

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3661

Appeal PA15-281-2

Office of the Public Guardian and Trustee

October 24, 2016

Summary: The Office of the Public Guardian and Trustee (the OPGT) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for records relating to the requester dated between 1997 and 2014. In this order, the adjudicator finds the OPGT's search for responsive records reasonable and upholds its search.

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

BACKGROUND:

[1] The Office of the Public Guardian and Trustee (the OPGT) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for records relating to:

Any and all records, phone calls, correspondence, digital media, notes, conversations related to [the requester] between 1997 and 2014.

[2] In its decision, the OPGT granted the requester partial access to the responsive records. The remainder of the records was denied pursuant to the discretionary personal privacy exemption in section 49(b) of the *Act*.

[3] The requester, now appellant, appealed the OPGT's decision.

[4] During mediation, the appellant advised that he believes that more records should exist. In particular, he was seeking an internal handwritten note that should have been attached to his file. He also wanted access to more records, including the name of one of the employees who was involved with his case and who entered some information in the OPGT computer system.

[5] In response, the OPGT answered the appellant's questions and conducted another search for responsive records. The OPGT stated that no additional records exist.

[6] The mediator obtained consent from an OPGT employee to the disclosure of her name to the appellant. The OPGT subsequently issued a decision granting the appellant access to this information.

[7] As mediation did not resolve the issues in this appeal, this matter proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought the representations of the OPGT and the affected person (the estate trustee) initially.

[8] The affected person then provided his consent to disclosure of information in the records to the appellant. As a result, the OPGT disclosed the remaining information at issue in the records, as well as additional records.

[9] The only remaining issue, therefore, was whether the OPGT conducted a reasonable search for responsive records. Both the OPGT and the appellant provided representations on this issue and they were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In this order, I uphold the OPGT's search for responsive records.

DISCUSSION:

DID THE INSTITUTION CONDUCT A REASONABLE SEARCH FOR RECORDS?

[11] 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 24.¹ 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.

[12] 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

¹ Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[13] 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.⁴

[14] 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.⁵

[15] 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.⁶

[16] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.⁷

[17] On the search issue, the appellant states that the OPGT has not located a document issued on January 30, 2012 indicating that the current estate trustee had guardianship. He states that a staff member issued a request to obtain that document from the archives. The appellant refers to conversations he had with a lawyer at the Ministry of the Attorney General who had indicated that there was a handwritten note in their files that the appellant might be interested in which had a number of names involved in the subject matter of the records, including that of the estate trustee.

[18] The appellant states that he is also seeking records from a specific hospital and those sent by that hospital to institutions other than the OPGT.

[19] The OPGT was sent the appellant's representations and was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Order MO-2213.

2. If the institution did not contact the requester to clarify the request, did it:

(a) choose to respond literally to the request?

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[20] In response, the OPGT states that the two documents the appellant believes exist, namely a document dated January 30, 2012 and a handwritten note with the name of an estate trustee, have already been provided by it, as follows:

- the January 30, 2012 document the appellant refers to is the "Certificate of Incapacity" that is listed as page 5 in the responsive records; and,
- the handwritten note is at page 21 of the responsive records.

[21] Concerning the hospital's records, the OPGT states that it has produced all records relating to the appellant, including all records sent to the OPGT from the hospital. It submits that it has no control over non-OPGT records in the possession of the hospital.

[22] The OPGT also provided an affidavit of its legal counsel (the counsel) who has had carriage of the OPGT's response in respect of the appellant's two requests and the subsequent appeals.⁸

[23] The counsel states, in response to the request in this appeal file, that she

⁸ This file PA15-281-2 and the related file PA15-485. In the latter file, all documents at issue have been disclosed to the appellant by the OPGT and appeal file PA15-485 is being closed upon issuance of the order in appeal file PA15-281-2.

conducted an electronic search of the OPGT's internal computer system with the name of the appellant for the time period of the request and located and printed all responsive records. She states that she then requested all paper file records with the name of the appellant for the time period requested and found and copied all responsive records. She states that all of the OPGT's records with respect to the appellant are either electronic based within its internal computer system or paper records.

[24] The counsel states that during the mediation stage of this appeal, at the IPC's request, the OPGT conducted a further search for a handwritten note, but did not locate any additional responsive records beyond those that had already been released. She also states that in accordance with the OPGT's record retention schedule, no records would have been destroyed.

[25] The counsel states that once the affected person provided his consent to release his own information during the adjudication stage of the appeal, it conducted another search and found a further six responsive records, which it disclosed to the appellant.

[26] The counsel submits that the OPGT has conducted an exhaustive and reasonable search and that no further search is required.

[27] The appellant did not provide representations in reply to the OPGT's representations.

Analysis/Findings

[28] In his request, the appellant sought access to OPGT records regarding:

Any and all records, phone calls, correspondence, digital media, notes, conversations related to [the appellant] between 1997 and 2014.

[29] As stated above, the appellant submits that the OPGT has specifically not located a document dated January 30, 2012 and a handwritten note with the name of the estate trustee.

[30] Based on my review of the parties' representations and the records already disclosed to the appellant, I find that the OPGT has located and disclosed the specific records sought by the appellant, the January 30, 2012 document at page 5 of the records and the handwritten note at pages 17 to 22 of the records. I also find that the OPGT conducted a reasonable search for responsive records. I find that it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[31] As detailed above, *FIPPA* does not require the OPGT to prove with absolute certainty that further records do not exist.

[32] In this appeal, I find that the appellant has not provided a reasonable basis for me to conclude that the searches conducted by the OPGT were not reasonable and that additional responsive records exist.

[33] Furthermore, I agree with the OPGT that records exchanged between the named hospital and institutions other than the OPGT are not within the OPGT's control, and, therefore, do not come within the scope of this appeal.

[34] Accordingly, I uphold the OPGT's search for responsive records and dismiss the appeal.

ORDER:

I uphold the OPGT's search for responsive records and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ October 24, 2016