Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4311-I

Appeal PA19-00413

McMaster University

October 21, 2022

Summary: McMaster University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to incidents at the David Braley Athletic Centre over a period of 11 years. The university identified incident reports and incident summaries and decided to provide the appellant partial disclosure to the incident reports withholding portions pursuant to the mandatory personal privacy exemption in section 21(1) of the *Act*. The university provided a fee estimate for responding to the request. The appellant appealed the fee estimate and, during mediation of that appeal, narrowed their request. The appellant agreed to pay the fee for the university to process the narrowed request and the appeal file was closed. Upon receipt of the responsive records, the appellant claimed that additional records should exist and brought a new appeal. In this order, the adjudicator finds that the additional records identified by the appellant are responsive to the appellant's narrowed request and that the university did not conduct a reasonable search for responsive records. The adjudicator orders the university 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, section 24.

Orders Considered: Orders P-134 and P-880.

OVERVIEW:

[1] McMaster University (the university) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to reported

incidents at its athletic centre.

[2] The request was submitted in August 2018 and sought access to the following:

1. All information about injuries and any associated incidents that transpired at David Braley Athletic Centre since its opening in 2007. In addition, all information on [the university's] response to the incidents, including steps taken to prevent further incidents.

2. Information on the number of times the David Braley Athletic Centre's indoor track has been inspected since its opening in 2007. If, during any inspection it was concluded that the indoor track did not meet the requirement and recommendations in the International Association of Athletics Federation's "Track and Field Manual", what measures were taken.

Time period: January 1, 2007 to July 31, 2018.

[3] Regarding the first part of the request, the university issued an interim access decision indicating that partial access would be granted to responsive records with portions withheld pursuant to the mandatory personal privacy exemption in section 21(1) of the *Act*. The university indicated that responsive records had been identified as follows:

i. Incident reports for incidents occurring at the athletic centre for the past 7 years, noting that incident reports are not, as a matter of standard practice, retained beyond 7 years; and

ii. Copies of incident report summaries for the stipulated time period, which have been retained beyond 7 years.

[4] The university also provided fee estimates for the work to be done to respond to the request. The requester, now the appellant, appealed the fee estimate to the Information and Privacy Commissioner (IPC) and appeal file PA18-00702 was opened.

[5] During the mediation stage of the appeal, the university disclosed the incident summaries to the appellant.

[6] The appellant narrowed the request for incident reports for six specified months: November 2010, December 2010, January 2011, December 2011, January 2012 and February 2012.

[7] The university decided to provide partial access to the records responsive to the narrowed request, withholding portions of the records pursuant to the mandatory personal privacy exemption in section 21(1) of the *Act* and issued a revised fee estimate, which the appellant agreed to pay to pursue access to the responsive records. Appeal file PA18-00702 was then closed.

[8] The university disclosed the incident reports that it identified as responsive to the narrowed request. Upon receipt of the disclosed records, the appellant appealed the university's decision to the IPC and appeal file PA19-00413 was opened to resolve the issues on appeal. A mediator was appointed to explore resolution and the mediator spoke to the appellant and the university.

[9] The appellant confirmed that they are not pursuing access to the portions of the disclosed records withheld under the personal privacy exemption in section 21(1) of the *Act*. The application of the mandatory personal privacy exemption to the disclosed records is therefore not at issue in this appeal. The university's decision in relation to the second part of the appellant's request is also not within the scope of this appeal.

[10] The appellant informed the mediator that they believe that records exist in addition to those disclosed by the university. Specifically, the appellant believes that the following three records are missing from the university's disclosure:

1. Incident report for a specified incident on December 10, 2011.

2. First aid report [specified number]

3. Assault report [specified number]

[11] The university advised the mediator that it had not been able to locate the first item and it takes the position that no such record exists. The university further advised that the other two items (the first aid report and assault report) are outside the scope of the narrowed request. The scope of the request is therefore at issue in this appeal.

[12] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and invited and received representations from both parties. The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure* (the *Code*) and *Practice Direction 7*.

[13] In this Order, I find that the records identified by the appellant are responsive to the narrowed request and that the university did not conduct a reasonable search. Accordingly, I order the university to conduct a further search for responsive records.

ISSUES:

A. What is the scope of the narrowed request for records? Which records are responsive to the request?

B. Did the university conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the narrowed request for records? Which records are responsive to the request?

[14] For the reasons set out below, I find that the scope of the appellant's narrowed request includes the three incident reports identified by the appellant in this appeal. Accordingly, these additional records are responsive to the appellant's request.

[15] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) Make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) Provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] To be considered responsive to the request, records must "reasonably relate" to the request.[1] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.[2]

[17] The university's position is that the appellant's narrowed request was clear and required no clarification. The university submits that the narrowed request is for "those specific incident reports contained in six specific monthly incident report summaries" that were provided to the appellant during mediation of appeal PA18-00702.

[18] The university states that the first aid report and the assault report identified by the appellant have reference numbers created from dates in December 2011 and its position is that these reports do not appear on the incident summaries for that month. The university submits that as all three reports identified by the appellant are not listed on the December 2011 incident summary, they are outside the scope of the appellant's

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[1] Orders P-880 and PO-2661.
[2] Orders P-134 and P-880.

narrowed request.

[19] It is the university's position that the incident summaries disclosed to the appellant each contained "exhaustive" lists of specific incident reports for the six specified months requested by the appellant.

[20] The university submits that incidents included in the summaries are classified into categories that include "first aid" and "health care" reports. The university states that it is unclear whether the first aid report identified by the appellant is an incident report classified as a "first aid" report. The university submits that reports related to incidents of assault on campus are prepared by the university's campus security services and are distinct from the "incident reports" to which the summaries relate.

[21] The university submits that the December 2011 incident summary lists six incident reports in total (three are classified as "first aid", two as "health care" and one as simply "incident"). The university's position is that for December 2011 these are the only records that are within the scope of the appellant's narrowed request.

[22] The university submits that having agreed to a clear and unambiguous scope of the narrowed request to the incident reports listed on the incident summaries, the appellant is "not at liberty to further modify the scope of the narrowed request, which followed a mediated settlement."

[23] The appellant's position is that during the mediation in appeal PA18-00702, they only narrowed the time frame of their request to the six specified months (November 2010, December 2010, January 2011, December 2011, January 2012 and February 2012). The appellant submits that the original request covered a time period from January 2007 to the date of the request (July 2018). The appellant does not agree that the scope of their request was narrowed to only those incidents appearing on the summaries for the specified six months.

Analysis and finding

[24] I have reviewed the correspondence in which the appellant narrowed the scope of their request during the mediation stage of appeal PA18-00702. Based on my review of the narrowed request, which states that the appellant is seeking "incident reports for 6 selected months", I find that the appellant narrowed the time frame of the request only.

[25] Previous orders of the IPC have held that to be consistent with the spirit of the freedom of information legislation, ambiguities regarding the scope of a request should be resolved in the requester's favour. In Order P-880, Adjudicator Anita Fineberg adopted this approach and stated:

> … the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a

> request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[26] Similarly, in the appeal giving rise to Order P-134, former Commissioner Sidney B. Linden resolved the ambiguity between the parties with reference to the spirit of the *Act*, stating:

> … the appellant and the institution had different interpretations as to what [is] meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[27] I agree with this approach and have adopted it in this appeal. The university submits that there is no ambiguity regarding the scope of the narrowed request and that there was therefore no need for it to seek clarification. I disagree with the university's submission and find that the ambiguity in this case arises from the parties' different interpretations of the appellant's narrowing of the request to the incident reports for six specified months. I accept the appellant's submission that they sought to narrow their request with reference to the time period and not to the incidents listed in the monthly summaries. As no clarification was deemed necessary by the university before processing the narrowed request, the ambiguity did not come to light until the records identified by the university as responsive were disclosed to the appellant.

[28] To resolve the ambiguity in a manner consistent with the spirit of the *Act*, a liberal interpretation of the narrowed request means including within its scope the incident reports identified by the appellant in this appeal. These are reports relating to incidents that the appellant submits they were involved in and that occurred at the university's athletic centre in the month of December 2011. I find that these reports are therefore *reasonably related* to the original request.

[29] Accordingly, I find that the three reports identified by the appellant are responsive to the original request and the narrowed request, which included December 2011 as one of six specified months.

[30] I note that the incident summaries were introduced by the university in its response to the initial request. In my view, the university's interpretation of the scope

of the narrowed request with reference to the incident summaries reflects the university's own reformulation of the request and is too literal.

[31] I have reviewed the incident summaries that the university disclosed to the appellant during the mediation of appeal PA18-00702 and I note the classification of the reports, including "first aid" and "health care" categories, referred to by the university. It is the university's position that incidents of assault on the university campus are the subject of reporting by the university's security services and are distinct from incident reports. The university does not make the point directly but I understand this submission to infer that incident reports are distinct from security reports and the latter are not responsive to the appellant's request.

[32] From my review of the incident summaries for the time period of the appellant's initial request, I note that the summaries include references to incident reports and security reports. While these references do not appear to be part of the "classification" of the reports, the university's response to the original request clearly included disclosure of incident report summaries that are also described as "security reports". In my view, a record that relates to the reporting of an incident of assault that occurred at the university's athletic centre in one of the six specified months is responsive to the appellant's narrowed request. The fact that the report is prepared by the university's security service does not remove the report from the scope of the request, whether as originally stated or as narrowed by the appellant.

[33] I find that the university has unilaterally applied its interpretation of the narrowed request to limit the scope of its response, which is inconsistent with the spirit of the *Act.*

[34] As I have found that the three reports identified by the appellant are responsive to the narrowed request, I will now consider whether the university conducted a reasonable search for responsive records.

Issue B: Did the university conduct a reasonable search for records?

[35] When a requester claims that additional records exist beyond those located by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24 of the *Act*.[3] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct a further search for records.

[36] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for

[3] Orders P-85, P-221 and PO-1954-I.

concluding that such records exist.[4]

[37] 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;[5] that is, records that are "reasonably related" to the request.[6]

[38] The university's position is that the six incident reports listed in the incident summary for the month of December 2011 were located and disclosed to the appellant. The university submits that its "good faith efforts to search for non-responsive records during mediation of this appeal are not relevant" to the issues that I have to determine.

[39] The information before me regarding the university's searches for "non-responsive records" is that in relation to the first incident report identified by the appellant for a specified incident on December 10, 2011, the university states that it arranged for external counsel to search through their historic records to locate such a document. The university submits that counsel conducted a search, did not identify any such incident report and the university therefore concludes that this record does not exist.

[40] The university submits that a physical search for the incident report has not been possible due to COVID-19 restrictions. However, the university states that it is under no obligation to perform any further search in relation to the appellant's request.

[41] In their representations, the appellant refers to extracts from the three incident reports that they believe exist in addition to those disclosed by the university. The appellant states that these extracts came to their knowledge in the course of related litigation.

[42] The appellant submits that the university has not explained why physical searches for the reports have not been conducted since the university campus re-opened in September 2021 subsequent to its closure related to COVID-19.

Analysis and finding

[43] Based on the totality of the university's submissions, I am not satisfied that it has demonstrated that it conducted a reasonable search for responsive records to the appellant's narrowed request. As noted above, the university's literal interpretation of the narrowed scope of the appellant's request has led it to limit its response to the request. The university's search appears to have been limited to locating the incident reports listed in the incident summaries for the six months specified by the appellant and requesting external counsel to search for one of the incident reports identified by

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[4] Order MO-2246.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.

the appellant.

[44] There is no information before me about whether an experienced employee knowledgeable in the subject matter of the appellant's request conducted searches for responsive records. The university has not described how incident summaries are collated or explained how incidents occurring at its athletic centre are stored or archived or the types of files that would need to be searched. The university has provided no explanation for its decision to request external counsel to conduct a search amongst counsel's historic records for the incident report.

[45] I am satisfied that the appellant has provided a reasonable basis for believing that additional responsive records ought to exist and have not been identified by the university through its searches conducted in response to the request so far.

[46] Accordingly, I find that the university did not conduct a reasonable search for records that reasonably relate to the appellant's narrowed search and I will order it to conduct a further search. The additional reports identified by the appellant and the focus of this appeal has been on incident reports related to incidents occurring during the month of December 2011. I will therefore order the university to conduct an additional search for incident reports reasonably relating to the first part of the appellant's request for the month of December 2011.

ORDER:

1. I order the university to conduct a further search for any incident reports for incidents occurring at the David Braley Athletic Centre in the month of December 2011.

2. I order the university to provide me with an affidavit sworn by the individual(s) who conducts the search within 21 days of this Interim Order. The affidavit should include information relating to the following:

    i. The names and positions of the individual who conducted the searches and their knowledge and understanding of the subject matter and the scope of the narrowed request described in provision 1;

    ii. Information about the types of files searched, the nature and location of the search and steps taken in conducting the search;

    iii. The results of the search;

    iv. Whether it is possible that responsive records existed but no longer exist. If so, the university must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and

v. If, as a result of the further search, it appears that no further responsive records exist, a reasonable explanation for why further responsive records do not exist.

3. If the university locates additional records as a result of its further search, it must provide a decision letter to the appellant regarding access to those records, in accordance with the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements for responding to the request.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

Original Signed by: October 21, 2022

Katherine Ball
Adjudicator