No. 4048 (C.A.).
[10] [2004] O.J. No. 163 (Div. Ct.).

course of action to the recipients of the email and the later email, sent by one of the recipients of the first email, sets out that the course of action is accepted. I find that the withheld portion of the records relate to an administrative decision regarding the appellant. Accordingly, I find that section 13(1) does not apply in conjunction with section 49(a) to exempt the withheld portion of the records from disclosure.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with section 14(1) apply to the records?

[28] The ministry takes the position that the exemption at section 14(1)(b) applies to the records.

[29] Section 14(1)(b) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result

[30] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[11] The investigation in question must be ongoing or in existence.[12]

[31] The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply.[13]

[32] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

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[11] Order PO-2085.
[12] Order PO-2657.
[13] Order PO-2085.

[33] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[14]
- a police investigation into a possible violation of the *Criminal Code*.[15]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings[16]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[17]

[34] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[18]

[35] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[19] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.

[36] In its representations, the ministry submits that the information exchanged in the withheld records refers to an ongoing law enforcement investigation and that disclosure of the records could reasonably be expected to interfere with the law enforcement investigation.

Finding

[37] As noted, the law enforcement investigation exemption under section 14(1)(b) requires that there be a specific, ongoing investigation. The exemption does not apply where the investigation is completed or where the alleged interference is with "potential" law enforcement investigations. After reviewing the ministry's representation on this issue, which is fully set out above, I find that it has not provided evidence that there is a specific, ongoing investigation. In addition, after reviewing the ministry's

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[14] Orders M-16 and MO-1245.
[15] Orders M-202 and PO-2085.
[16] Order MO-1416.
[17] Order MO-1337-I.
[18] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[19] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

representations, I find that it has not provided detailed evidence about the potential for harm as required. Accordingly, I find that exemption at section 14(1)(b) in conjunction with section 49(a) does not apply in this circumstance.[20]

[38] Having found that neither of the exemptions claimed by the ministry applies to the withheld information, I will order the ministry to disclose the withheld information on pages 7 and 8 of the records.

Issue C: Did the institution conduct a reasonable search for records?

[39] 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 24.[21] 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.

[40] 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.[22] To be responsive, a record must be "reasonably related" to the request.[23]

[41] 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.[24]

[42] 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.[25]

[43] 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.[26]

Representations

[44] The ministry submits that it carried out a reasonable search for responsive

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[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[21] Orders P-85, P-221 and PO-1954-I.
[22] Orders P-624 and PO-2559.
[23] Order PO-2554.
[24] Orders M-909, PO-2469 and PO-2592.
[25] Order MO-2185.
[26] Order MO-2246.

documents.

[45] The ministry provided an affidavit, sworn by the manager of court operations for the Waterloo region courthouse. The records requested by the appellant were certain records sent or received by the manager of court operations. In the affidavit, the manager of court operations indicates that she was aware of the request. She submits that as the request was specifically for the release of documents that were sent to or received by herself, she carried out a thorough search of her hard copy and electronic files for the responsive records. The affiant states that the scope of the request and the documents sought were clear from the wording of the request and she was able to respond literally without requiring any additional clarification. The affiant also states that she is confident that all of the records responsive to the request have been located and that no responsive records have been destroyed or deleted.

[46] In his representations, the appellant speaks to the incident that precipitated his request for access to records in this appeal. In my view, this is not relevant information for the purpose of this appeal and will not be set out.

[47] In his representations, the appellant identifies nine emails that he obtained from another access request that he submits are responsive to his access request in this appeal.[27] The appellant submits that the ministry has not provided these nine emails to the IPC, yet he is aware that these emails exist. The appellant submits that these emails should have been produced from the initial search.

Analysis

[48] As set out above, the *Act* does not require the ministry to prove with absolute certainty that further records do not exist, however, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[28] In this appeal, I have considered the appellant's representations in which he identifies reasons why he believes that further responsive records exist. I have also considered the ministry's initial and reply representations. In this instance, and for the reasons set out below, I find that the ministry has not provided sufficient evidence to show that its search was reasonable.

[49] In reviewing the representations of the ministry, it is apparent that upon receipt of the request, the manager of court operations was of the view that the request was clear and therefore she did not need clarification from the appellant. The manager states that she conducted a search of her hard copy and electronic files for records that were responsive to the request. However, in the appellant's representations, he refers

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[27] According to the appellant's representations, he received the nine referenced emails from an access request made to the Waterloo Regional Police Service.
[28] Orders P-624 and PO-2559.

to nine specific emails that he submits would be responsive to the request and provided the information that would be contained in them. He submits that if those emails are not contained within the redacted information, then this is evidence that a reasonable search has not been conducted.

[50] The ministry was provided with an opportunity to reply to the appellant's representations. Therefore, if the emails referenced by the appellant were not located in its search, the ministry had an opportunity to explain why. Since the ministry did not comment on this part of the appellant's representations, I am of the view that a reasonable search has not been completed and that the ministry should conduct a further search for responsive records, specifically the nine emails referenced by the appellant. On that basis, I will order the ministry to conduct a further search.

ORDER:

1. I order the ministry to disclose the information withheld on pages 7 and 8 of the records to the appellant by providing him with a copy of this information by **April 25, 2019**.

2. I order the ministry to conduct a further search for records responsive to the appellant's request relating to this appeal, specifically the nine emails referenced by the appellant in his representations dated October 16, 2017. I order the ministry to provide me with an affidavit sworn by the individual who conducts the search(es) within **30 days** from the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

    a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities

    b. the identity/ies of individual(s) conducting the search and their titles

    c. the locations searched

    d. the results of the search(es)

    e. if as a result of the further search(es) it appears that no further responsive records exist, a reasonable explanation for why such records would not exist.

3. If the ministry locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

4. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the records provided to the appellant.

5. I remain seized of this appeal to address any issues arising out of order provision 2.

Original Signed by: March 26, 2019

Alec Fadel
Adjudicator