Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3494

Appeals PA13-537 & PA13-538

Ministry of Community Safety and Correctional Services

May 27, 2015

Summary: The ministry received two separate requests for information. The first was for records relating to information sharing between the Ontario Provincial Police (OPP) and the Canada Revenue Agency (CRA), and the second was for records related to the OPP's seizure of "things not specified", pursuant to section 489 of the *Criminal Code*. The ministry responded to both requests by granting access to all responsive records. The appellant appealed both decisions on the basis that the ministry had not conducted reasonable searches. This order finds that the ministry conducted reasonable searches in response to the two requests.

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

Orders and Investigation Reports Considered: PO-1744

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received two related requests from the same appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requests and subsequent appeals were initially processed separately, but joint representations were received from the parties, and this order addresses both appeals.

Request 1

[2] The appellant's first request reads as follows:

> All records … in the possession and/or control of the Ontario Provincial Police (OPP) concerning the policies and procedures governing the exchange of information between OPP and the Canada Revenue Agency (CRA). This includes, but is not limited to, copies of all memoranda of understanding and other agreements, policies, memoranda and/or directives on the exchange of information between the OPP and CRA.

[3] In response, the ministry issued a decision indicating that full access was granted to the three pages of responsive records, which were three pages extracted from the OPP Orders (parts of chapters 2, 5, and 6).

[4] The appellant appealed the decision on the basis that additional responsive records ought to exist, and that the ministry's search was, therefore, not reasonable.

[5] During mediation, the appellant provided support for his position that additional records exist by referring to a letter of agreement dated September 12, 2005 between the OPP and other identified parties, and a memorandum of understanding. The parties also agreed that the scope of the request could be expanded, and the appellant submitted a revised/clarified request to the ministry which read:

> … our request was intended to include all training material in the possession of the Provincial Police Academy relating to the exchange of information that has been seized by [the OPP] (whether by way of warrant or otherwise) with any other law enforcement agency (including but not limited to [the CRA]). Our request includes … all records relating to section 490(15) of the *Criminal Code*. Our request was also intended to include … all policies, procedures and training material governing the receipt by the OPP of information originating from [the CRA]. This would include … all records relating to section 241(3) of the *Income Tax Act* and section 462.48 of the *Criminal Code*.
>
> Our entire request was intended to include … copies of all memoranda of understanding and other agreements, policies, memoranda and/or directives. This includes [these types of documents] encompassing the OPP as a whole, as well as [these types of documents] relating to the exchange of information seized by the OPP in relation to [an identified investigation involving the appellant's client]. Furthermore, … our request was not intended to include [these types of documents] concerning specific investigations conducted by the OPP other than in relation to our client ….

> In other words, we want all non-case-specific agreements, policies, memoranda and/or directives relevant to the above described exchange of information as well as all agreements, policies, memoranda and/or directives relevant to the above described exchange of information that are case-specific to our client.

[6] The appellant also confirmed that the request was for records dated between January 1, 2005 and December 31, 2008 inclusive.

[7] In light of the wording of the revised request, and because of other requests the appellant had made to the ministry, the parties agreed that the portion of the revised request pertaining to records that are case-specific to the appellant's client would form part of another identified request relating to the appellant's client. The appellant indicated, however, that he was not aware of whether a particular requested agreement was or was not "case-specific."

[8] Also during mediation, the appellant provided a copy of certain OPP notes in support of his position that a Memorandum of Understanding, a Letter of Agreement dated September 12, 2005 and a Working Agreement (that may or may not be case-specific) have not been located and ought to exist.

Request 2

[9] The appellant's second request reads as follows:

> All records … in the possession or control of [the OPP] concerning policies and procedures in force on February 15, 2007, relating to the seizure of things not specified, pursuant to section 489 of the *Criminal Code*.

[10] In response, the ministry issued a decision indicating that full access was granted to the two pages of responsive records, consisting of one page extracted from the OPP Orders (part of chapter 2) and one page from a power point presentation.

[11] The appellant appealed the decision on the basis that additional responsive records ought to exist, and that the ministry's search was not reasonable.

[12] During mediation, the appellant indicated his belief that additional records such as training materials, guidelines and policies ought to exist. Also during mediation, the appellant filed a separate request for records that may be held by the Ontario Police College. In addition, by agreement of the parties, the appellant submitted a revised/clarified request to the ministry which read:

> … we requested records pertaining to the seizure of things not specified, pursuant to section 489 of the *Criminal Code*. As discussed, please be

> advised that our request was intended to include all records pertaining to policies, procedures and training in the possession of the Provincial Police Academy relating to the seizure of things not specified, pursuant to section 489 of the *Criminal Code.* Furthermore, please be advised that we seek these records in relation to the time frame of January 1, 2005 to December 31, 2007.

Responses to the revised requests

[13] In response to the revised requests, the ministry issued a supplemental decision addressing both of them. The ministry identified that the scope of the appellant's first request was as follows:

> "all training material in the possession of the Provincial Police Academy relating to the exchange of information that has been seized by [the OPP] with any other law enforcement agency". Responsive records would include all memoranda of understanding and other agreements, policies, and/or directives encompassing the OPP as a whole and governing the receipt by the OPP of all information originating from but not limited to [the CRA] and records relating to sections 462.48 and 490(15) of the *Criminal Code* and section 241(3) of the *Income Tax Act* for the time frame covering January 1, 2005 to December 31, 2008. You also clarified that your request relating to "agreements" refer to "non-specific agreements" only.
>
> Please note that … you agreed to redirect the portion of your request relating to "case specific agreements" to [another identified request made by you].

[14] The scope of the appellant's second request was identified as:

> "all records pertaining to the seizure of things not specified, pursuant to section 489 of the *Criminal Code*." Responsive records include "all policies, procedures and training material in the possession of the Provincial Police Academy" for the time frame covering January 1, 2005 to December 31, 2007.

[15] The ministry's decision indicated that it had conducted additional searches for responsive records, and then stated:

> In this regard, please note that the Policy section of the Business and Financial Services Bureau of the OPP, the Investigative Bureau of the OPP and the OPP Academy conducted an additional search for responsive

> records. Please be advised that no additional records were located [in relation to] these portions of the above-noted requests.
>
> With respect to the additional searches conducted by the Ministry relating to "training materials" relevant to [the requests], … the OPP Academy located responsive records relevant to [the second request only.] Total access has been granted to these [four pages of records].
>
> Please note that the OPP Academy have confirmed that training content is retained in accordance with their retention period of two years plus current. The OPP Academy does not have any Course Training Standards related to anti-rackets investigative training.

[16] After receiving the ministry's supplemental decision letter, both appeals were placed "on hold" until other outstanding requests by the appellant to the ministry were processed. These appeals were then reactivated after the ministry issued decision letters in relation to those other requests.

[17] The appellant maintained that the ministry's searches for records responsive to his revised requests were not reasonable, and that more records should exist. Mediation did not resolve the appeals, and they were transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the parties inviting representations on the issues. I received representations from both the ministry and the appellant, which were shared. I then received reply representations from the ministry in response to the appellant's representations.

[18] The sole issue in this appeal is whether the ministry conducted reasonable searches for records responsive to the two requests. I find that ministry's searches were reasonable, and I dismiss these appeals.

DISCUSSION:

Introduction

[19] In appeals involving a claim that additional responsive records exist, as is the case in these appeals, the 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 ministry's decision will be upheld. If I am not satisfied, further searches may be ordered.

[20] A number of previous orders have identified the requirements in reasonable search appeals.[1] In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[21] I agree with Acting-Adjudicator Jiwan's statement, and have applied her approach in a previous order.[2]

[22] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[23] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The ministry's representations

[24] The ministry submits that it conducted reasonable searches for records responsive to the appellant's requests.

[25] The ministry begins by outlining its efforts to seek clarification from the appellant regarding the nature of his requests. The ministry submits that "[t]hese efforts were extensive and iterative… and assisted the appellant in formulating the scope for what became the actual requests."

[26] The ministry states that it then determined that, if they existed, responsive records for both appeals would be located in the OPP's Business Management Bureau (BMB), its Investigation and Support Bureau (ISB) and/or the OPP Academy. The ministry then confirmed that a contact person was identified for each of the three

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[1] Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.
[2] Order PO-3114.

offices, who was responsible for conducting or overseeing the search, identifying any potentially responsive records and reporting back to the ministry.

[27] The ministry then provides details about the searches in each of the three offices.

[28] With respect to the search of the BMB, the ministry states that the BMB administers and maintains the OPP's operational policies and procedures, known as "Police Orders". The ministry confirms that a Policy Development Officer with the BMB, who is familiar with the "organization" of the Police Orders, conducted a search of the Police Orders for the time period of the request. It also confirms that these police orders are searchable by using keywords, and that, aside from the records that were identified and disclosed to the appellant, the ministry does not believe that any additional records exist in the BMB.

[29] Regarding the search of the ISB, the ministry identified that the ISB conducts various law enforcement activities, including investigations into suspected criminal wrongdoing which may result in criminal charges. The ministry confirmed that the ISB is responsible for specific investigations and does not typically store records that do not pertain to a particular investigation. The ministry then confirmed that a Detective Sergeant at the ISB was consulted and determined that there were no responsive records.

[30] With respect to the search of the OPP Academy, the ministry indicates that the OPP Academy provides law enforcement training primarily to members of the OPP. It confirms that Academy records are stored on the Academy's shared drives and that, as a result of a search of the Academy's shared drives, one responsive record was located. It also states that the Manager of the OPP Academy does not believe there are any other responsive records for the following reasons:

> (a) The OPP Academy does not provide training courses that are related to the scope of the requests; and
>
> (b) The OPP Academy destroys its records two years plus the current year after they are created, if they are no longer needed or in use. It is possible that other responsive records existed at one time, but these would no longer exist as they would have been destroyed in accordance with the Academy's retention schedules.

[31] The ministry then addresses the appellant's claim that "a memorandum of understanding, a letter of agreement dated September 12, 2005 and a working agreement (that may or may not be case-specific) have not been located and ought to exist." The ministry responds to this by stating that the closest it has come to identifying a responsive record is an unsigned agreement dated August 25, 2005. The

ministry describes the agreement and confirms that it was disclosed to the appellant in response to one of his other requests. The ministry then states that other records likely do not exist because:

> … the OPP and federal law enforcement agencies such as the CRA routinely work together on law enforcement investigations, and do not, as a matter of course, enter into agreements or written understandings. There is no legal obligation for such agreements to be executed. Such agreements are not required in order to authorize the sharing of information for the purposes of a law enforcement investigation. Therefore, it is reasonable to assume that there are no responsive records in existence, because none were ever created in the first place.

The appellant's representations

[32] The appellant takes the position that the ministry has not conducted a reasonable search for responsive records. In his representations, he identifies the following three reasons why he takes this position:

1) *The ministry has provided no evidence concerning the reasonableness of the search*

[33] The appellant submits that previous orders of the IPC have found that an institution "must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records." The appellant refers to *Practice Direction 6* issued by this office, which refers to the nature of the evidence that can be provided in the course of appeals with this office. He specifically refers to the option for parties to provide affidavit evidence "where a factual issue (such as the reasonableness of a search) may be contentious" and suggests that affidavit evidence in support of the ministry's position should have been provided in this appeal.

2) *The ministry has provided no evidence that the searches were conducted by employees familiar with the storage and retrieval practices at the sites where responsive records could be identified*

[34] In relation to the individuals conducting the searches at the BMB, the ISB and the OPP Academy, the appellant submits that the search must be "conducted by an experienced employee who expends a reasonable effort to locate records which are reasonably related to the request." The appellant also submits that an "'experienced employee' must necessarily be knowledgeable in the subject-matter of the request and be familiar with the storage and retrieval practices concerning the subject-matter of the request."

[35] The appellant does not dispute the experience of the Policy Development Officer at the BMB; however, he argues that the ministry has not provided sufficient information to establish that the employees who conducted the searches at the ISB and the OPP Academy were adequately familiar with the storage and retrieval practices of each office. In regard to the ISB, the appellant submits that the ministry's explanation that an unidentified ISB Detective Sergeant was consulted, without further information relating to the searcher's experience, familiarity with storage and retrieval practices, or the search itself, is insufficient. Regarding the OPP Academy, the appellant states that the ministry "has not identified which employees conducted the searches at this site, let alone their experience or familiarity with the subject-matter of the request."

3) *The ministry has failed to provide sufficient information about the searches conducted at each of the three offices*

[36] In relation to the BMB, the appellant argues that the ministry provided no evidence with respect to:

(a) The keywords used in the searches;

(b) The time-period captured by the search. He states that "it is unclear whether the [Policy Development Officer] searched for all orders *in force* during [the time period stated in the first request], or improperly restricted their search to all orders that were *issued* during that time period;" and,

(c) Whether the BMB is in possession or control of other potentially relevant records, other than Police Orders.

[37] Regarding the ISB, the appellant submits that no evidence has been provided by the ministry to support its assertion that the ISB does not typically store records that are not specific to a particular investigation. The appellant also states that the ministry has provided no evidence to confirm whether the search, if actually conducted, was performed by the Detective Sergeant, or another employee.

[38] The appellant submits that the ministry has failed to provide sufficient evidence about the searches conducted by the OPP Academy. In particular, the appellant argues that the ministry has provided no evidence on:

(a) Who conducted the search;

(b) The manner of search conducted (ie: were the entire shared drives reviewed, or was a keyword search conducted? If the latter, which keywords were used?); or,

(c) Whether any record repositories other than the "shared drives" could reasonably be expected to contain relevant records, and if so, whether those repositories were searched.

[39] The appellant notes that the ministry did not provide a copy of the OPP Academy's retention schedule, or provide specific details relating to the destruction of potentially responsive records. The appellant also submits that the ministry "has failed to advise whether past material (hard-copy or electronic) is archived or otherwise accessible, or whether any inquiries were made in that regard."

[40] The appellant then identifies the specific evidence he believes would be sufficient to establish that the searches were reasonable, including affidavit evidence from each of the employees responsible for conducting the search, and the wording of those affidavits. The appellant also asks that, if I find that the ministry's searches were not reasonable, I require the ministry to meet certain other obligations and provide the appellant with other information.

The ministry's reply representations

[41] The appellant's representations were provided to the ministry, and the ministry provided reply representations in response, addressing a number of the appellant's claims.

[42] Regarding the appellant's questions about the experience and knowledge of the staff who conducted the searches in the ISB and the OPP Academy, the ministry maintains that these searches were conducted by "experienced staff knowledgeable with the records systems they were searching." The ministry then names the Detective Sergeant who conducted the search of the ISB, confirms that he is assigned to the investigation relevant to the records, and notes that he has been with the Anti-Rackets branch for 10 years and "is familiar with the storage and records retrieval practices at the [ISB]."

[43] The ministry also identifies by name the Manager and Chief Instructor of the OPP Academy's Leadership and Design Unit who coordinated the search of the OPP Academy, and notes that this individual has been with the OPP Academy since 2008. The ministry also names the three individuals (two sergeants and the Registrar) who actually conducted the searches. It notes that the two named Sergeants were both lead instructors at the relevant times. The ministry also confirms that one of the sergeants has been with the OPP Academy since 2012, the other sergeant since 2010, and the Registrar since 2006.

[44] In response to the appellant's claim that the ministry did not provide sufficient information about the searches conducted, the ministry states:

> (a) *Business Management Bureau:* … we confirm that the search period of the Police Orders was for all orders in force during the applicable time period. We also confirm that we do not believe the Bureau has any other responsive records, other than Police Orders; and,
>
> (b) *Investigation and Support Bureau:* We confirm that the search for the records was personally conducted by [the named Detective Sergeant].

[45] The ministry also responds to other portions of the appellant's representations. The ministry notes that, "[t]he appellant has asked for additional information including the keywords used in searches, and a retention schedule governing the OPP Academy." The ministry submits that it is required to demonstrate that a reasonable search for records was conducted. It then states:

> [T]here is a distinction between having to demonstrate that [the ministry] conducted a reasonable search, and responding to questions, which are clearly outside of the scope of the Notice of Inquiry, just because the appellant has asked them. The appellant's question about keyword searches would not yield answers that would explain whether a reasonable search was conducted, unless the appellant also [understands] how records were stored, and database search engines were configured.

[46] The ministry maintains that it has conducted a reasonable search for the requested records.

Analysis and finding

[47] As set out above, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the ministry's search for responsive records was reasonable in the circumstances, the ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[48] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.[3] In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

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[3] Order M-909.

> In my view, an institution has met its obligations under the Act by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[49] I adopt the approach taken in the above orders.

[50] In this appeal I have considered the appellant's representations in which he identifies what he regards as insufficient evidence provided by the ministry in support of the searches it conducted. I have also considered the ministry's initial and reply representations. In the circumstances of this appeal, I find that the ministry has provided sufficient evidence to establish that reasonable searches were conducted for responsive records. I make this finding for a number of reasons.

[51] First, as noted above, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the representations of the appellant, I note that all of his representations focus on what he perceives to be insufficient evidence provided by the ministry. However, other than his initial reference to specific documents (agreements), which I address below, the appellant has not provided evidence to establish a reasonable basis for concluding that additional responsive records exist. He has not submitted evidence that other records exist which were not located as a result of the searches conducted.

[52] With respect to the appellant's initial reference to specific documents, this relates to his statement that "a memorandum of understanding, a letter of agreement dated September 12, 2005 and a working agreement (that may or may not be case-specific) have not been located and ought to exist." The ministry responded to this by stating that the closest it came to identifying a responsive record is an unsigned agreement dated August 25, 2005, and that this agreement was disclosed to the appellant in response to one of his other requests. Although I accept that there is some confusion regarding whether or not this agreement, or similar requested agreements are "case-specific," in light of the ministry's decision that the August 25, 2005 agreement was responsive to another of the appellant's request, I will review the issue of the possible existence of additional records responsive to this part of the appellant's request in that other appeal, which is also before me. I will therefore not address this issue in this order.

[53] Regarding the appellant's view that further evidence, including affidavit evidence, should have been provided by the ministry, although I agree that this office can request that evidence be provided in affidavit form, this is not a requirement in every case. The nature of the evidence required to establish that a reasonable search has been conducted depends on the circumstances of a given appeal.[4] In this appeal, I find that the ministry has provided sufficient evidence to satisfy me that it has made a reasonable effort to identify and locate records which are reasonably related to the request.

[54] Regarding the appellant's concern that the ministry has not provided sufficient information relating to the experience of the ISB and OPP Academy staff who conducted the searches, including the identity of the searchers, I find that in its reply representations the ministry has provided sufficient evidence regarding the identities, positions, and experience of the individuals who conducted or were involved in the searches for responsive records in these departments. The ministry clarified which individuals conducted the searches and included their names, ranks, the nature of their positions, and their years of experience. Based on this evidence, I am satisfied that these were experienced employees, who were knowledgeable in the subject-matter of the requests and familiar with the relevant record-keeping practices.

[55] With respect to the appellant's argument that the ministry should be required to provide more information regarding the keywords used, I find that, in the circumstances of this appeal, this level of detail is beyond what is required to establish that the ministry has conducted reasonable searches. I agree with the ministry that, in the circumstances of this appeal, it is not required to answer the appellant's questions regarding the keywords used to conduct the searches, as this would not necessarily establish whether or not the ministry conducted reasonable searches without training on how ministry records are stored, or how information is configured in the ministry's databases.

[56] I also find that the ministry adequately clarified that its search for Police Orders was confined to Police Orders in force during the applicable time period. Further, I am satisfied that the ministry sufficiently considered whether other responsive records may exist within the BMB, and whether it was necessary to search record repositories other than the "shared drives" within the OPP Academy.

[57] In short, I am satisfied that the employees who conducted the searches were sufficiently experienced and familiar with the subject matter of the appellant's requests, and that these employees expended a reasonable effort to identify and locate responsive records. As a result, and in the absence of any further evidence from the appellant that additional responsive records exist, I find that the ministry has conducted reasonable searches for responsive records in accordance with section 24 of the *Act*.

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[4] See, for example, orders MO-2143-F, MO-2875, PO-2559 and PO-3114.

ORDER:

I dismiss these appeals.

Original Signed By: May 27, 2015
Frank DeVries
Senior Adjudicator