

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3386

Appeal PA13-465

Ministry of Transportation

August 27, 2014

Summary: The appellant sought access to records under the *Freedom of Information and Protection of Privacy Act* related to a road realignment application. The ministry located responsive records. The appellant claimed that the ministry did not conduct a reasonable search for responsive records. This order upholds the ministry's search.

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 Transportation (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following:

1. The tender documents for the ditching, tree removal and the widening of the Devil's Lake Road in 2011.
2. Any correspondence (including letters, faxes, e-mails) in 2011 between [a named employee] and [a specified] Devil's Lake Local Roads Board trustee, about the re-alignment of the Devil's Lake Road off of [name's] property, and the correspondence between [the named

employee] and [another named employee] regarding [name's] road re-alignment.

3. The correspondence between [the named employee] and [the specified] Devil's Lake Local Roads Board trustee, regarding the cancellation of the road re-alignment off of [name's] property.

[2] The ministry located 36 pages of records responsive to part 1 and part 2 of the request and issued a decision to the requester advising that partial access was granted to these records. Some information in the records was denied pursuant to sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The ministry also advised that access to records regarding part 3 of the request could not be granted as no written correspondence between the individuals existed.

[3] The requester (now the appellant) filed an appeal of the ministry's decision.

[4] During the course of mediation, the appellant advised the mediator that he was not pursuing access to information severed pursuant to section 17(1) of the *Act*. As a result, this information and section of the *Act* are not at issue in this appeal. However, the appellant advised the mediator that he was pursuing access to information severed pursuant to section 21(1) of the *Act*. The appellant also advised that he believes that further records responsive to the request exist. In particular, the appellant believes that internal ministry emails and emails exchanged between the individuals named in the request should exist.

[5] The ministry agreed to conduct a second search for records responsive to the request. After conducting a second search, the ministry identified additional responsive records. The ministry issued a decision to the appellant explaining that it was providing partial access to the records not impacted by its notice to an affected third party. The ministry denied access to the withheld information pursuant to section 21(1) of the *Act*.

[6] After receiving the affected party's consent for the disclosure of the information relating to him to the appellant, the ministry issued a supplementary decision to the appellant. The ministry provided the appellant access to the information relating to this affected third party and denied access to information relating to other affected third parties pursuant to section 21(1) of the *Act*.

[7] The appellant subsequently advised the mediator that he was not pursuing access to the remaining information denied pursuant to section 21(1) of the *Act*. As such, this information and section of the *Act* are no longer at issue in this appeal. However, the appellant advised he still believes additional records responsive to his request exist, specifically emails exchanged between the individuals named in the request. The mediator relayed the appellant's position to the ministry.

[8] The ministry explained that the appellant has filed a new request since this appeal was opened and that this request was similar since it was for emails between the same individuals. As a result, the ministry explained that it had identified all such emails and disclosed those emails to the appellant under the new request. The ministry provided its position that no further records responsive to the request exist.

[9] The mediator relayed this information to the appellant who did not accept the ministry's position. He explained that the new request had a different date range (2012), and that all records disclosed to him under that request were from 2012. In light of this, he maintains his position that responsive emails from the year 2011 should exist. As a result, the reasonableness of the ministry's search is at issue in this appeal.

[10] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process. After the Notice of Inquiry was sent out, the ministry located more responsive records, consisting of six emails, which it disclosed to the appellant. The ministry also provided four affidavits listing the details of the searches undertaken for responsive records.

[11] The appellant maintained that additional records still existed. The oral inquiry, therefore, proceeded by teleconference.

[12] The appellant represented himself at the oral inquiry. In attendance for the ministry were its:

- Manager, FOI (freedom of information) and Privacy Office
- Legal Counsel
- Regional Manager, Operations
- Municipal Services Supervisor
- Senior Municipal Supervisor
- Head, Operational Services
- FOI Program Coordinator (Northeast Region)

[13] At the conclusion of the oral inquiry, it was agreed by the parties that the Municipal Services Supervisor had not conducted a thorough search and that, as a result, he would conduct another search of his paper files, and archived and active emails for responsive records. This search was conducted and yielded two additional emails exchanged between the Municipal Services Supervisor and the Devil's Lake Local Roads Board trustee named in the request.

[14] In response, the appellant maintained that a reasonable search had still not yet been done. He explained that he had asked for records from 2011, and the new disclosure only contained records from 2012. In support of his position that additional records dated 2011 existed, he asked that the ministry produce the Head, Operational Services' approval of the road realignment in 2011.

[15] In reply, the ministry stated that the Head, Operational Services had completed another search of his email and written notes focussing on 2011. His search produced no additional records.

[16] The ministry also stated that in 2011 the Senior Municipal Supervisor was in the field so the majority of his correspondence would have been done via phone. As well, in 2011 the Head, Operational Services was travelling throughout Northern Ontario on work-related assignments and did not spend much time in the office.

[17] The ministry further stated that the work in question was considered minor in nature and was being done internally; therefore, there was no need for contract documents and formal approvals. It stated that the Head, Operational Services gave the Senior Municipal Supervisor verbal approval to utilize the funds available in the Specific Fund portion of the ministry's Unincorporated Roads program. Furthermore, it stated that the time of the year limited what work could be done before the construction season ended.

[18] In surreply, the appellant questioned the details of the request the Head, Operational Services gave to the Senior Municipal Supervisor for the verbal approval for the road realignment. He stated there must be more documentation.

Analysis/Findings

[19] In appeals where the only issue remaining is where the appellant believes that additional records exist, as is the case in this appeal, the sole issue to be decided is whether the ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the ministry will be upheld. If I am not satisfied, further searches may be ordered.

[20] Important factors in assessing the reasonableness of the search will be whether the appellant provided sufficient identifying information to assist the institution in its search and has provided a reasonable basis for concluding that such records exist.

[21] 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.¹ To be responsive, a record must be "reasonably related" to the request.²

¹ Orders P-624 and PO-2559.

² Order PO-2554.

[22] 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.³

[23] 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.⁴

[24] Based on my review of the appellant's request, the records disclosed by the ministry, and the parties written and oral representations, I find that the ministry provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[25] Not only did the ministry provide affidavits of the searches undertaken prior to the oral hearing from its Head, Operational Services, Senior Municipal Supervisor, Regional Manager of Operations, and Municipal Services Supervisor, it undertook additional searches after the hearing. In addition, in attendance at the oral hearing were several individuals who provided testimony about the searches undertaken. I have carefully reviewed all of the evidence provided by the parties before, during, and after the oral hearing and find that the ministry has conducted a reasonable search for responsive records.

[26] I find that the appellant has not provided a reasonable basis for concluding that additional responsive records exist.⁵

[27] Therefore, I am upholding the ministry's search for responsive records and dismissing the appeal.

ORDER:

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

Original Signed By:
Diane Smith
Adjudicator

August 27, 2014

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2185.

⁵ Order MO-2246.