

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4054-I

Appeal PA19-00395

Ministry of the Solicitor General

July 29, 2020

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information pertaining to a specified incident that was investigated by a named OPP officer. The ministry provided partial access to the responsive records, and the appellant appealed the ministry's decision. The record remaining at issue is the audio recording of a statement he made to the police. The ministry advised that the audio recording was unintentionally deleted. At issue is the reasonableness of the ministry's search. In this order, the adjudicator does not uphold the ministry's search as reasonable because she finds insufficient evidence regarding the OPP's retention policies and retrieval efforts, if any. As a result, she orders the ministry to provide further details in this regard.

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

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information pertaining to a specified incident that was investigated by a named Ontario Provincial Police (OPP) officer, including the following:

... I am requesting the recordings taken of me including but not limited to, June 24, 2018, as well as the statement/recording taken when he [named officer] attended my property. I am also requesting all police will-says/statements/notes, sciences reports, expert reports, videos, audio

tapes including but not limited to the 911 recording for this investigation, photographs of injuries, police diagrams, email communications, and the Investigation Summary for this case. My request includes the above information but is not limited to it. I am requesting all information relating to my case that is now closed, and the investigation completed.

[2] The ministry issued a decision granting partial access to the responsive records pursuant to the certain discretionary exemptions of the *Act*, which are not at issue in this appeal. The ministry's access decision also stated that some information had been removed from the records as not responsive to the request and marked as N/R, and that the audio version of the statement given by the requester to the OPP no longer exists.

[3] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] During mediation, the appellant received a partially redacted transcript of the recording that the ministry said no longer exists. The written consent of an affected party resulted in further disclosure of that transcript.¹ The appellant advised the mediator that he would like to pursue the appeal at adjudication on the basis that the audio recording of his statement to police should exist. Accordingly, the file moved to the adjudication stage, where an adjudicator may conduct a written inquiry.

[5] As the adjudicator of this appeal, I began my inquiry under the *Act* by sending out a Notice of Inquiry, setting out the facts and issues on appeal, first to the ministry, then to the appellant. The ministry provided representations in response, which I shared with the appellant, on consent. The appellant then provided representations in response.

[6] For the reasons that follow, I find that the ministry provided insufficient evidence regarding the OPP's retention policies and retrieval efforts, if any, in relation to the record at issue, and I will order a further search.

DISCUSSION:

[7] The only one issue to decide in this appeal is whether the ministry conducted a reasonable search for an audio recording of a statement that the appellant provided to the OPP (the record at issue), as required by section 24 of the *Act*.² Since I am not satisfied that the search was reasonable in the circumstances, as explained below, I will

¹ Other details were communicated between the parties, which are not relevant to the issue to be decided in this order.

² Orders P-85, P-221 and PO-1954-I.

order a further search.

The appellant's position

[8] An appellant must provide a reasonable basis for concluding that an additional responsive record exists.³

[9] Here, the ministry disclosed a transcript of an audio statement, and the appellant submits that the audio record he seeks should exist because a transcript was made of it. He states that he does not know why it would be destroyed, noting that it clearly existed at some point in the past.

The ministry's position

[10] 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. The ministry submits that it conducted a reasonable search. As I will explain below, I agree with that position for most aspects of its search, but in a case involving a record that is believed to be deleted, there is insufficient evidence before me about retention policies and/or recovery efforts, if any.

[11] 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

[12] In this case, the appellant did not object to the experience level of the employee involved in the search, and I find that it was reasonable for the former (acting) Freedom of Information Coordinator (FOIC) for West Region of the OPP to conduct the search for responsive records. As that employee is no longer with the OPP, the ministry provided an affidavit from the current FOIC, who has held her position for about five years. I accept that she is knowledgeable about the OPP's record holdings and the requirements of the *Act*. The current FOIC attested that the employee who conducted the search used the OPP's records database (Niche RMS) and searched for responsive records by the occurrence number of the incident. She attests that the database and search criteria used to conduct the search was in accordance with the OPP's regular practice for searches under the *Act*. I find that a search in Niche RMS by the occurrence number was reasonable in the circumstances.

[13] In her affidavit, the current FOIC also attests that all responsive records were provided to the Freedom of Information analyst assigned to this appeal at the time of

³ Order MO-2246.

⁴ Orders M-909, PO-2469 and PO-2592.

the search, and that the audio record of the police statement was not identified as one of the responsive records.

[14] Furthermore, the current FOIC attests that the records that she has reviewed indicate that the audio record of the police statement was accidentally destroyed by a member of the Professional Standards Bureau (PSB) who had requested the record from the detachment in order to conduct his investigation. She explains that after the PSB investigator conducted his investigation, sent an email that he destroyed the record, not realizing at the time that it was the only copy. I find that this is a reasonable, though unfortunate, explanation for the ministry's belief that the record at issue was deleted.

[15] However, in light of the fact that the ministry believes the record no longer exists, it was incumbent on the ministry to provide further evidence about retention and/or recovery issues than it did. In the Notice of Inquiry I sent the ministry at the outset of the inquiry, I asked the ministry a series of questions to consider, including:

In particular:

. . . .

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules. **Please include information about efforts, if any, to retrieve any records that may have been deleted.** [Emphasis in the original.]

[16] In my view, the ministry did not sufficiently provide these requested details. As mentioned, it did explain the background about how the record came to be deleted. Its representations state that it does "not believe that a copy of the record still exists, and [its] search supports this conclusion." However, I find that the search results from the database do not explain what, if anything, was done to retrieve the deleted record, or if that was possible in light of any retention policies or procedures that the OPP may have. The current FOIC attested that "[g]iven that the record seems to have been destroyed some time ago, [she does] not believe it can be retrieved," and she stated that they spoke to the relevant PSB investigator, and learned that the record was destroyed. However, I find that that evidence does not sufficiently enable me to understand the OPP's maintenance policies and practices, such as retention schedules, or what efforts, if any, were made to retrieve the deleted record from within any OPP back-up area that may exist. This type of evidence was requested in the Notice of Inquiry, as set out above, but was not sufficiently provided. As noted in the Notice of

Inquiry, 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

[17] For these reasons, I do not uphold the ministry's search as reasonable and will order it to provide further details of the record's deletion (including the applicable retention policy) and the ministry's attempts to recover the record.

ORDER:

1. I do not uphold the ministry's search for the deleted record at issue as reasonable. Accordingly, I order the ministry to provide this office and the appellant with an affidavit specifying further details of the record's deletion (including the applicable retention policy) and the ministry's attempts to recover the record, within 30 days of this order.
2. The timeline noted in provision 1 may be extended if the ministry is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by _____
Marian Sami
Adjudicator

July 29, 2020 _____

⁵ Order MO-2185.