

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4625

Appeal PA22-00156

Archives of Ontario

March 27, 2025

Summary: Under the *Freedom of Information and Protection of Privacy Act*, an individual asked the Archives of Ontario for access to reports from third-party advisers. The archives located one responsive record that was already available to the public online and issued a decision stating that further records responsive to the appellant's request do not exist. The individual believes more records should exist.

In this order, the adjudicator determines that the archives conducted a reasonable search for 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 Archives of Ontario (the archives) received an access request, under the Freedom of Information and Protection of Privacy Act (the Act), for the following information:

All reports from the third-party adviser(s) appointed by the minister for infrastructure in relation to the investigation of the activities of [two identified individuals] and/or [identified company], as well as the integrity of the St. Michael's hospital project and/or other projects [two named individuals] or [identified company] may have been involved with. This

investigation was referenced in [identified minister's] response to a question by [an identified member of provincial parliament] on September 29, 2015. During the meeting of the Legislature's Standing Committee on Estimates on November 17, 2015, [the identified minister] identified the third-party adviser as [an identified individual].

Timeframe: All records since September 1, 2015.

[2] The archives issued a decision denying access to a responsive record under section 22(a) (information published or available to the public) of the Act and provided the web address where this record could be found online.

[3] The appellant appealed the archives' decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the appellant confirmed that he believes further records responsive to his request should exist and that he is not seeking further access to the record that is publicly available. Accordingly, section 22(a) is not at issue in this appeal.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the Act. I commenced an inquiry in which I sought and received representations from the parties about the issue of reasonable search.

[6] In this order, I find that the archives conducted a reasonable search for reports from third party advisers and dismiss the appeal.

DISCUSSION:

[7] The sole issue in this appeal is whether the archives conducted a reasonable search for responsive records. Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.¹ If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[8] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.² A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

related (responsive) to the request.³

[9] 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.⁴

Representations, analysis and findings

[10] For the reasons that follow, I find that the archives conducted a reasonable search for reports from third party advisers as requested by the appellant.

[11] The archives submits that it conducted a reasonable search for responsive records and none were located. In support of its position, the archives provided an affidavit from a Freedom of Information Analyst (FOI analyst) in the archives Management, Information and Storage Branch. The relevant portions of the affidavit are as follows:

- The archives reached out to the Ministry of Infrastructure (the ministry) to discuss whether the request should be transferred and was advised by the ministry's FOI office that it had received the same request and conducted its own search. The ministry advised that no records were found, and it was likely that any responsive records would be part of the previous government's records, which were transferred to the archives after the 2018 provincial election.
- The archives consulted with the ministry's FOI office to ascertain which individuals may have been involved in the subject matter of the request during the relevant timeframe. The ministry's FOI office identified two former ministers and their respective chiefs of staff as individuals who would have been most likely to have the responsive records during the relevant timeframe.
- The archives searched the deactivated email accounts of two former ministers and their respective chiefs of staff; the former minister's office network shared drive; and hard copy records.
- Based on the timeframe of the request, the archives also identified and searched three archival records series in the archive's collection that may contain responsive records in hard copy format only.

[12] The appellant's representations provide a lot of background information about his request and the circumstances that led to it. I will only summarize the portions most relevant to the issue of reasonable search. The appellant's representations also address custody or control of the records under section 10(1) of the Act. However, as noted above, the sole issue in this appeal is reasonable search, so I will only address portions

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2246.

of those representations that relate to the issue of search.

[13] The appellant takes the position that further records responsive to his request should exist. He submits that a specified third-party adviser was hired to be the ministry's "eyes and ears" on an investigation into serious allegations of misconduct that called into question the integrity of a major government procurement. He submits that this role would entail providing reports to the minister or the ministry that would be responsive to part two of his request. The appellant submits that these records should have been retained by the ministry or the archives for a variety of reasons, such as their relevance to ongoing litigation and police investigations (and subsequent criminal charges), as well as what the minister acknowledged as the public's interest in the investigation.

[14] The appellant submits that in response to his request to the ministry, it advised that any responsive records it once had would have been sent to the archives following the 2018 provincial election. The appellant submits that the ministry did not dispute that the specified adviser submitted reports responsive to part two of his request, but that such reports would have been transferred to the archives.

[15] The appellant submits that the archives did not contact the individuals who might have direct knowledge of the specified adviser's reports and what became of them, such as the former ministers, deputy ministers, or other ministry staffers. He submits that the archives only contacted ministry staffers in the FOI Office. The appellant also submits that the archives did not contact the specified adviser or his law firm to obtain copies of the reports or to get any other information about who received the reports.

[16] The appellant submits that even if the reports were lost or destroyed after being received by the ministry or the archives, copies could have been requested from the specified adviser or his firm.

[17] The appellant submits that the archives should conduct a reasonable search that includes reaching out to the specified individuals with direct knowledge of the reports and what became of them, including the specified adviser. He submits that all responsive records should be obtained and identified, whether or not they are in the archives' physical custody.

[18] In response to the appellant's representations, the archives submits:

- Although the appellant asserts that the specified adviser would have submitted a report and that this report is a responsive record that should be in the archives' holdings, this does not establish a reasonable basis for concluding that the report was in fact created and that it is in the custody or control of the archives.
- The archives is not the institution that created or commissioned the report that the appellant asserts exist. The archives is not an active creator of records but a repository of records that are of archival value that it receives from public bodies

as set out in section 7 of the *Archives and Recordkeeping Act, 2006 (ARA)*.⁵ In this role, the archives is dependent on the public body in maintaining appropriate recordkeeping practices and following any relevant protocols at the time when records were sent to the archives. If this report exists, it would have been created by the ministry (formerly the Ministry of Economic Development, Employment and Infrastructure).

- Since there was a government change after the provincial election in 2018, public records of the previous ministers' offices were required to be transferred to the archives as provided for in the *Common Records Schedule Minister's Public Records*,⁶ which provides a framework for how each minister's public records are to be managed.
- Before records with archival dispositions are transferred to the archives, they are given a transfer number to track records that are transferred over to the archives. The necessary protocols, attestations, and retention schedules were followed in 2018 when the ministry's records were transferred to the archives.
- The archives searched all the archival records series from the ministry and no responsive records have been located during any of the archives' searches. Contrary to the appellant's assertions, the archives has not argued that the responsive records are not in its custody or control, but rather no responsive records were located as a result of its searches. Furthermore, the archives has not suggested that records have been destroyed as the archives can only destroy public records in accordance with their retention schedules.⁷

[19] The archives has described where it searched, the results of the search, and the staff involved in the search. I am satisfied that the archives carried out a search involving experienced employees knowledgeable in the subject matter of the request and that those employees expended a reasonable effort to locate records which are reasonably related to the request.⁸ I am satisfied that the archives' search was sufficiently thorough, and it has provided sufficient evidence to establish the reasonableness of its efforts.

[20] As noted above, 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.⁹ Based on my review of the representations of the parties, I find that there is insufficient evidence before me to establish a reasonable basis to conclude that the specific records the appellant believes should exist, exist in the archives' record holdings but have not yet been located by the archives through its searches. Given that the archives is not the creator of records and it

⁵ *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A.

⁶ Under sections 11 and 12 of the *ARA*.

⁷ Section 15(2)(a) of the *ARA*.

⁸ Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2246.

has now conducted multiple searches for these specific records, I am not persuaded that ordering the archives to conduct another search will locate these records that the appellant claims should exist.

[21] Even if I found the archives did not conduct a reasonable search, which I do not, I can only order the archives to conduct a further search. I acknowledge that the appellant believes that the archives should have reached out to specific individuals, including the specified adviser, to ask for a copy of the records the appellant believes should exist. However, the Act does not require the archives to prove with absolute certainty that further records do not exist. The archives must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.¹⁰ As the archives would not be the creator of the records the appellant alleges exists, I find that it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the appellant's request in its record holdings.

[22] For all the reasons set out above, I find that the archives conducted a reasonable search for responsive records.

ORDER:

I uphold the archives' search as reasonable and dismiss the appeal.

Original Signed by: _____

Anna Truong
Adjudicator

March 27, 2025

¹⁰ Orders P-624 and PO-2559.