Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4239

Appeal PA19-00441

Ministry of the Solicitor General

February 28, 2022

Summary: This order deals with a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry) for access to records relating to the appellant's incarceration at a detention centre during a two-month period in 2007. The ministry granted partial access to responsive records. The ministry withheld some portions of the records on the basis that they were not responsive to the request, and to others on the basis of the exemptions in section 49(a) (discretion to refuse requester's own information), 49(b) (personal privacy), and 49(e) (confidential correctional record). The ministry disclosed all of the appellant's personal information in the records to him. In this order, the adjudicator finds that the ministry properly interpreted the scope of the appellant's request and that the partially disclosed records are responsive to it. She upholds the ministry's search for responsive records 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, sections 2(1) (definition of "personal information") and 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 certain records relating to the requester's incarceration. The request was as follows:

> In between September 1, 2007 and October 31, 2007, I was incarcerated at [a specified detention centre] (the detention centre) where gang issues

> arising from the crisis precipitating events for 2007 led to a physical altercation with another inmate over words said about the then recent targeted [assault on a specified individual].
>
> I am requesting all statements and observations reports pertaining to this incident and any other statements or observations reports for this period of incarceration.

[2] The ministry conducted a search and located responsive records. The ministry issued a decision granting partial access to the responsive records. The ministry located observation reports and statements in the appellant's institutional file to which it granted partial access. The ministry withheld only the name and inmate number of another inmate, other identifying information about an individual, and administrative information about the forms printed along the bottom of the records.

[3] The ministry denied access to portions of the records on the basis of the discretionary exemption in section 49(a) (discretion to refuse requester's own information), read with sections 14(1) (facilitate commission of an unlawful act) and 14(2)(d) (correctional record), and the discretionary exemption in section 49(b) (personal privacy). The ministry also cited the mandatory personal privacy exemption at section 21(1), with reference to the factor in section 21(2)(f) (highly sensitive). Finally, the ministry claimed the exemption at section 49(e) (confidential correctional record) and also that a portion of the record was non-responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore the possibility of resolution. During mediation, the appellant did not challenge the exemptions claimed by the ministry to withhold portions of the responsive records. Rather, he maintained that additional responsive records exist that the ministry did not locate or disclose.

[5] When mediation no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The sole outstanding issue for adjudication was identified as the reasonableness of the ministry's search for responsive records. I decided to conduct an inquiry. In the meantime, the IPC received correspondence from the appellant questioning whether the ministry had searched for all types of records identified in the request. Because the appellant had also raised this concern during mediation, I added the scope of the appellant's request as an issue to this appeal.

[6] I began my inquiry by inviting the ministry to submit representations on the issues of the scope of the appellant's request and the reasonableness of its search for responsive records. The ministry submitted representations. I shared the ministry's representations with the appellant, who then made his own representations in response to a Notice of Inquiry on the same facts and issues put before the ministry.

[7] In reviewing the appellant's representations and the correspondence he had sent to the IPC after the completion of mediation regarding the issues in this appeal, it came to my attention that, after the mediator's report was issued, the appellant had tried to contact the IPC to correct what he says were errors in the mediator's report. The appellant wrote in correspondence to the IPC that he was not only appealing the reasonableness of the ministry's search for responsive records, but also the exemptions the ministry claimed in its decision. In his representations (in response to the Notice of Inquiry), the appellant made submissions about those exemptions, although they were not identified in the Notice of Inquiry as issues in the appeal.

[8] Because of what appear to be mail delays associated with the appellant's incarceration, compounded by the current pandemic and intervening December holidays, and because the appellant's notice of appeal had argued against the exemptions claimed by the ministry, I decided to seek the ministry's representations on the exemptions. I sent a Supplementary Notice of Inquiry on the exemptions the ministry claimed to withhold personal information from the records. The ministry provided representations which were shared with the appellant, who made representations in response.

[9] In sum, the parties were given the opportunity to submit representations on the scope of the request, the reasonableness of the ministry's search for responsive records and the exemptions claimed by the ministry in its decision to deny access to personal information of individuals other than the appellant. The parties' representations were shared between them in accordance with IPC's *Practice Direction 7* on the sharing of representations.[1]

[10] In this order, I find that the only personal information withheld from the records is the personal information of individuals other than the appellant. Because all of the appellant's personal information has been disclosed, and because the appellant does not seek access to the personal information of other individuals, I need not consider the exemptions claimed by the ministry to withhold that information. I also find that the appellant's request was clear and unambiguous and that the records at issue are responsive to the request. I uphold the ministry's search for responsive records as reasonable and I dismiss this appeal.

RECORDS:

[11] The records are a two-page Accident/Injury Report (record 1) and a two-page Health Care Report (record 2). At issue is the information withheld from each by the

[1] Because the appellant submits that he does not seek access to personal information that is not his own, the ministry did not make representations on the section 49(a), (b) or (e) exemptions, submitting them to be no longer in issue. In response to the ministry's representations in this regard, the appellant reiterated that he is not seeking access to the other individuals' personal information and that it could be "de-identified and/or redacted" from the records.

ministry.

ISSUES:

A. What is the scope of the request? Is some information in the records not responsive to the request?

B. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?

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

DISCUSSION:

Issue A: What is the scope of the request? Is some information in the records not responsive to the request?

[12] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. These include the requirement that a requester provide sufficient detail in the request to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.[2] Where the requester does not sufficiently describe the record to which access is sought, section 24 requires the institution to inform the requester of the defect, and to offer assistance in reformulating the request.[3]

[13] In order to best serve the purposes of the *Act*, institutions should interpret requests liberally. Generally, if there is ambiguity in the request, it should be resolved in the requester's favour.[4]

[14] Finally, to be considered responsive to a request, the information at issue must "reasonably relate" to the request.[5]

The appellant's representations

[15] The appellant says that records responsive to his request should include "security files, observation reports, security concerns, range changes and any other files that pertain to [him] during the timeframe of incarceration." He also submits that he thought his request would have included the "administrative information deemed non-responsive."

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[2] Section 24(1)(b) of the *Act*.
[3] Section 24(2) of the *Act*.
[4] Orders P-134 and P-880.
[5] Orders P-880 and PO-2661.

[16] The appellant submits that his request was clear in scope and "meets both the relevancy and proportionality requirements for the further disclosure of records." He also says that the ministry failed to outline the limits of the scope of his request, which he says would have allowed him to make an informed decision about whether to provide any additional direction to the ministry about the records he sought.

[17] The appellant's representations include submissions about the reasons for the request. He says that the information to which he seeks access relates to "prevailing issues leading up to a strategic confession to police," his appeal of his conviction, and violence against his family. I have read the appellant's entire representations, but I have only summarized those portions that are relevant to the issues in this appeal under the *Act*.

The ministry's representations

[18] The ministry says that the appellant's description of what he believes are responsive records is an attempt to substantively amend his request to one entirely different from what it was initially.

[19] The ministry submits that the request was clearly for two types of records – statements and observation reports. The ministry says that observation reports and statements have commonly understood meanings in the context of the provincial correctional system: an observation report is a report filed by correctional officers at the end of the day for their shift, while a statement is an account of an event given by an individual, possibly an inmate. The ministry explains that statements might be included in an observation report.

[20] The ministry says that it considered this to be a very specific request for specific records without any ambiguity. The ministry submits that it was able to respond to the request literally because it was specific and detailed. The ministry says that the appellant clearly delineated its scope, so that there was no need for the ministry to outline the limits of the request.

Analysis and findings

[21] The appellant's request is for access to "all statements and observation reports" pertaining to an altercation with another inmate during his incarceration at the detention centre from September 1 to October 31, 2007, and to any other "statements or observation reports" for this same period.

[22] I find that the request is unambiguous and clear on its face, and that it seeks access to two specific types of records (statements and observation reports) for a clearly defined period of time, and gives details about a specific incident that occurred during that time for which statements and observation reports are sought. I agree with the ministry that the request is specific and detailed, and I am satisfied that there was no need for the ministry to have sought to outline the limits of the scope of the request

to the appellant, or to solicit clarification from him.

[23] I have examined the records and find that they contain the appellant's statements and corrections staff's observations. Both records contain statements and observations about whether any injuries were sustained. Record 1 contains the appellant's statement about the altercation and its alleged cause. Record 2 contains staff observations and the appellant's comments about whether or not he felt treatment was required. Both records fall within the period of time identified in the request.

[24] The appellant has provided me with no basis on which I could reasonably conclude that the request seeks access to the broader category of "all records" associated with his incarceration, or that it is for the types of records (security files, security concerns, range changes and "any other" files) that he submits ought to have been interpreted to be included in the request. I agree with the ministry's submission that the appellant's representations appear to substantively change the scope of the request by expanding the types of records sought. I find that the records located by the ministry which are at issue in this appeal are responsive to the request.

Administrative severances are non-responsive

[25] I have also examined the portions of the records that the ministry withheld on the basis that they are not responsive to the request. I find that they are not reasonably related to the request. The portions the ministry withheld as non-responsive appear at the bottom of each page of both records. They consist of a pre-printed form number and a pre-printed general caution in English and French about the use of each record. As this pre-printed information is not related to the appellant's request for statements and observation reports pertaining to the specific incident during his incarceration, I find that it is not responsive to the request.

[26] For these reasons, I find that the records at issue are responsive to the request. However, I find that the administrative severances are not responsive and have been properly withheld from the records.

Issue B: Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?

[27] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the records contain "personal information," and if so, to whom this personal information relates. Previous IPC orders have established that where a record contains both the personal information of the requester and another individual, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b).[6] Some exemptions, including the personal privacy exemption, are mandatory under Part II (section 21(1)), but discretionary under Part III (section 49(b)), so that in the latter case, an institution may disclose

[6] Order M-352.

information under Part III that it would not disclose if Part II is applied.[7]

[28] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.

[29] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual.[8]

[30] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[9]

[31] Section 2(1) of the *Act* gives a list of examples of personal information. Those relevant to this appeal are the following:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
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> …
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …

[7] Orders MO-1757-I and MO-2237.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> (h) the individual's name if 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.

[32] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[10]

[33] If the records contain the requester's own personal information, their access rights are greater than if they do not.[11] Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.[12]

Representations

The ministry's representations

[34] The ministry submits that the records contain personal information "of two third-party individuals, which would likely identify the individuals." The ministry says that in one instance, the records contain the name of an individual and identifies them in relation to a specific incident, while in the second instance, another individual is referenced sufficiently to render them potentially identifiable in connection with a suspected offence.[13]

[35] The ministry submits that the records also contain the names and other identifying information of ministry staff, but that this information was disclosed because it is about them acting in a professional capacity and therefore is not their personal information.

The appellant's representations

[36] The appellant submits that his statement is his personal information because it contains no information from any other individuals and contains information he provided in confidence. He submits that he does not seek access to the name of "the other individual involved in the incident" or any portion of his statement that identifies any other party involved in the incident. He states that:

- he "is agreeable to having all personal information from any other party de-identified and/or redacted to exclude the names of any and all such parties"
- he is "not seeking any portions of his statement that identifies any other party" involved in the incident

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[10] Order 11.
[11] Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[12] See section 14(1) and 38(b).
[13] As the victim of the offence described in the request.

- he is "only interested in procuring the incident details that were provided by the appellant at that time."

[37] The appellant does not dispute that statements made by ministry staff regarding the alleged cause of the incident are not personal information if they were taken while those individuals were working.[14]

Analysis and findings

[38] I have reviewed the records and find that they contain the appellant's personal information and the personal information of other identifiable individuals. The records contain the appellant's name, date of birth, client identification number, a brief description of his involvement in an altercation with another inmate, as well as the appellant's statement about the altercation. Record 1 also contains another inmate's name and identification number. Record 2 contains information about the appellant's prior medication and his treatment following the altercation.

[39] Collectively, I find that this is information that falls within the definition of "personal information" in paragraphs (a), (b), (c), (e) and (h) of section 2(1) of the *Act*.

[40] The appellant explicitly states that he does not seek access to personal or identifying information of other individuals in the records, that they can be "de-identified" and their information redacted, and that he only seeks access to the incident details he provided at the time. I have examined the records and I am satisfied that the ministry disclosed all of the appellant's personal information that is contained in them to him, including his statement. Apart from the administrative information that I have already found to be non-responsive to the request, the only other information withheld form record 1 is the personal information of other individuals that the appellant submits can be redacted. This includes the name and identification number of another inmate, and the identity of another individual that I find would identify them in connection with another offence. The ministry otherwise disclosed the entire record, including the identity and observations of correctional staff.

[41] Except for the non-responsive administrative information pre-printed on it, record 2 was otherwise fully disclosed to the appellant.

[42] In these circumstances, where the appellant has received all of his personal information contained in the records and does not seek access to other individuals' personal information that was redacted, I find that access to this personal information is no longer at issue and I do not need to make any determinations on whether that information is exempt under section 49(b) or any other basis claimed by the ministry.

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[14] This information was disclosed to the appellant.

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

[43] If a requester claims that additional records exist beyond those found by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[15] If the IPC is satisfied the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[44] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they must still provide a reasonable basis for concluding that such records exist.[16]

[45] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[17] that is, records that are "reasonably related" to the request.[18]

[46] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[19] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[20]

Representations

The appellant's representations

[47] The appellant submits that the ministry did not conduct a reasonable search because it did not search for "security files, observation reports, security concerns, range changes and any other files that pertain to" the appellant during his incarceration at the detention centre. As noted above, he also submits that a search for responsive records should include "all records in relation to the [a]ppellant's incarceration at [the detention centre] at the times specified."

[48] The appellant says that additional statements should exist, namely a statement that he says he made at the time of the incident.[21] The appellant also submits that the ministry is resisting disclosing a witness statement and is in a conflict of interest

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[15] Orders P-85, P-221 and PO-1954-I.
[16] Order MO-2246.
[17] Orders P-624 and PO-2559.
[18] Order PO-2554.
[19] Orders M-909, PO-2469 and PO-2592.
[20] Order MO-2185.
[21] I have already found, under Issue B, above, that the appellant's statement contained in record 1 was disclosed to him.

because the information to which the appellant says he seeks access "further points toward a miscarriage-of-justice in the matter for which the Appellant is currently incarcerated." As noted above, the appellant's representations include discussion about legal issues associated with his incarceration. As also noted earlier, although I have reviewed the appellant's entire representations, including his correspondence to the IPC, I have only summarized those portions that address the issues before me in this appeal under the *Act*.

The ministry's representations

[49] The ministry submits that its search was reasonable. The ministry provided an affidavit sworn by a senior records clerk (clerk) with 18 years' experience. She explains in her affidavit that the detention centre where she works is responsible for responding to requests for the detention centre where the appellant was incarcerated after the latter closed.

[50] According to the clerk's affidavit, the appellant's request was clear enough that she did not require clarification from him. She says that records about an incarceration, and especially observation reports, are stored in an inmate's institutional file. The appellant's file was retrieved from the archives and responsive records were located in the archived file. The ministry says that, since the kinds of records requested are contained in an inmate's institutional file, the appellant's institutional file was searched and responsive records were located in it.

[51] The ministry submits that the appellant is not alleging that additional observation reports and statements should exist, but that additional records should exist that are not responsive to the appellant's request. With respect to the appellant's submission that his request includes all files pertaining to him, including security files (which I have found above to be outside the scope of the request) the ministry submits that it did not search for such records because they are not responsive to the request.

Analysis and findings

[52] I am satisfied that the ministry conducted a reasonable search for records responsive to the appellant's request, and, in particular, for statements and observation reports relating to the appellant during his incarceration at the detention centre and to the specific incident identified in the request.

[53] The ministry's representations demonstrate that an experienced employee, knowledgeable in the records related to the subject matter of the appellant's request, made reasonable efforts to locate responsive records. The ministry explained that the types of records sought by the appellant are typically stored in an inmate's incarceration file, which the ministry retrieved and searched.

[54] 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 such records exist. Based on the information before me, the appellant does not argue that the records are not responsive. Rather, he submits that the search should have included different and broader types of records that I have already found were outside the scope of his request.

[55] The appellant also argues that the responsive records should include his statement about the incident described in his request and that his statement was not disclosed to him. Based on my review of the records, I note that record 1 contains the appellant's statement about the incident and its alleged cause under the heading "Statement/Déclaration" (and, as I have noted above, the appellant's statement was disclosed to him). The appellant's statement appears in the first-person and is separate from the observations of staff who witnessed the altercation and who provide their own description of the incident (which, except for the other inmate's name and identification number, has also been disclosed to the appellant). The appellant has otherwise provided insufficient information about any other witness statements he believes should exist but were not disclosed in response to this request to support a finding that his belief in their existence is reasonable.

[56] Finally, having found above that the appellant's request was not for "all records" about him (including security-related records or records about range changes), I find that it was not unreasonable for the ministry not to have searched for records that were not included in the request.

[57] In these circumstances, I find that the appellant has not provided a reasonable basis for me to conclude that additional records exist but have not been located by the ministry. I therefore uphold the ministry's search for responsive records as reasonable.

Conclusion

[58] I find that the ministry properly interpreted the scope of the appellant's request and granted partial access to records responsive to it. I find that pre-printed administrative information on the records is not related to the appellant's request for access to statements and observation reports and I uphold the ministry's decision to withhold this information as non-responsive to the request. I also uphold the ministry's search for responsive records as reasonable.

[59] For the reasons set out above, I dismiss this appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: February 28, 2022

Jessica Kowalski
Adjudicator