



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2885

Appeal PA09-115

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or FIPPA) for access to any and all written communications, in electronic form, or otherwise:

- from the Ministry of Transportation, (MTO) and/or its representing consultants to the Ontario Provincial Police, (OPP) Highway Safety Division (including any and all responses from same), regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy #10, since January 1, 2000;
- exchanged between the executive levels of the OPP Highway Safety Division and the involved OPP detachments (including any and all responses from same), regarding the safety and/or design of the 410 extension project from Sandalwood Parkway to Hwy #10, since January 1, 2000;
- exchanged between the executive levels of the OPP Highway Safety Division and the Town of Caledon (including any and all responses from same), regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy #10, since January 1, 2000, and
- exchanged between the executive levels of the OPP Highway Safety Division and the Region of Peel (including any and all responses from same), regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy #10 since January 1, 2000.

The Ministry identified records responsive to the four-part request and granted partial access to them. The Ministry relied on the mandatory exemption at section 21(1) of the *Act* (personal privacy) to deny access to the portion it withheld.

The requester (now the appellant) appealed the decision.

At mediation, the appellant advised that he is not interested in pursuing access to any personal information. As a result, that information and the application of the mandatory exemption at section 21(1) of the *Act* is no longer at issue in the appeal. Also at mediation, the appellant challenged the adequacy of the Ministry's search for responsive records. The appellant provided the mediator with certain information and a copy of a letter in support of his position, which the mediator then shared with the Ministry. The Ministry undertook a further search for responsive records based on the information and letter, but no additional records were located. The Ministry then sent a letter to the appellant outlining the nature and extent of its search for responsive records, along with a page from its Records Maintenance Manual that set out the retention period for certain types of records. The appellant was not satisfied with the Ministry's search and maintained his position that additional responsive records should exist.

Mediation did not resolve the appeal and it was moved to the adjudication phase of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. Before the Ministry provided its representations, it notified this office that additional responsive records had been located during a further search. The Ministry issued a supplementary decision letter dated October 6, 2009 granting partial access to these additional records. The Ministry claimed that section 21(1) applied to the information that was withheld. The Ministry then provided its representations. I sent a Notice of Inquiry along with the Ministry's representations to the appellant. The appellant provided representations in response. I determined that a portion of the appellant's representations raised issues to which the Ministry should be provided an opportunity to reply. Accordingly, I sent that portion to the Ministry inviting its representations in reply. The Ministry provided reply representations.

DISCUSSION:

PRELIMINARY MATTER

A large portion of the appellant's representations do not address the adequacy of the Ministry's search for responsive records but instead take issue with the process, procedure and design for the 410 extension project between Sandalwood Parkway and Highway #10. He lists amongst his concerns:

- the degree of access to information relating to the project,
- much of the information that was provided was inaccurate or incomplete
- certain residents were not given appropriate status in the consultation phase of the project,
- that the best interests of the residents were not considered during the course of project,
- the acts or omissions of various entities, including the OPP, have led to safety risks in the design of Phase III of the 410 Highway,
- long combination vehicles are now starting to use the highway heightening the need to ensure all safety precautions and procedures were followed, and
- design changes after the construction commenced lend support for his assertion that the initial design was flawed and did not incorporate important considerations.

Although the appellant feels strongly about these matters, I am able to provide rulings only with respect to the reasonableness of the Ministry's search for responsive records. In that regard, I will only be considering evidence relevant to the adequacy of that search. Hence, considerations of the design of the project, the degree of community consultation or any alleged safety risk is not within my mandate or the scope of the appeal.

Finally, in his representations, the appellant alluded to the former Mayor of Caledon being in a conflict of interest due to a recent affiliation with the Peel Regional Police. This issue is also beyond my jurisdiction and the scope of this appeal.

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that 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 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that 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.

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 that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

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 related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 that such records exist [Order MO-2246].

Representations

The Ministry's Representations

In support of its position that it conducted a reasonable search for responsive records, the Ministry provided affidavits from the following individuals:

- the Commander of the OPP Highway Safety Division (the Commander),
- the administrative assistant to the Commander and Command Staff at divisional headquarters (the Administrative Assistant),
- a Staff Sergeant based out of the Port Credit OPP Detachment until 2005 (the Staff Sergeant),

- a Detachment Administration Clerk at Port Credit Detachment (the Detachment Administration Clerk), and
- a Staff Sergeant who is a Detachment Operations Manager in the Caledon OPP Detachment (the Detachment Operations Manager).

The Ministry submits that the search took place at Divisional Headquarters and the Port Credit and Caledon OPP Detachments, which “are the only places where records are likely to be located, given the area the request covers.” The Ministry submits that the Commander, the Staff Sergeant, and the Detachment Operations Manager conducted searches of their own records while the Administrative Assistant and the Detachment Administration Clerk conducted searches of databases and administrative files.

The Ministry submits that all of these individuals are experienced and knowledgeable about the records or databases they were searching and “in most cases, they performed more than one search of the same records.”

In his affidavit, the Commander deposes that he is responsible for the support and delivery of provincial traffic training, policy, equipment procurement and traffic service delivery across the OPP’s five Regions. This includes the region that is the subject of the request. He deposes that in February 2009, he undertook a search for any records in the custody and control of the OPP Highway Safety Division (HSD) that would be deemed responsive to the appellant’s request for access to emails relating to the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy. #10, since January 1, 2000.

He states:

With respect to this request and to the best of my knowledge any record relating to Environmental Assessments are filed at the detachment and not at the Regional Headquarters. If I receive an Environmental Assessment request/notice I normally footnote and have it forwarded to the appropriate detachment and file copies are not normally retained.

As a result, the only records I would have access to, personally, are contained in my email files, Microsoft and pst files, which I maintain in the course of my duties. I searched my pst files for any correspondence relating to this request and located a number of emails. I forwarded them to the FOI office. As part of this search, I did not search my sent or deleted files.

As a result of the appeal, in September 2009, I conducted a supplemental search of my Microsoft pst files and directed my administrative assistant to conduct a manual search of the paper files in RHQ.

I checked a total of 18 separate pst files dating from 2005 to current. This included admin file folders, deleted and sent files.

I located a number of files. These were as follows:

1. email relating to original request
2. email relating to ongoing correspondence between OPP Caledon, the requestor and others that I was copied on or provided information item.
3. correspondence relating to this request.

It would appear that the additional records that were located by the Commander in September 2009 were partially disclosed to the appellant along with the Ministry's supplementary decision letter of October 6, 2009.

The Administrative Assistant deposes in her affidavit that in the month of February 2009, she undertook a search for any responsive records in the custody and control of Highway Safety Division (HSD) Headquarters that would be deemed responsive to the appellant's request for access to written communications regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy. #10, since January 1, 2000. She deposes that:

All correspondence coming in and or going out is filed in our admin office for 2 years plus current. All correspondence that pertains to any Highway construction projects are filed in the 642-00 files. I searched all files in the 642-00 files for anything pertaining to the Hwy. 10 expansion project. There was no information pertaining to this request and I then advised [the Commander] informing him of same.

Another search was conducted in the month of August 2009, for all 600 series files for any responsive records in the custody and control of Highway Safety Division Headquarters that would be deemed responsive to the appellant's request under the FIPPA for access to written communications regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy. #10, since January 1, 2000. Again there was no information pertaining to this request.

In his affidavit, the Staff Sergeant deposes that on or about June 10, 2009, he conducted a search for records in his custody that were responsive to the appellant's request for access to written communications regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy #10, since January 1, 2000.

He indicates that:

... the Detachment Commander of Port Credit sent me an email asking me if I had any documents/material with regards to the Hwy 410 expansion project because I had sent a memo response to the Ministry of Transportation acknowledging their announcement of the project. This written memorandum simply stated that I would be interested in receiving progress information concerning the development of the Hwy 410 extension.

I have checked my notebooks and searched my email for any reference to the 410 expansion project with negative results. I then sent an email to [the Commander] informing him of same, adding that any related correspondence would have been retained at Port Credit Detachment and filed in accordance with Government Policy.

In her affidavit, the Detachment Administration Clerk deposes that on or about June 10, 2009, she conducted a search for any responsive records in the custody and control of the Port Credit Detachment pertaining to the appellant's request for access to written communications regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy. #10, since January 1, 2000.

She states that:

All correspondence coming in and or going out is filed in my office for 2 years plus current. All correspondence that pertains to any Highway construction projects are filed in the 642-00 files. On June 10, 2009 I searched all files in the 642-00 files for anything pertaining to the Hwy. 10 expansion project. As nothing was found in these files I also conducted a search of all the 600 files to make sure nothing was misfiled. There was no information pertaining to this request and I then sent an email back to [the Detachment Commander of Port Credit] informing him of same.

Another search was conducted on August 31, 2009 in all 600 series files for any responsive records in the custody and control of Port Credit Detachment that would be deemed responsive to the appellant's request under the FIPPA for access to written communications regarding the safety and/or design of the 410 extension project between Sandalwood Parkway and Hwy. #10, since January 1, 2000. Again there was no information pertaining to this request.

The Detachment Operations Manager deposes that in September 2009, he conducted a search for responsive records in the custody and control of the Caledon OPP Detachment pertaining to the appellant's request for access to information pertaining to the Highway 410 Extension construction for Mayfield Road to Hwy 10 in the Town of Caledon.

He deposes that:

I interpreted the search to be for the provision of all documents under my control and in the possession of Caledon OPP that applied to the appellant's request.

I completed searches of hard copy files kept regarding the issue that were in my office. I also referred to the Detachment Administrative files for like records but could not locate any files. I provided all of the information that I had kept regarding this request from the hard drive on my computer. I know of no other areas records regarding this request would have been kept if they existed.

Finally, the Ministry advises that based on its records retention schedule:

... it is possible that responsive records existed but no longer exist. The retention schedule for highway project files was 2 years plus current. Given that the request is for records from 2000, this means that older records may well have been destroyed in accordance with the schedule.

The Appellant's Representations

The appellant submits that communication or correspondence between the OPP and MTO regarding Phase III of the 410 Highway must exist, and in failing to locate it, the Ministry did not conduct an adequate search for responsive records.

The appellant submits that the letter discussed in the Staff Sergeant's affidavit, above, represents the Staff Sergeant's comments about the safety of Phase I of the 410 extension project and that this would have been the first of three letters corresponding to each phase of the project. He further submits that "(w)e have been told that there is a second similar letter for Phase II but we have not seen it." The appellant also relies on a statement in a letter from the Detachment Operations Manager he included in his representations which provides that "(t)he OPP has provided the MTO with its comments with respect to this particular proposed highway and, as a result, the OPP considers this matter closed". The appellant also points to a newspaper article he included in his representations where the Mayor of Caledon is quoted as saying, "I'm not a safety expert but I would say that if the MTO has designed it to their standards and the OPP has signed off on it, then the experts have to rule."

The appellant submits that the OPP has influenced design modification before allowing a new highway to open and points to the actions of an OPP officer representing the OPP Highway Safety Division, who, the appellant submits, took it upon himself to challenge the MTO on the design of some off-ramps of Highway 407. The appellant submits that this refutes the statements made by the Caledon detachment that the OPP has no involvement in highway design. The appellant also points to a statement made by a media outlet relating to an unrelated access to information request in an effort to demonstrate that this is evidence that there are documents kept longer than two years and that the OPP are capable of "heel-dragging" during access requests.

The appellant submits that in light of the above, he would have expected to see "some correspondence between the OPP and MTO, perhaps even, but not limited to, a Phase III of the 410 Highway Extension project Safety Letter, signed by the OPP."

Finally, the appellant submits that:

During my research related to this [access request] to the OPP, I discovered it is possible the OPP are only obligated, by policy, to keep these kinds of records for two (2) years. However, somehow I find it difficult to believe all trace of these kinds of records would be eliminated totally - in case of future challenges or possible liability. But, I expect while the records could not be retained on paper

(for numerous logistical reasons) they would be retained electronically for archival purposes.

Yet, there is no indication in the responses to me that any of the parties involved on behalf of the OPP have searched any electronically stored documents, other than email, to satisfy our FOI request to them. I suggest if this hasn't been done that it should be standard process for such a search to be undertaken when an FOI request is received.

The Ministry's Reply Representations

The Ministry submits in reply that:

The OPP's position continues to be that it has carefully conducted multiple searches for all records that are responsive to this appeal. The OPP has released all responsive records to the Appellant. The OPP has documented the scope of its searches in the 5 affidavits it provided. In sum, the OPP submits it has met or exceeded the standards of conducting a reasonable search for all responsive records, in accordance with the *Freedom of Information and Protection of Privacy Act*, and the jurisprudence that has interpreted what a reasonable search means in the context of that *Act*.

... The appellant suggests ... that the OPP has not released records that contain some kind of sign-off by the OPP of Phases 2 and 3 of the Highway 410 extension. The reason these records were not found is that the OPP no longer signs-off on new provincial highways. Moreover, to the extent that it ever did provide a sign-off, it was never an approval as to the safety of the design of a highway. Rather, the "sign-off" served as an acknowledgement that it had been consulted.

The Appellant further suggests that [the Detachment Operations Manager] has withheld comments he provided to the Ministry of Transportation about Highway 410. [The Detachment Operations Manager] believes that any comments he provided to the Ministry of Transportation were never put into writing. Instead, [the Detachment Operations Manager] believes that the comments may have been provided verbally, over the telephone, to his contact at the Ministry of Transportation. [The Detachment Operations Manager] reports that this is not unusual since much of the business he conducts with the Ministry of Transportation is by phone.

The OPP has been clear from the start of this appeal process that it is not responsible for approving highway design. Paragraph 3 of subsection 19(1) of the *Police Services Act* requires the OPP to maintain a traffic patrol on Kings Highways such as Highway 410. This statutory obligation is consistent with its responsibilities as a law enforcement agency. Approving highway design is not a statutory requirement of the OPP, nor is it part of the mandate of any law

enforcement agency. The only reasonable conclusion to come to in the circumstances is that the records do not exist because the OPP would never have created them.

Analysis and Finding

The time frame of the appellant's request is for records from January 1, 2000 to the date of his request. In his affidavit the Commander deposes that the records which he personally has access to are contained in his email files, Microsoft and pst files. He deposes that in his last search he "checked a total of 18 separate pst files dating from 2005 to current" which included "admin file folders, deleted and sent files". There is no explanation for why the date of 2005 and not January 1, 2000 was chosen as the starting date for his search. The Ministry has provided evidence that certain types of records are only retained for two years, however, the year 2005 is more than two years before the date of the request. There is also no evidence before me that the Commander does not have access to administration file folders, deleted and sent files for the period from January 1, 2000 to January 1, 2005.

Accordingly, while the Ministry's searches were extensive and wide-ranging I am not satisfied that it has made a reasonable effort to identify and locate records accessible by the Commander which are responsive to the appellant's request under section 24 of the *Act*, which predate 2005. As a result, I will order that the Ministry conduct a further search for responsive records for the period from January 1, 2000 to January 1, 2005 in the Commander's email files, Microsoft and pst files, including administration file folders, deleted and sent files.

ORDER:

1. I order the Ministry to conduct a further search for responsive records for the period from January 1, 2000 to January 1, 2005 in the Commander's email files, Microsoft and pst files, including administration file folders, deleted and sent files. If, as a result of the further searches, the Ministry identifies any additional records that are responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of any decision letter provided to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ May 17, 2010