

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4581-I

Appeal PA21-00530

Ministry of the Solicitor General

December 19, 2024

Summary: An individual made a request to the Ministry of the Solicitor General under the *Freedom of Information and Protection of Privacy Act* for records of entities that have queried or accessed a specified OPP file. The ministry initially refused to confirm or deny the existence of the requested records (section 14(3)) but subsequently provided the requester with access to part of a record.

The requester believes that additional records regarding queries of and accesses to the OPP file ought to exist and challenged the reasonableness of the ministry's search.

In this interim order, the adjudicator finds that the ministry has not provided sufficient evidence to demonstrate that reasonable efforts have been made to conduct a search for the records the appellant is seeking. The adjudicator orders the ministry to conduct a further search for records and to provide affidavit evidence explaining its searches.

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

OVERVIEW:

[1] This interim order considers the reasonableness of a search conducted by the Ministry of the Solicitor General (the ministry) for records of individuals and entities that have queried or accessed a specified Ontario Provincial Police (OPP) file.

[2] The ministry received a two-part request under the *Freedom of Information and*

Protection of Privacy Act (the *Act*) for records relating to a specified file and records relating to certain police policies and procedures. Following discussions with the ministry, the requester withdrew the second part of the request relating to records of police policies and procedures.

[3] The requester confirmed his request for access to the records described in part one of his request, specifically, for the following records relating to a specified file:

- a. A log of all persons/officers/agencies that have queried or accessed, in full, or in part, the [specified file], using any police database or program.
- b. A log of all persons/officers/agencies that have accessed or queried [a] name on any police database [specified name].
- c. A log of all persons/officers/agencies that have accessed or queried the name of [named individual].

[4] The ministry issued a decision refusing to confirm or deny the existence of the requested records in accordance with section 14(3) of the *Act*.¹

[5] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed but mediation did not resolve the issues in the appeal and the file was transferred to the adjudication stage of the appeal process. During the adjudication stage, the ministry issued a revised decision granting the appellant partial access to a responsive record. The ministry withheld portions of the record citing several exemptions and some information on the basis that it was not responsive to the request.²

[6] In light of the ministry's revised decision, the appeal file was returned to mediation to explore resolution of the outstanding issues. During mediation, the appellant advised that he is no longer pursuing access to the withheld portions of the disclosed record nor the information in that record identified as non-responsive. Accordingly, access to the information withheld from the record is not at issue in this appeal.

[7] The appellant advised that he is seeking records of agency access or queries in relation to the specified file. The appellant stated that aside from the OPP, there are no other agencies listed in the disclosed record. The ministry advised that the information in the record is limited to the OPP. Dissatisfied with the ministry's response, the appellant stated that he believes that additional records ought to exist and challenges the reasonableness of the ministry's search.

¹ Section 14(3) permits an institution to refuse to confirm or deny the existence of a record to which one or more of the law enforcement exemptions in section 14(1) or (2) would apply.

² In the revised access decision, the ministry cited its discretion to refuse a requester access to their own personal information in section 49(a), read in conjunction with the law enforcement exemption in section 14(1) and the discretionary personal privacy exemption in section 49(b).

[8] As no further mediation was possible, the file was transferred to adjudication for determination of the reasonableness of the ministry's search. I decided to conduct an inquiry and invited the parties to submit representations addressing the facts and issues set out in a Notice of Inquiry. I received representations from the ministry and the appellant, which were shared in accordance with *Practice Direction 7*.

[9] For the reasons set out below, I find that the ministry has not provided sufficient information for me to determine whether it has expended reasonable efforts to search for the records sought by the appellant. Accordingly, I order the ministry to conduct a new search for records and to provide me with affidavit evidence of the search.

DISCUSSION:

[10] The sole issue in this appeal is the reasonableness of the ministry's search for records of access and queries made to the OPP file specified in the appellant's request by agencies other than the OPP. The appellant's position is that additional records ought to exist beyond the single record that the ministry located and partially disclosed to him.

[11] When a requester claims that additional records exist beyond those found by an institution, the issue on appeal is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.³

[12] 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.⁴

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

Ministry's representations

[15] During the mediation stage of the appeal process, the ministry's Freedom of Information (FOI) analyst advised the mediator of information received from the OPP about its search. The OPP informed the FOI analyst that the "request was through [the]

³ Orders P-85, P-221 and PO-1954-I.

⁴ Order MO-2246.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

RMS [Records Management System] Unit which extracts from our Entity of the Records Management System.”

[16] In the Notice of Inquiry, I asked the ministry to provide affidavit evidence of the steps taken in response to the appellant’s request. The ministry provided me with a letter signed by counsel. Counsel described the records sought by the appellant as agencies aside from the OPP that have “accessed or queried” the specified OPP file. Counsel explained that the OPP does not have access to this information but only has access to information about the members of its own staff who accessed the relevant data.

[17] In addition, counsel stated that a member of staff in the OPP’s Technical Disclosure Unit conducted the search for records. Counsel stated that the member of staff who conducted the search is no longer employed by the OPP and the ministry cannot provide affidavit evidence about the search.

[18] The ministry’s position is that it does not have access to the records the appellant seeks, if they exist.

Appellant’s representations

[19] The appellant’s position is that he is not requesting information from other agencies and acknowledges that to access such information he would need to make an access request to those agencies. The appellant states that he is seeking from the ministry “what specific agencies themselves requested the records” relating to the specified file or the agencies to which the individuals identified in the logs or emails belong.

[20] In his representations, the appellant addresses both records identifying agencies that accessed the specified OPP file and records identifying parties who made queries relating to the file.

[21] The appellant disagrees with the ministry’s position that the OPP does not have access to the information he is seeking. The appellant states that police agencies typically have mechanisms in place to track who accesses police records. The appellant states that when one police agency accesses records from another agency, this activity is logged and that the police agency that owns a record can see who has accessed it, together with details such as the time and purpose of the access. The appellant submits that as the OPP owns the file specified in his request, the OPP is the agency that is responsible for the handling of and accesses to the file.

[22] The appellant explains that logging access to police files ensures transparency, accountability and security in the handling of sensitive information within law enforcement. The appellant provides examples of record management systems and states that they have comprehensive logging and audit capabilities as part of their software security features. The appellant submits that the *Act* requires police agencies to protect personal information in police files and that access to it must be logged.

[23] The appellant states that if another agency has accessed the specified OPP file, it may have been done so through a centralised system where logs are kept by a third party. The appellant provides different examples of these third party systems. The appellant submits that as the owner of the file, the ministry (via the OPP) may be able to request a search on the third party system.

[24] The appellant submits that as the ministry is not able to contact the individual who conducted the search in response to his request, it should conduct a further search. The appellant submits that the search should include a search of OPP emails, messaging systems and fax correspondence for requests from other agencies that were granted access to the specified OPP file.

Ministry's reply representations

[25] I invited the ministry to respond to the appellant's submissions regarding the mechanisms used by police agencies to track access and security of records and his position that record management systems have logging capabilities that allow police agencies to log access to records. In addition, I referred the ministry to the statement made by its FOI analyst during mediation and the appellant's representations about the OPP's records potentially being accessible through a centralised system that might include logging.

[26] The ministry provided me with another letter from counsel maintaining its position set out in the earlier letter and stating that "we" do not have records containing logs of accesses made to a specified file by agencies other than the OPP.

[27] The ministry maintains that it has conducted a reasonable search for records over which it has custody or control. In response to the appellant's suggestion that the ministry conduct a further search or make inquiries of databases maintained by a third party or inform the appellant of other government agencies that would be able to provide the appellant with the information he is requesting, counsel submits that these suggestions are not supported by the *Act*.

Analysis and findings

[28] For the reasons that follow, I find that the ministry has not provided sufficient evidence for me to determine whether reasonable efforts have been made to locate the records the appellant is seeking, as required by section 24 of the *Act*.

[29] The only information before me about the search conducted in response to the appellant's request is the statement made by the ministry's FOI analyst during mediation. The ministry has not provided any explanation or evidence expanding on this statement. The statement by the ministry's FOI analyst appears to relate only to records of *accesses* to the specified file. There is no information before me of any searches for records of *queries* regarding the specified OPP file.

[30] In the Notice of Inquiry, I asked the ministry to provide a written explanation, in affidavit form, of all steps taken in response to the request as well to respond to a number of questions about the specifics of its search.

[31] I also explained that the IPC may order a further search if the ministry does not provide enough evidence to show that its search was reasonable.⁷

[32] I accept the submission from the ministry's counsel that the relevant individual in the OPP's Technical Disclosure Unit is no longer employed with the OPP and accordingly the ministry is unable to provide affidavit evidence of the search from that individual. However, I am not persuaded that the ministry is unable to provide *any* evidence about its response to the request.

[33] During mediation, the ministry provided some information about an extraction from the OPP's "part" of its Records Management System. Despite having been asked to provide further explanation, the ministry has not explained the *type* of search that the "extraction" entailed, what is meant by the OPP's "part" of the record management system nor the scope and limitations of this process. In addition, the ministry has not responded to the appellant's position that a reasonable search should include a search of records of *queries* about the specified file from other agencies held in OPP emails and other communications.

[34] 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.⁸ Without any evidence about the type of search that has been undertaken, the knowledge and experience of the individual who conducted it or the efforts required to conduct a further search, there is no basis for me to find that the ministry (or the OPP) has expended reasonable effort in its response to the request.

[35] Had the ministry provided affidavit evidence addressing these points from an employee with knowledge and experience of the subject matter of the appellant's request, it might have been sufficient for me to determine the reasonableness of its search. Without this evidence, I am unable to find that the search was reasonable.

[36] Although a requester will rarely be in a position to indicate precisely which records an institution has not identified, they must provide a reasonable basis for concluding that such records exist.⁹ The appellant's submissions about his understanding of police agency record management practices are persuasive. I find that he has provided a reasonable basis for believing that additional records ought to exist. In particular, if accesses or queries of an OPP file have been made by another entity, records of these accesses or queries ought to exist.

⁷ See Order MO-2185.

⁸ See Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2246.

[37] Accordingly, I will order the ministry to conduct a new search for records responsive to the appellant's request, including its records of queries from other police agencies relating to files on the OPP's record management system, such as a log of all persons/officers/agencies that have accessed or queried the information specified in the request. In addition, I will order the ministry to provide affidavit evidence from the OPP employee who conducts the search addressing the points set out below.

[38] I note counsel's submission that the appellant's suggestion that the ministry inform him of other government agencies that would be able to provide the information he is requesting is not supported by the *Act*. I make no finding on the applicability of the section in the circumstances of this case but remind the ministry of its obligations under section 25 of the *Act*.¹⁰

ORDER:

1. I order the ministry to conduct a new search for records responsive to the appellant's request, including records of emails or other communications from entities with queries relating to the name and/or OPP file specified in the request.
2. I order the ministry to provide me with affidavit evidence describing its search efforts, within 30 days of the date of this order. At a minimum, the affidavit should include an explanation about the following:
 - a. The name(s) and position(s) of the individual(s) who conducts the new search(es) and their knowledge and understanding of the subject matter and scope of the appellant's request;
 - b. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and steps taken in conducting the search(es);
 - c. Whether it is possible that responsive records existed but no longer exist. If so, the ministry must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and

¹⁰ In summary, section 25 sets out an institution's obligations when it receives a request for access to a record that it does not have in its custody or control, or where it considers another institution to have a greater interest in the record being sought. Section 25(1) requires an institution to make all necessary inquiries to determine whether another institution has custody or control of the record and to forward the request. Section 25(2) allows an institution to transfer a request to the institution that has a greater interest in the sought record.

- d. If it appears that no further responsive records exist after the new search, a reasonable explanation for why additional records do not exist.
3. In the event that the ministry locates additional records in its new search, or if it does not locate additional records, I order it to issue an access decision to the appellant, in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request.
4. I remain seized of this appeal to deal with any issues arising from provisions 1, 2 and 3 above.
5. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the access decision issued to the appellant pursuant to order provision 3 above, as well as any records disclosed with the access decision.

Original Signed by: _____
Katherine Ball
Adjudicator

December 19, 2024 _____