

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER PO-4447-I

Appeal PA22-00151

Infrastructure Ontario

October 12, 2023

**Summary:** Infrastructure Ontario (IO) received a request under the *Act* for environmental assessment records regarding the proposed Kemptville jail. IO conducted a search and advised the appellant that no responsive records exist.

In this interim order, the adjudicator orders IO to conduct another search for responsive records.

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

### OVERVIEW:

[1] Infrastructure Ontario (IO) is a Crown corporation that provides a wide range of services to support the Province of Ontario's initiatives to modernize and maximize the value of public infrastructure and realty. IO partners with public sector agencies, including provincial ministries, Crown corporations, municipalities, and not-for-profit organizations to renew infrastructure across Ontario.

[2] IO is working with the Ministry of the Solicitor General to deliver a new jail in Eastern Ontario.

[3] This order concerns the reasonableness of a search conducted by IO for records about an environmental assessment for this jail.

[4] This appeal arises from a request received by IO under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for:

... all records held by Infrastructure Ontario related to the "Class Environmental Assessment" that have been completed at the proposed site for the Eastern Ontario Correction Complex in Kemptville/North Grenville [the Kemptville jail] from 2020-03-01 to 2022-01-31.

Of particular interest is access to a report generated by an ecological/biodiversity survey of the proposed site. Was the site investigated to determine the harm caused to the existing natural environment if the facility was built upon it?

I am requesting access to general records and written communications (non-personal information) for clarification. An interim report in electronic format is acceptable, providing the final report would be hard copy.

[5] After conducting a search for responsive records, IO issued a decision to the requester advising that no responsive records were located.

[6] The requester, now the appellant, appealed IO's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[7] During the course of mediation, the appellant advised the mediator that he believes there should exist records responsive to the request. The appellant explained that, during a public engagement meeting that was held in November 2021, IO provided the community stakeholders with a project timeline that included an "Environmental Assessment (EA) (6 months)."

[8] The appellant advised the mediator that he believes that enough time had elapsed that an environmental assessment should have been completed and that there should exist the assessment itself, as well as records regarding any work done on the assessment. The appellant advised he was also requesting any environmental surveys or biologists reports on the biodiversity of the site.

[9] Mediation did not resolve this appeal and was moved to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and sought the parties' representations.

[10] In this interim order, I find that IO has not conducted a reasonable search for responsive records and order it to conduct another search.

## **DISCUSSION:**

[11] The sole issue in this appeal is whether IO conducted a reasonable search for responsive records.

[12] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.<sup>1</sup> 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 another search for records.

[13] 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 concluding that such records exist.<sup>2</sup>

[14] 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;<sup>3</sup> that is, records that are "reasonably related" to the request.<sup>4</sup>

[15] 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.<sup>5</sup> 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.<sup>6</sup>

## **Representations**

[16] IO's position is that it has conducted a reasonable search for responsive records. It states that it had sufficient information to undertake a search of the records at its custody and control. IO further submits that it did not in any way limit the scope of the search and completed it diligently in accordance with the requirements of *FIPPA*.

[17] IO states that:

Upon receipt of a request, the *FIPPA* Specialist reaches out to relevant departments that have relevant knowledge in a particular matter, requesting to run a full search of all records, including archives. Each record is then scanned to see whether it fits the criteria of a request and whether any *FIPPA* exceptions or exclusions apply to it. Upon completion

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Order MO-2246.

<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

<sup>6</sup> Order MO-2185.

of a search and analysis, a requester is advised of an IO's access decision accordingly.

IO submits that the request of the appellant was handled diligently and in accordance with the requirement of *FIPPA*. IO conducted a search and did not find any records in its custody and control that would meet the description in the freedom of information request submitted by the appellant.

[18] Accompanying its representations, IO provided an affidavit from its *FIPPA* specialist in which she states that she sent an email to the business unit at IO requesting that it conduct a search to see if IO had any records in response to the access request. The business unit at IO informed her that it located no responsive records after a thorough search of all records that were in IO's custody and control.

[19] In his representations, the appellant specifically asks for disclosure of additional records that he acknowledges are not within the scope of his original request. Because these additional records are outside of the scope of the original request, they are not within the scope of this appeal and I will not address them further.

[20] The only argument of the appellant that relates to the request in this appeal is the following:

I find it difficult to believe that IO, which releases numerous Class Environmental Assessment[s] on a wide variety of projects, cannot release one on the Kemptville jail.

[21] In reply to this submission by the appellant, IO states that the assertion made by the appellant that "IO, which releases numerous Class Environmental Assessment on a wide variety of projects, cannot release one on the Kemptville jail," is beyond the scope of this appeal and is irrelevant to this matter. It states:

As was previously contemplated in IO's final access decision and further explained in IO's representations supported by the affidavit, no records were found that would meet the description provided by the appellant in their request. Thus, IO respectfully submits that the IPC should not consider the irrelevant comment made by the appellant in their representations

## **Findings**

[22] The appellant's request, as more particularly described above, sought IO records related to a Class Environmental Assessment for the proposed site of the Kemptville jail.

[23] The appellant's position is that there should be records related to a Class Environmental Assessment for the Kemptville jail. IO did not search for these records as

its position is that these are not within the scope of the appeal. IO says that the appellant's representations about whether IO releases such an environmental assessment is irrelevant.

[24] I disagree with IO that the appellant's submission is irrelevant to this appeal. It appears to me that these records are the actual records sought by the appellant in his request.

[25] IO was asked in the Notice of Inquiry to provide details of any searches it carried out including: who conducted the search, the places searched, who was contacted in the course of the search, the types of files were searched, and the results of the search.

[26] I have considered IO's search efforts as outlined in its representations and accompanying affidavit. In my view, IO's representations and accompanying affidavit do not provide me with sufficient details to be satisfied that it conducted searches for the actual records sought by the appellant. Although IO indicates that relevant departments were contacted in its search efforts, the accompanying affidavit indicates that only IO's business unit, not other IO departments, conducted a search for responsive records.

[27] Even though IO indicated in its representations that only its business unit conducted the searches for responsive records, I note that it did not indicate what its business unit does and why it is that this unit is the only unit that would have responsive records.

[28] IO also did not indicate who exactly in its business unit conducted the search(es) and how these individuals would have knowledge of the location of any responsive records, what types of record holdings were searched, and why no other units of IO conducted searches for responsive records.

[29] Instead, IO's *FIPPA* specialist merely states that she asked its business unit to search for any responsive records and the business unit did not locate any responsive records. Because IO is of the view that the very records that the appellant seeks are outside the scope of the request, I am unable to find that the searches undertaken would have yielded the records sought.

[30] I find that the appellant has provided a reasonable basis for me to conclude that additional responsive records may exist and that IO has not conducted a reasonable search for responsive records.

[31] I will order IO to conduct another search for responsive records.

**ORDER:**

1. I order IO to conduct a further search for records responsive to the appellant's request.

2. I order IO to issue an access decision to the appellant in accordance with the *Act* regarding any records located in its further searches, treating the date of this interim order as the date of the request for the purpose of the procedural requirements of the *Act*.
3. I order IO to provide me with affidavit evidence describing its search efforts pursuant to this interim order **by November 14, 2023**. The affidavit(s) should include the following information:
  - i. The names and positions of the individual(s) who conducted the searches;
  - ii. Information about the types of records searched, the nature and location of the searches and steps taken in carrying out the searches;
  - iii. The results of the searches; and
  - iv. Details of whether records could have been destroyed, including information about record maintenance policies, practices and retention schedules.
4. IO's affidavit(s) will be shared with the appellant, unless there is an overriding confidentiality concern as set out in *Practice Direction 7*, which is available on the IPC's website. IO should indicate whether it consents to the sharing of its affidavit(s) with the appellant.
5. I remain seized of this appeal to deal with issues arising from this interim order.

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

October 12, 2023