

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4457

Appeal PA21-00161

Ministry of Municipal Affairs and Housing

November 20, 2023

Summary: The appellant sought access to records from the Ministry of Municipal Affairs and Housing (the ministry) related to the Office of the Provincial Land and Development Facilitator. The ministry searched for and disclosed responsive records to the appellant. The appellant maintained that the ministry did not conduct a reasonable search for responsive records.

In this order, the adjudicator upholds the ministry's search for responsive records and dismisses the appeal.

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

OVERVIEW:

[1] The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. Copies of all directives from the Minister to the Provincial Land and Development Facilitator.
2. A list of all site-specific development proposals facilitated or being facilitated by the Facilitator, since June 2018, and a description of the facilitation.

3. A list of other matters facilitated or being facilitated by the Facilitator since June 2018, and a description of the facilitation.
4. All reports from the facilitator to the Minister since June 2018.
5. All submissions to the Local Planning Appeal Tribunal by the Facilitator since June 2018 with respect to matters being facilitated in #2 and #3.
6. All submissions to planning approval authorities (e.g. municipalities, MECP, conservation authorities, etc.) by the Facilitator since June 2018 with respect to matters being facilitated in #2 or #3.

[2] The ministry located responsive records and issued a decision granting the appellant partial access to them. The appellant appealed the decision to the Information and Privacy Commissioner of Ontario (IPC). He challenged the reasonableness of the ministry's search for records responsive to his request, arguing that additional records should exist. He also stated that he wished to pursue access to the withheld information.

[3] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct and inquiry. The adjudicator sought and received representations from the parties, along with reply and sur-reply representations. Representations were shared in accordance with the IPC's *Code of Procedure*. The appeal was then transferred to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek further representations.

[4] During the inquiry, the appellant stated that he was not disputing the application of the exemptions that the ministry was claiming, but he believed additional responsive records should exist. Accordingly, the reasonableness of the ministry's search is the sole issue in this appeal.

[5] For the reasons that follow, I find that the ministry's search was reasonable and dismiss the appeal.

DISCUSSION:

[6] The sole issue to be determined is whether the ministry conducted a reasonable search for records responsive to the appellant's request.

[7] 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*.¹ If the IPC is satisfied that the search

¹ Orders P-85, P-221 and PO-1954-I.

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.

[8] 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.²

[9] 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;³ that is, records that are "reasonably related" to the request.⁴

[10] 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.⁵ 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.⁶

Representations

The ministry's representations

[11] The ministry submits that it conducted a reasonable search in response to the appellant's request. It provided affidavits from two employees: an acting manager of the ministry's Corporate Services Unit (CSU) and an Executive Office Coordinator of the Office of the Provincial Land and Development Facilitator (OPLDF). The ministry states that both staff are experienced and familiar in coordinating freedom of information searches, and the OPLDF employee is familiar with OPLDF records.

[12] Each of the employees provided an overview of the steps that were taken in response to the request. The CSU manager explained that CSU and ministry staff determined that any records responsive to the request would be located within the OPLDF's offices, and asked the OPLDF to conduct a complete search of their records. The OPLDF coordinator affirmed that they conducted a complete search of the OPLDF's records, with all OPLDF staff, including the Provincial Land and Development Facilitator (the facilitator), participating in the search.

[13] The OPLDF coordinator stated that based on the wording of the request, there were no records responsive to item 2 of the request, as there were no site-specific development proposals requested to be facilitated during this time period. They stated

² Order MO-2246.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

that no records were located in response to items 5 and 6 of the request. They stated that for item 3, they worked with OPLDF staff to compile a responsive list, which included all matters for which the facilitator received a mandate from the minister to facilitate during the requested time period. The ministry submits that CSU staff reviewed the records that were found, applied the redactions, and provided them to the appellant. A total of 10 records, consisting of 32 pages, responsive to the request were located, with partial redactions being applied to some of the records.

The appellant's representations

[14] The appellant submits that he received a 32-page document whose unredacted pages contained seven directives from the minister, a slide deck concerning one of the directives, and a two-page note summarizing seven matters undertaken by the facilitator. He submits that, with the possible exception of the slide deck, the package did not include any of the "regular updates" from the facilitator that the minister requested in his directives, or other records responsive to item 4 of his request.

[15] He states that the package did not include any information on the facilitator's role in negotiations regarding the disposition of the Dominion Foundry Lands, referenced in an October 2020 document obtained by a news organization.⁷ The appellant states that the article provides clear evidence of the involvement of the facilitator in the matter, but the package he received contained no records related to these negotiations. The appellant also submitted that some of the directives he received concerned applications that were before the Local Planning Appeal Tribunal (LPAT) and involved municipal planning authorities, but the package he received contained no record of these interactions between these organizations and the facilitator.

[16] The appellant takes issue with the ministry's statement that the ministry and CSU determined that any records responsive to the request would be located within the OPLDF. He says that efforts should have been made to search the records in the minister's office, which he submits would presumably be holding reports to the minister from the facilitator. He also raises whether the ministry had interpreted his request too narrowly, such as by interpreting "facilitated" to only mean actions that resulted in a successful resolution. He states that he clarified at mediation that his request concerned all matters within the mandate of the facilitator, including undertakings by the facilitator that were not successful or resolved.

[17] He submits that according to Order in Council 1349/2020⁸ the facilitator is paid on a per diem basis at \$1,200 per day, and based on the figures in the Public Accounts

⁷ The appellant referenced the following news article: "Toronto foundry site meetings set to occur as questions linger over scope of development" (Global News, February 23, 2021 <https://globalnews.ca/news/7656394/toronto-dominion-foundry-neighbourhood-meetings-developer-questions/> accessed October 23, 2023).

⁸ Available online at <https://www.ontario.ca/orders-in-council/oc-13492020>.

2019-20,⁹ the facilitator worked more than 220 days in the year. He states that it is unlikely that his request, that should have captured the product of nearly three years of work by the facilitator, would only produce 32 pages of records.

The ministry's reply representations

[18] The appellant's representations were provided to the ministry for reply. The ministry reaffirmed that their search was reasonable, submitting that the employees who conducted the search were knowledgeable in the subject matter of the request and that they had made reasonable efforts to locate records related to the request. They addressed the claims the appellant made in his representations.

[19] They first address the appellant's claim that the search should have yielded records responsive to item 4 (reports by the facilitator to the minister) because several of the minister's directives to the facilitator requested regular updates. The ministry submits that they disclosed two briefing decks prepared by the facilitator for the minister and deputy minister. They submit that there were no other written reports or records between the facilitator and the minister or minister's office, because the facilitator's updates to the minister and minister's office are primarily through meetings or discussion with ministerial staff.

[20] They submit that the facilitator's office is structured to operate as an "informal facilitation and/or mediation body, with private and government parties, often in situations that do not require any further ministerial approval or decision." They state that none of the facilitator's facilitations in the specified time period, with the exception of the file that documents were provided for, required a decision by the minister as the facilitator's role was accomplished largely by encouraging resolutions through informal mediation at the facilitator's discretion.

[21] The ministry addressed the appellant's concerns regarding the lack of LPAT records. They submit that the facilitator is not a formal party to litigation and any submissions are made by and between the parties and the LPAT, rather than by the facilitator. As such, they submit that a search of the facilitator's records did not yield any submissions to the LPAT or other approval authorities.

[22] Last, the ministry addressed the appellant's claim about the small number of records that the request yielded and whether the ministry inappropriately narrowed the request. In response, the ministry submits that their search was conducted "according to the wording of the request."

[23] They state that the structure of the facilitator's office and its role with respect to the LPAT and other approval authorities, described above, explains the minimal amount of records for items 4, 5, and 6. With respect to item 1, they state that all seven

⁹ Available online at <https://www.ontario.ca/page/public-accounts-2019-20-consolidated-financial-statements>.

directives received by the facilitator from the minister during the specified period were disclosed. For item 2, they state that the facilitator did not engage in any site-specific facilitations during the specified period, so they could not release a list of site-specific facilitations. For item 3, they submit that a list and accompanying descriptions of all facilitations, both successful and unsuccessful, that the OPLDF undertook in this period was provided, and state that they did not narrow the search to only successful facilitations.

[24] Regarding the appellant's submissions on the lack of records related to the Dominion Foundry files, they submit that the ministry's view is that any records related to the Dominion Foundry were not responsive to the appellant's request.

The appellant's sur-reply representations

[25] The ministry's reply representations were provided to the appellant for sur-reply. The appellant addressed the lack of records of meetings and discussions between the ministry and the facilitator. He submits that it is not clear if the ministry is stating that there are no records of updates from the facilitator because the ministry has excluded the minutes or records of these meetings, or that there were no minutes or records of these meetings kept.

[26] He submits that meetings minutes or records should have been captured by his initial request, and if no minutes were kept, the ministry is inappropriately not documenting the facilitator's meetings, possibly to avoid public accountability. He submits that this is contrary to the purposes of the *Act*, as well as the *Archives and Recordkeeping Act*.¹⁰ He refers to a previous IPC report, *Deleting Accountability*,¹¹ which expressed concerns about a practice of avoiding the creation of written and electronic records. He asks that if I find that no records exist because the ministry has adopted a "verbal culture" to prevent the keeping of records, I also find that this practice is contrary to the *Archives and Recordkeeping Act*.

[27] He further submits that, with respect to the location of the records, it is reasonable to expect that a report to the minister, for example, would be kept by the minister's office. He submits that he accepts the ministry's statement regarding LPAT records.

[28] The appellant submits that the ministry's statement that the search "was conducted according to the wording of the request" raises concerns that the ministry was using an unreasonably narrow interpretation of the request. Referring to IPC Order PO-3304, he submits that ambiguity in the request should be resolved in the requester's favour. He submits that "matters facilitated or being facilitated by the facilitator" should include all matters described in the facilitator's mandate, per the facilitator's Terms of

¹⁰ 2006, S.O. 2006, c. 34, Sched. A.

¹¹ Available online at <https://www.ipc.on.ca/resource/deleting-accountability-record-management-practices-of-political-staff-a-special-investigation-report/>

Reference, and that a reasonable search encompassing all of the activities within the Terms of Reference should have returned a greater number of responsive records.

[29] The appellant also raises concerns about the lack of records related to the Dominion Foundry lands. He submits that the ministry has not disputed the accuracy of the media reports he referenced in his original representations, and states that the ministry's response is inconsistent with their response to a separate request he made for records involving the facilitator and the Dominion Foundry lands. He submits that in that request (the separate request), the ministry claimed that there was a large number of records that would take additional time to process. He submits that it does not make sense for one request to generate no responsive records, while a similar request generates multiple, and that a reasonable search should have produced records related to the Dominion Foundry.

The ministry's sur-reply representations

[30] The appellant's sur-reply representations were provided to the ministry for sur-reply. With respect to the appellant's statements about records being contained in the minister's office, the ministry submits that the facilitator does not make development decisions on behalf of the province or third parties that would require ministerial approval. They further submit that the staff overseeing the search consulted with representative of each division within the ministry, including the minister's office, and determined that any records responsive to the search would be located within the OPLDF.

[31] Regarding the ambiguity of the request and the appellant's concerns about the small amount of records the request produced, the ministry submits that no matters were excluded from the list of facilitated matters that they provided and that it is unreasonable to expect that a greater number of responsive records should have been produced. The ministry did not provide a further explanation on why records related to the Dominion Foundry Lands were not responsive to the request, but did state that they were preparing to release a number of records related to the Dominion Foundry Lands as part of a separate request.

Analysis and finding

[32] As a preliminary matter, the parties dispute whether records relating to Dominion Foundry Lands would be responsive to the request at issue in this appeal. However, they also appear to agree that they are responsive to the separate request, also made by the appellant.

[33] To be considered responsive to the request, records must "reasonably relate" to the request.¹² Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution

¹² Orders P-880 and PO-2661.

should interpret it broadly rather than restrictively.¹³

[34] It is not clear why the ministry determined that these records were not responsive to the request in this appeal, considering that they appear to involve the facilitator and the specified time period of the request. Considering the context of the request and the information being sought, I find that the records would be responsive to the request. However, as the parties have indicated that these records are the subject of the separate request, I will not further address them here.

[35] Based on my review of the parties' representations and evidence, I am satisfied that the ministry has conducted a reasonable search for records.

[36] I acknowledge that there is also the possibility that other records, aside from those that are responsive to the separate request, exist. However, I find that the appellant has not established a basis for me to identify what these records might be, or established that a new search would be likely to yield new records.

[37] As discussed above, the ministry is not required under the *Act* to prove with certainty that no further records exist, they only must provide enough evidence to show that they have made a reasonable effort to identify and locate responsive records. It may be the case, as the appellant appears to suggest, that there are other responsive records that were not provided, but I do not have sufficient evidence before me to determine what those other records would be, or how the ministry's search efforts were insufficient. In either case, a reasonable search does not require the institution to prove with certainty that further records do not exist.

[38] Considering the evidence that the ministry provided, they had experienced employees knowledgeable in the subject matter of the request expend a reasonable effort to identify and locate records responsive to the request. The appellant stated that a search of the minister's office should have been conducted. Having reviewed the representations of each party, I accept the ministry's submission that OPLDF staff and staff in the minister's office were in the best position to determine where the records were located.

[39] I find that the appellant has not established that a new search involving the minister's office is warranted in the circumstances. The ministry submits that there was minimal written correspondence between the facilitator and the minister's office, and that this explains the amount of records that the search produced. The appellant has not explained, if additional reports from the facilitator to the minister were to exist, why they would be located within the minister's office but not the OPLDF, or why the OPLDF and minister's office staff are not in a position to determine where records responsive to the request are located.

[40] I appreciate the appellant's concerns regarding the number of records that were

¹³ Orders P-134 and P-880.

produced, given the evidence the appellant provided about the amount of days the facilitator worked in the specified time period. The issue in this appeal is whether the ministry conducted a reasonable search for records in response to the appellant's request. After considering the totality of the representations and evidence provided by each party, I find that they have.

ORDER:

I uphold the ministry's search as reasonable and dismiss the appeal.

Original Signed By: _____
Chris Anzenberger
Adjudicator

_____ November 20, 2023