Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3100

Appeal PA11-54

Ministry of Children and Youth Services

July 24, 2012

Summary: The appellant sought access to information related to the race/ethnicity of youth held in youth detention centres in the province of Ontario. The ministry granted partial access to information pertaining to Aboriginal youth, but took the position that no other responsive records exist and that producing a responsive record would unreasonably interfere with the ministry's operations. This order finds that the ministry did not conduct a reasonable search for responsive records and orders the ministry to issue a new access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1, 2(1)(a), 2(1)(b), 10(1), 24(1), 57(1) and sections 2 and 6(5) of regulation 460 to the *Act*; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1)(b); *Youth Criminal Justice Act*, SC 2002, c 1, as amended, section 118(1).

Orders and Investigation Reports Considered: M-436, MO-2129 and PO-2904.

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

OVERVIEW:

[1] The Ministry of Children and Youth Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

> Information/Data/Statistics related to the race/ethnicity of youth held in youth detention centres in the province, broken down by
>
> - Pre-trial and sentenced
> - Region
> - Institution
> - Gender

[2] The request was for the most recent year that the information was available, along with the two previous years.

[3] In its initial decision letter the ministry took the position that, beyond the data provided for Aboriginal youth, no responsive records exist that provided a further breakdown of "youth by race/ethnicity". The ministry granted access to the responsive information pertaining to Aboriginal youth.

[4] The requester (now the appellant) appealed the ministry's decision. As set out in his letter of appeal, the appellant asserted that based on his investigation additional responsive records ought to exist.

[5] Prior to mediation, in response to a letter from an Intake Analyst at this office, the ministry clarified its position in a supplementary decision letter. The ministry confirmed its earlier position but advised that the requested information "would need to be created, and as such, required a research proposal submitted to the ministry". The appellant took the position throughout this appeal that he was not requesting the information for the purpose of research.

[6] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] I invited representations on the facts and issues in the appeal. I received representations from the ministry and the appellant and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7.[1]

ISSUES:

[8] I have reviewed the representations and the contents of the appeal file and find that the following is at issue in this appeal:

A. Did the ministry conduct a reasonable search for responsive records?

[1] The appellant's sur-reply representations were not shared with the ministry.

B. Is the *Youth Criminal Justice Act* (*YCJA*) an impediment to the ministry issuing a new access decision?

DISCUSSION:

A. Did the ministry conduct a reasonable search for responsive records?

[9] The ministry's position is that there are no records that are responsive to the request because "the information is not collected in the manner requested by the individual". The ministry submits that Order M-436 states that an institution's "only obligation is to locate records which already exist and which contain the requested information". The ministry asserts that:

> … , statistical information in the Youth Online Tracking Information System (OTIS) is not categorized according to the requester's parameters. In fact, any personal information entered into the database is done on a client's voluntary basis. In addition, the ministry has never verified the integrity or quality of the data.

[10] Finally, the ministry submits that producing a responsive record would unreasonably interfere with the ministry's operations.

[11] The appellant submits that the ministry's position should be "rejected" for the following reasons:

> … the ministry did not provide me with the statistical information in the [OTIS], the voluntary information, or the unverified data all of which are arguably responsive to my request. Also the accuracy of the data is not relevant to whether it should be produced (*Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*[2] at para 18 [*Toronto Police*]).

[12] Relying on an affidavit that the appellant provided with his representations he asserts that there is a reasonable basis for concluding that responsive records exist.

[13] He states that during an in-person conversation with an identified manager in the ministry's Effective Programming and Evaluation Branch (the manager) he was told that the "ministry possessed information on the race/ethnicity of those persons detained in youth detention facilities in the province of Ontario." He submits that the existence of this information, albeit in a form different than requested, was confirmed in

[2] 2009 ONCA 20.

the ministry's supplementary decision when it stated that the requested information would need to be created and, accordingly, required a research proposal.

[14] The appellant states that in this same conversation the manager told him that the ministry had recently provided aggregate level data, which included information responsive to the request at issue in this appeal, to a named legal clinic. The appellant states that this was confirmed by the legal clinic.

[15] In addition, the appellant states that after receiving the ministry's response to his request, he contacted an identified Supervisor for Statistics and Applied Research at the Ministry of Community Safety and Correctional Services, the branch responsible for overseeing OTIS. He states that this individual confirmed that "information on race is contained in the OTIS database, that race is one of the standard descriptors, and that data can be pulled using a specific run."

[16] Finally, the appellant takes issue with the ministry's submission that producing the requested record would unreasonably interfere with the ministry's operations. The appellant submits that:

> … even if, as the ministry asserts, the information is not available in the format requested, the ministry has not, with respect, satisfied the burden of proof with respect to the argument that "creating such information would unreasonable interfere with the ministry's operations …". In fact, it has not identified any reasons for why this might be so. First, if the ministry's objection relates to reformatting the already existing information, the jurisprudence suggests that reformatting information that already exists in a recorded form does not constitute "creating" a record ([*Toronto Police*] at para. 35). Second, the mere fact that production of this information might take time and effort is not a sufficient basis on which to object to its production ([*Toronto Police*] at para. 20).

[17] In reply, the ministry submits that:

- in order to respond to the appellant's request, "the aggregate data would need to be manually extracted and inputted into a chart, computed and sorted according to his specifications."

- the identified legal clinic was provided with information as a result of its research request.[3] The same process is available to the appellant.

[3] The ministry advises that as with any research data provided to a third party, the ministry did not keep a copy of the report generated for the legal clinic.

[18] In sur-reply, the appellant asserts that the ministry's objection is to "reformatting already existing information", a matter fully addressed in *Toronto Police*, and that his request was properly constituted under section 24(1) of the *Act*.

Analysis and Findings

[19] Section 1 of the *Act* sets out that the purposes of the *Act* are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[20] Section 10(1) of the *Act* sets out a person's general right of access to records:

> Subject to subsection 69(2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request to access is frivolous or vexatious

[21] Section 24(1) of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[22] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[23] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Section 6(5) of Regulation 460 reads:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

[24] Section 2(1) of the *Act* specifically defines a "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[25] Section 2 of Regulation 460 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

[26] Generally speaking, an institution is not required to create a new record in response to a request under the *Act*.[4] However, as set out above, the term "record" is defined in section 2(1) of the *Act*. Paragraph (b) of the definition provides that subject to the regulations, the term "record" includes any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

[27] In Order PO-2904, I wrote:

> As explained by Adjudicator Colin Bhattacharjee in Order MO-2129, the term, "machine readable record," is not defined in the *Act*. However, a machine readable record can be defined as a record that is capable of being rendered intelligible by a machine. For example, a machine readable record would include a database that is capable of being rendered intelligible by a computer. Other examples of machine readable records would include a DVD which can be played or rendered intelligible by a DVD player or an audiotape which can be listened to or rendered intelligible by a tape recorder.

[4] See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

> Section 2 of Regulation 460 under the *Act* (quoted above) places further limits on the definition of "machine readable record" in section 2 of the *Act* by excluding a record from that definition "if the process of producing it would unreasonably interfere with the operations of an institution."
>
> In Order P-50, Former Commissioner Linden stated that what constitutes "unreasonable interference" is a matter which must be considered on a case-by-case basis, but it is clear that the regulation is intended to impose limits on the institution's responsibility to create a new record.
>
> Moreover, section 6(5) of the same regulation provides for a fee to be charged by an institution "for developing a computer program or other method of producing a record from a machine readable record."

[28] In Order MO-2129, Adjudicator Bhattacharjee addressed a request for information that appeared to exist within the record holdings of an institution, but not in the format asked for by the appellant in that appeal. In particular, the Toronto Police Services Board (the police) submitted that the requested information did not exist in list format and that their database does not contain a report function capable of extracting a list of agencies. However, they acknowledged that the information that could be used to compile a list exists in both paper and electronic records.

[29] In finding that the police failed to adequately respond to the request in that appeal, Adjudicator Bhattacharjee wrote:

> I agree with former Commissioner Linden's reasoning in Order P-50. Clearly, it would be unreasonable to expect an institution to create a record in the format sought by the requester if the records are the type contemplated by paragraph (a) of the definition of a record, such as paper records. Unless the records are few in number, it would require significant resources and staff time for an institution to manually organize the data from such records into the format sought by the requester, such as a list.
>
> However, there is a clear policy rationale underlying the special rules governing computerized or electronic records inherent in paragraph (b) of the definition of a record. The data in a machine readable record, such as a database, can be retrieved, manipulated and reorganized with ease through the use of information technology tools, such as computer software. Consequently, in comparison to paper records, it is significantly easier and less labour intensive for institutions to organize electronic data into the format sought by the requester. This is why section 2(1) of the *Act* defines a record as including any record that is capable of being

produced from a machine readable record in the circumstances set out in paragraph (b).

In 1997, this office published a paper, *Electronic Records: Maximizing Best Practices*, that provided further commentary on this requirement:

> The *Acts* and regulations recognize the obligation of government organizations to create electronic records when requested, except where to do so would unreasonably interfere with the operations of the government organization. That obligation would be satisfied through the use of the appropriate hardware and software to create the document …

[30] Adjudicator Bhattacharjee went on to address the obligations of the police in the circumstances of that appeal, determining that:

> … If the request is for information that currently exists in a recorded format different from the format asked for by the requester, as is the case in this appeal, the Police have dual obligations.
>
> First, if the requested information falls within paragraph (a) of the definition of a record (e.g., paper records), the Police have a duty to identify and advise the requester of the existence of these related records (i.e., the raw material). However, the Police are not required to create a record from these records that is in the format asked for by the requester (e.g., a list).
>
> Second, if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. In such circumstances, the Police have a duty to create a record in the format asked for by the requester.
>
> In my view, a reasonable search for records responsive to an access request would include taking steps to comply with these two obligations.
> …

[31] In *Toronto Police*, the Ontario Court of Appeal discussed the application of a contextual and purposive analysis of the identically worded section 2(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*:

> A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information.
>
> The Divisional Court made no mention of these principles of interpretation in constructing s. 2(1)(b) of the *Act* and in concluding that the Adjudicator's interpretation was unreasonable. This omission led the court to give s. 2(1)(b) a narrow construction – one which, in my respectful view, fails to reflect the purpose and spirit of the *Act* and the generous approach to access contemplated by it.
>
> The Divisional Court's interpretation of s. 2(1)(b) would eliminate all access to electronically recorded information stored in an institution's existing computer software where its production would require the development of an algorithm or software within its available technical expertise to create and using software it currently has. In my view, other provisions in the *Act* and the regulations tell against this interpretation.
>
> Sections 45(1)(b) and (c) of the *Act* require the requester to bear the "costs of preparing the record for disclosure" and "computer and other costs incurred in locating, retrieving, processing and copying a record," in accordance with the fees prescribed by the regulations. Subsections 6(5) and (6) of Reg. 823 were enacted pursuant to s. 45(1) of the Act. These provisions state:
>
> > 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
> >
> > …
> >
> > 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
> >
> > 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those

> costs are specified in an invoice that the institution has received.
>
> In my view, a liberal and purposive interpretation of those regulations when read in conjunction with s. 2(1)(b), which opens with the phrase "subject to the regulations," and in conjunction with s. 45(1), strongly supports the contention that the legislature contemplated precisely the situation that has arisen in this case. In some circumstances, new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it. [reference omitted]

[32] Although the ministry maintains that producing a responsive record would unreasonably interfere with its operations, it did not provide any clear and cogent evidence to support this bald assertion. In its representations, the ministry simply states that to respond to the appellant's request the aggregate data would "have to be manually extracted and put into a chart, computed and sorted according to the appellant's specifications." The ministry does not elaborate on this extraction process, or how it would unreasonably interfere with its operations.

[33] The ministry's representations, taken together, suggests that the data is available in electronic form and that it is possible for it to be formatted in accordance with the appellant's request. In fact, the ministry seems quite willing to provide the information in the format requested by the appellant so long as he provides a "research proposal."

[34] In my view, the circumstances of this case are not unlike those in the *Toronto Police* case. It may be that new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a responsive record from a machine readable record, with the requester being held accountable for the costs incurred in developing it. However, given that the ministry has been able to provide a report in the past that contains similar information, it may be that the program for doing so may already exist. The ministry's representations do not address this possibility other than to suggest that it would be prepared to respond to the request if it was worded as a "research proposal".

[35] In short, I find that the ministry has failed to provide sufficient evidence to establish that it has made a reasonable effort to identify and locate responsive records, and I will, accordingly, order it to conduct a further search for responsive records applying the principles applicable to machine readable records, set out above.

[36] After the ministry has completed its further search, it must issue a new access decision to the appellant, including any actual fee or fee estimate for providing access

to the records. The appellant has the right to appeal this new access decision to the Commissioner's office.

B. Is the *YCJA* an impediment to the ministry issuing a new access decision?

[37] In its reply representations, the ministry states that in order to meet the requirements of the *YCJA,*[5] a part of the named legal clinic's research proposal was an agreement regarding the protection of their program participants' *YCJA* information.

[38] The ministry submits that in the case of the request at issue before me:

> … given the potentially small number of racialized youth in a number of the ministry's institutions, the ministry would be at a very high risk of contravening these sections of the *YCJA* as the youth could then be easily identified as "young persons' dealt with under the act".

[39] With respect to the ministry's position regarding the *YCJA*, the appellant submits in sur-reply that the ministry submissions refer to "very high risk", rather than certainty of the breach of the provisions of *YCJA* if the requested information is disclosed.

[40] The appellant submits that, in any event, the *YCJA* does not contain an absolute ban on the release of information, rather the jurisprudence suggests that it prohibits only the publication of a "sliver of information." In this regard, the appellant relies on *Re F.N.,*[6] a decision that addressed the non-disclosure provisions of the *Young Offenders Act* ("*YOA*"), the predecessor to the *YCJA*.[7]

[41] The appellant submits that the information requested does not fall within the "sliver of information" that is prohibited under the *YCJA*. The appellant submits that he does not seek information on names, birthdates or other identifying information.

[42] Finally, the appellant submits that similar, if not more detailed, information about youth involved in the criminal justice system has been released in the past.[8]

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[5] Section 118(1) of that statute provides that: "Except as authorized or required by this Act, no person shall be given access to a record under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act."

[6] [2000] 1 S.C.R. 880.

[7] The appellant also relies on *Southam Inc. and The Queen* (1984) 48 O.R. (2d) 678 (Ont. H.C.).

[8] The appellant submits that in February 2010, the Toronto Star published a series of articles on the role of race and racial profiling in policing. The appellant submits that the data that served as the foundation for the series was obtained in a Freedom of Information request for arrest data that lists details about youth as young as 13 years old including: contact ID, zone, nature of contact, contact date time, year and month of birth, sex, birthplace, and skin colour.

Analysis and Finding

[43] I find on the evidence before me that the *YCJA* is no impediment to the ministry issuing a new access decision. Although the ministry claims that small cell counts would enable the identification of an individual youth it has provided insufficient evidence to support this argument. It is also trite to say that the composition of youth detention centres in the province of Ontario changes over time. The information that is requested does not include the name, birthdates or other identifiers of the youth. It does not appear that section 118(1) provides for an exception by agreement to the prohibition against disclosure of information that would identify the young person to whom it relates as a young person dealt with under the *YCJA*. The ministry provided similar information, albeit subject to an agreement regarding the *YCJA*, to the named legal clinic with no concerns about the contravention of the *YCJA*. The ministry also had no similar misgivings about providing the information pertaining to Aboriginal youth, which appears to have been disclosed to the appellant without limitation.

ORDER:

1. I order the ministry to conduct further searches for the records responsive to the appellant's request, in accordance with the findings in this order.

2. I order the ministry to issue a new access decision to the appellant, including a fee decision, with 45 days of this order.

3. I order the ministry to provide this office with a copy of the new decision letter that it issues to the appellant.

Original Signed by: July 24, 2012
Steven Faughnan
Adjudicator