

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4018-F

Appeal PA17-395-2

Ministry of the Attorney General

December 16, 2019

Summary: In Interim Order PO-3976-I, the adjudicator ordered the Ministry of the Attorney General (the ministry) to conduct a search for records. This search was related to a separate file about the appellant concerning the existence of instructions within the ministry to coordinate responses to him. In this final order, the adjudicator upholds the ministry's search for these records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 24.

Orders Considered: Orders PO-3058 and PO-3976-I.

OVERVIEW:

[1] The appellant made a three-part request to the Ministry of the Attorney General (MAG or the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). The first two items of the request sought:

1. All documentation referencing [the requester] and contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, of any date.
2. All documentation pertaining to the handling of communication from or directed by him, from any date and more specifically from September 21, 2009 to the present time, contained within or produced by the MAG, including documentation

created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format.¹

[2] In response, the ministry indicated that it did not intend to conduct a search for responsive records as these items were previously addressed in IPC Order PO-3058.

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

[4] The appeal was not resolved at mediation. It was transferred to the adjudication stage, where an adjudicator conducts an inquiry. At adjudication, representations were sought and exchanged between the parties in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction 7*.

[5] I then issued Interim Order PO-3976-I, where I found that the ministry had not conducted a search for records responsive to items 1 and 2 of the appellant's request for the time-period following the request date in Order PO-3058. Provisions 2 to 4 of this interim order required the ministry to conduct a search and read:

2. Regarding items 1 and 2 of the appellant's request, I order the ministry to conduct a search for a separate file about the appellant related to the existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017. I order the ministry to provide me with an affidavit sworn by the individual who conducts the search within 30 days of 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. a statement describing the employee's knowledge and understanding of the subject matter of the request;

¹ In Interim Order PO-3976-I, I upheld the ministry's search for item 3 of the request, which sought:

All documentation pertaining to [the requester's] Freedom of Information Request ("Request") dated July 25, 2014, from any date and more specifically from July 25, 2014 to the present time, contained within or produced by the MAG, including documentation created by an MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, including, more specifically, any and all documentation pertaining to the temporary loss, mishandling or misplacement of the request and of the decision not to process the fee supplied as a cheque by [the requester], and to the drafting of the letter from [named individual] to [the requester] dated April 14, 2015.

The appellant sought a reconsideration of my decision on item 3 of the request in Interim Order PO-3976-I. This reconsideration decision is pending.

- c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
- d. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
- e. the results of the search; and
- f. if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

3. If responsive records are located as a result of the search referred to in Provision 2, I order the ministry to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

4. The affidavit referred to in Provision 2 should be forwarded to my attention and may be shared with the appellant, unless there is an overriding confidentiality concern.

[6] In response, the ministry conducted a search for responsive records. It then provided the requested affidavit, as well as a decision letter to the appellant attaching over 300 pages of records located as a result of this search.² The appellant provided a response to this affidavit and disclosure, in which he submitted that the ministry did not conduct a reasonable search for records responsive to items 1 and 2 of his request.

[7] In this order, I uphold the ministry's search for records responsive to Interim Order PO-3976-I order provisions 2 to 4 regarding items 1 and 2 of the appellant's request.

² From these over 300 pages, the ministry withheld approximately seven partial pages of records under the discretionary advice or recommendations exemption in section 13(1) and approximately nine partial pages of records under the discretionary solicitor-client privilege exemption in section 19. The appellant has not indicated that he is appealing the application of these two exemptions. The ministry also identified and withheld duplicate information in the records as non-responsive.

DISCUSSION:

Did the ministry conduct a reasonable search for records responsive to items 1 and 2 of the appellant's request as required by Interim Order PO-3976-I?

[8] 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 24.³ 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.

[9] 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.⁴ To be responsive, a record must be "reasonably related" to the request.⁵

[10] 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.⁶

[11] 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.⁷

[12] 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.⁸

Representations

[13] Concerning items 1 and 2 of the appellant's request, namely the existence of instructions within the ministry to coordinate responses to the appellant, the ministry provided an affidavit from a lawyer at its Court Services Division whose responsibilities include overseeing responses to Freedom of Information requests involving the Court Services Division.

[14] The ministry's lawyer arranges for, and supervises, the searches for responsive

³ Orders P-85, P-221 and PO-1954-I.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2246.

documents in the Office of the Assistant Deputy Attorney General for Court Services Division, the Operational Support Branch,⁹ Toronto Regional Office, Justice Sector Security Office and Central East Regional Office. She provided the names and positions of persons conducting the searches, as follows:

1. The searches for responsive documents in the Office of the Assistant Deputy Attorney General for Court Services Division were carried out by:¹⁰
 - Assistant Deputy Attorney General, Court Services Division
 - Executive Coordinator
 - Administrative Assistant
 - Senior Planning Advisor
2. The searches for responsive documents in the Operational Support Branch were carried out by:
 - Director
 - [7 different] Counsel
 - Senior Policy and Business Analyst
 - [6 different] Consulting Managers
 - Administrative Coordinator
 - Senior Policy and Business Analyst
3. The searches for responsive documents in the Toronto Regional Office were carried out by Client Services Officer.
4. The searches for responsive documents in the Justice Sector Security Office were carried out by Security Coordinator.
5. The searches for responsive documents in the Central East Regional Office were carried out by:

⁹ The ministry advises that in 2016, the Court Services Division Civil Policy and Programs Branch and Family Policy and Programs Branch were combined and are now known as the Operational Support Branch.

¹⁰ In this order, I list only the titles of the individuals who carried out the searches. The ministry also provided the names of each of these individuals to me.

- [2 different] Managers Court Operations
 - [5 different], Supervisors Court Operations
 - Administrative Assistant
 - [5 different] Superior Court of Justice, Judicial Secretaries
 - Supervisor
 - Analyst
6. There are five former members of Court Services Division who were also involved in the search for responsive records.
- [two former] Counsel
 - one former Consulting Manager
 - one former Supervisor of Court Operations, Newmarket
 - one former Assistant Deputy Attorney General

[15] The ministry states that each of the above-named staff/managers were asked to search for records regarding the handling of communication from or directed by the appellant. This search was to include documentation created by any ministry employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format.

[16] The ministry states that it was emphasised that these individuals should conduct a search for a separate file related to the existence of instructions within the ministry to coordinate responses to the appellant. A copy of the initial access request and Interim Order PO-3976-I was attached to the search request.

[17] In addition, all those asked to search were advised to include in, but not limit their search to, the following key words: "appellant's last name" and "appellant's first and last name". In addition, all those asked to search were advised to limit their search to records created between January 2, 2011 and June 12, 2017, inclusive, as per Interim Order PO-3976-I.

[18] The ministry states:

The files searched included emails, computer records stored in electronic folders and relevant court files including the correspondence folder. Searches were conducted electronically using key word searches in Outlook e-mail and both the public and personal computer drives of the above-named staff/managers. Court files were checked for responsive documents...

All persons included in the search were also asked whether they delete or otherwise destroy records, including email and hard copy records, and if they do, to advise whether documents responsive to the appellant's request may have been deleted or destroyed. All those searching indicated that they do not delete or destroy records.

[19] The ministry states that it issued a decision letter to the appellant disclosing responsive records with specific exemptions applied to the portions of the records withheld.

[20] The appellant provided 14 pages of submissions¹¹ in response to the ministry's affidavit and in response to over 300 pages of disclosure. His representations are difficult to understand; however, I interpret them to include concerns about the following:

- The expertise of the ministry counsel who provided the affidavit in searching for responsive records;
- The expertise of the individuals who searched for records and whether the locations they searched contained records dated between 2011 and 2017;
- That some emails, especially those dated prior to 2015, may no longer exist, having been deleted or archived;
- That each and every individual listed in every record should have been required to perform their own individual search for records;
- That the person who printed the emails in the records should be required to conduct his own search; and
- That each of the 38 individuals who searched for records should be required to directly, rather than indirectly, provide a written confirmation that they actually did not delete or destroy records.

Analysis/Findings

[21] In Interim Order PO-3976-I, in regards to items 1 and 2 of the appellant's request, I ordered the ministry to conduct a search for a separate file about the appellant related to the existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017. The

¹¹ The appellant's submissions were 24 pages in total (plus 3 pages of attachments). Pages 14 to 23 of his submissions address item 3 of his request, which is the subject of his reconsideration request. Page 24 is a summary of the relief sought by the appellant.

ministry had previously not searched for this file for this specific time-period.

[22] The ministry had 38 individuals search for responsive records and produced over 300 pages of records. The ministry applied limited redactions to these pages.

[23] As noted 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.¹² In the affidavit, the ministry provided extensive representations as to the extent of the search for records related to the existence of instructions within the ministry to coordinate responses to the appellant, as directed in Interim Order PO-3976-I. This affidavit included details about the 38 individuals who conducted the searches, the databases searched and the expertise of the persons who conducted the searches.

[24] I find that the ministry has provided sufficient evidence to establish that it made a reasonable effort to identify and locate responsive records as directed in Interim Order PO-3976-I.

[25] I disagree with the appellant that the ministry's search for responsive records was not reasonable. I find the appellant's expectations about the required search to be undertaken by the ministry to be both unrealistic and unreasonable. For example, requiring that each person mentioned in each of over three hundred pages of records conduct their own search, as the appellant is seeking to do, would require the ministry to conduct a search well beyond what is considered reasonable in this context.

[26] As stated in Interim Order PO-3976-I, I had asked the appellant to specifically identify what responsive records he believes have not yet been located by the ministry. In that order, as well in his representations leading up to this order, he did not clearly identify any records that have not yet been located.

[27] In particular, with respect to this order, the appellant has not clearly identified to me records that have not been located, that he does not already have copies of, related to the existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017.

[28] 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. In this case, the appellant has not provided a reasonable basis upon which I could conclude that such records exist.

[29] As set out above, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to

¹² Orders P-624 and PO-2559.

locate records which are reasonably related to the request. The *Act* does not require the ministry to prove with absolute certainty that further records do not exist.¹³ In my view, the appellant is seeking to require the ministry to prove with absolute certainty that further responsive records do not exist.

[30] I find, with respect to Interim Order PO-3976-I order provisions 2 to 4, that experienced ministry employees knowledgeable in the subject matter expended a reasonable effort to locate responsive records. These responsive records concerned a separate file about the appellant related to the existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017.

[31] Accordingly, I find that the ministry's search for records regarding items 1 and 2 of the appellant's request, in accordance with order provisions 2 to 4 of Interim Order PO-3976-I, was reasonable under section 24 of the *Act*, and I will not require it to conduct another search for those records.

ORDER:

I uphold the ministry's search for records responsive to items 1 and 2 of the appellant's request.

Original signed by: _____

Diane Smith
Adjudicator

December 16, 2019 _____

¹³ See Order MO-3577.