Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3739

Appeal PA15-550

Ministry of Finance

June 22, 2017

Summary: The Ministry of Finance (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to Estate Information Returns. The requester identified 9 questions to which he sought responsive information. In response to the request, the ministry created a one-page chart with answers to the 9 questions. The ministry granted access to the information that is responsive to questions 1, 2, and 9 but denied access to the information that is responsive to questions 3 to 8 pursuant to the discretionary exemption at section 18(1)(d) which addresses information relating to the government of Ontario's economic interests. The requester appealed the ministry's decision. During mediation, the reasonableness of the ministry's search for information responsive to question 9 was added as an issue on appeal. In this order, the Adjudicator finds that the exemption at section 18(1)(d) applies to the information at issue and that the ministry's search was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(d) and 24.

OVERVIEW:

[1] The Ministry of Finance (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to Estate Information Returns (EIRs). EIRs are required to be submitted to the Minister of Finance (the Minister) by every application for a certificate of appointment of estate trustee where estate administration tax (EAT) is payable pursuant to Regulation 301/14. The requester listed 9 questions to help identify the specific information that he seeks:

1. How many EIRs should have been submitted to the Minister?

2. How many EIRs were received by the Minister?

3. How many of the EIRs received have been selected for review?

4. How many of those reviews have given rise to a request for further information?

5. How many of those reviews have led to an assessment for additional EAT?

6. How much of the additional EAT assessed has been collected?

7. How much of the additional EAT assessed has been written off as being uncollectable?

8. How many persons have been charged for offences alleged to have been committed under the *Estate Administration Tax Act, 1998*?

9. Please set out the budgeted costs to the Ministry of Finance for the fiscal period ending March 31, 2016 and its actual costs as at the Cut-Off Date for operation of this audit and verification authority (including collection measures), taking into account:

    a. internal costs, including salaries, benefits, allocation of occupancy and all other costs; and

    b. external costs, including hiring outside third parties such as accountants, valuators, lawyers, etc.

[2] The requester not only asked that the information provided in response to his 9 questions be current up to a specific date, but also asked for continuing access to such information. The request stated:

> Pursuant to subsection 24(3) of the *Freedom of Information and Protection of Privacy Act*, I intend that the request, if granted, be a continuing request for access for a period of two years from the date of your receipt of this request. More particularly:
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> • The request for information in items 1 to 8, inclusive, is intended to be a request for that information – in each case on a cumulative basis from January 1, 2015 – as of each of: (i) December 31, 2015; (ii) June 30, 2016; (iii) December 31, 2016; and (iv) June 30, 2017.
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> • The request for information in item 9 is intended to be a request for that information for each of the fiscal periods respectively ending on March 31, 2016 and March 31, 2017 and, in the case of the budgeted costs only, for the fiscal period ending on March 31, 2018, as well.

> I understand that if this request or any part thereof is granted, I will receive a schedule showing dates in the specified period on which such request or part thereof shall be deemed to have been received again and an explanation as to why those dates were chosen.

[3] In response, the ministry created a record, a one-page chart providing answers to questions 1 to 9 of the request. The ministry granted access to the information that is responsive to questions 1, 2 and 9 but denied access to the information that is responsive to questions 3 to 8. Access was denied pursuant to the exemptions at sections 14(1)(l) (facilitate commission of an unlawful act) and 18(1)(d) (economic and other interests) of the *Act*. The ministry's decision did not respond to the portion of the request that addressed continuing access to the responsive information.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] During mediation, the appellant confirmed that he is satisfied with the information provided in response to questions 1 and 2. However, he took the position that the answer provided to question 9 does not respond to his request. The ministry reviewed question 9 and advised that records responsive to that question do not exist. As the appellant believes that information responsive to question 9 should exist, the issue of the reasonableness of the ministry's search is at issue in this appeal.

[6] The appellant also confirmed that he seeks continuing access, as set out in the schedule outlined in his request, to the information that is responsive to all 9 questions. The ministry advised that it will not take a position on continuing access. Accordingly, the issue of continuing access was raised as an issue this appeal.

[7] Finally, the appellant confirmed that he continues to seek access to the information that is responsive to questions 3 to 8 which were denied pursuant to sections 14(l) and 18(1)(d).

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues, to the ministry, initially.

[9] In its representations on the application of the exemption at section 14, the ministry included representations on not only the possible application of the exemption at section 14(1)(l) but also the exemption at section 14(1)(c). As a result of the ministry's representations, I modified the Notice of Inquiry that I subsequently sent to the appellant with the ministry's representations (which were shared with the appellant in accordance with this office's *Practice Direction Number 7*). I added information related to the exemption at section 14(l) to the discussion on section 14 in the Notice of Inquiry. I also invited the appellant to comment on the late raising of section 14(1)(c).

[10] The appellant provided representations in response, which I shared, in turn, with the ministry who provided representations in reply. Finally, I sought and received sur-reply representations from the appellant.

[11] In the order that follows I find that the discretionary exemption at section 18(1)(d) applies to the information that is at issue, the responses to questions 3 to 8 of the request. I find that the ministry's search for responsive information, particularly with respect to question 9 of the request, was reasonable and in accordance with the *Act*.

RECORD:

[12] The record in this appeal is a one-page chart, created by the ministry to respond to questions 1 to 9 of the appellant's request. The ministry disclosed the information that is responsive to questions 1 and 2, while the information that is responsive to questions 3 to 8 has not been disclosed and remain at issue. The responses to questions 3 to 8 have been severed pursuant to sections 14(1)(c) and (l) and 18(1)(d) and the appellant submits that additional information responsive to question 9 should exist.

ISSUES:

A. Does the discretionary exemption at section 18(1)(d) apply to the records?

B. Did the ministry exercise its discretion under section 18(1)(d)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Issue A: Does the discretionary exemption at section 18(1)(d) apply to the records?

[13] The ministry claims that the discretionary exemption at section 18(1)(d) applies to exempt the information that is responsive to questions 3 to 8 of the appellant's request from disclosure. Section 18(1)(d) states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[14] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected

under the *Act*.[1]

[15] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[2] For section 18(1)(d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[3]

[16] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[4]

Representations

[17] The ministry submits that the disclosure of the responses to questions 3 to 8 on the chart that it prepared in response to the appellant's request are exempt pursuant to the discretionary exemption at section 18(1)(d) because disclosure of this information could have the effect of reducing the deterrent effect of the ministry's auditing activities.

[18] In support of its position, the ministry refers to Order P-752 in which Adjudicator Donald Hale found that a record that outlined internal control weaknesses and vulnerabilities within the social assistance system was exempt under section 18(1)(d) because disclosure could reasonably lead to abuses in the system which would increase the incidence of social assistance fraud, resulting in financial loss for the province.

[19] Relating the current appeal to the circumstances that gave rise to Order P-752, the ministry submits:

> Similarly, in the current appeal, disclosure of the exempted responses in the record could provide sufficient information for some individuals to ascertain the ministry's resources for auditing and compliance. This could lead to inference of weaknesses within the EIR system. If the deterrent effect was reduced through disclosure of the record, some people who might otherwise have submitted their EIR might gain confidence not to submit it, or undervalue the true value of the assets associated with the estate, leading to a loss of Ontario's tax revenue. Similar to the case in

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[1] Toronto: Queen's Printer, 1980.
[2] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.
[3] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[4] Order MO-2363.

> Order P-752, this would result in an increased incidence of tax evasion, resulting in financial loss for the province. In order to counteract this, the ministry might have to increase its expenditure on auditing. In either case, it is evidence that it would be injurious to the financial interests of the Ontario government.

[20] In its representations on the possible application of sections 14(1), the ministry explained more specifically how the disclosure of the responses to questions 3 through 8 would allow individuals knowledgeable in this area to deduce the probability for audit and collection of assessed EAT. In my view, these representations are also relevant to the determination of whether section 18(1)(d) applies. The ministry stated:

> By knowing how many EIRs were selected for review (Question 3), how many of those gave rise to request for further information (Question 4), and how many of those led to an assessment (Question 5), the appellant – and therefore the public – would be able to determine the probability for review and assessment. With the knowledge of the amount of collections (Question 6), write-offs (Question 7) and charges for offences (Question 8)., the appellant could determine the efficacy and the extent of resources the ministry allocates to promote compliance. Therefore, an estate representative with this sensitive information could weigh the risks of being assessed against the benefit of not filing a return. Similar to the situation in Order PO-3105 … disclosure would compromise the integrity and functionality of the EIR system. The appellant would understand how the system is set up to audit improperly submitted EIRs.

[21] The appellant disagrees with the ministry's position. The appellant submits that disclosure of information relating to audit functions is a routine part of the Canada Revenue Agency's Annual Report to Parliament as evidenced in that report, a copy of which he attached to his representations. He submits that the ministry is merely speculating as to the adverse effects of disclosing the information at issue and argues that the concern is not shared by the Canada Revenue Agency (CRA).

[22] The appellant further submits that to suggest that some loss in estate administration tax revenues would be "injurious to … the ability of the Government of Ontario to manage the economy of Ontario" (as set out in section 18(1)(d)), is "absurd." He submits:

> Estate administration tax revenues amount to $154 million in the 2015 fiscal period. In the context of overall provincial revenues in the area of $130 billion for that year, how can it be asserted that a small part of the $154 million could be injurious in this manner?

[23] In its reply representations, the ministry addresses the appellant's submissions on how disclosures that appear in the CRA's Annual Report are similar to the information that is being requested. The ministry submits that the report, from a federal government agency, does not affect its claim that section 18(1)(d) applies. It submits

that section 18(1)(d) specifically permits the exemption of information where disclosure could reasonably be injurious to the financial interests of the Government of Ontario. The ministry submits a number of reasons why the federal government may treat information differently:

> Disclosure of similar information that might not be injurious to the federal government, possibly due to the federal government's larger scale, nevertheless could be injurious to the Government of Ontario.
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> In addition, the CRA is a federal agency which may have different reporting protocols and policies. It is not the same as that of the Ministry of Finance. The ministry does not release reports or any other information to the public that is as specific to a tax statute that the appellant is requesting. The ministry has a rationale for protecting the confidentiality of audit information in order to ensure compliance in the tax system.
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> Further, in considering the exercise of discretion, one of the factors considered is the ministry's historic practice with respect to [the disclosure] of similar information; not the practice of other governments.
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> Even if the appellant compares the CRA report to the present request (a method which the ministry denies affects the application of section 18), the context is markedly different. For example, the appellant refers to the General Anti-Avoidance Rule section of the report, which provides how many thousands of files it reviewed. However, importantly, what the CRA report does not state in the General Anti-Avoidance Rule section, is how many files there are in total from which the reviews were chosen. From the CRA report, the taxpayer's chance of being reviewed cannot be determined, because the total number of files is not disclosed. The chance of being reviewed can be determined with knowledge of both the total number of files and the number of files reviewed. In the present request, the ministry has disclosed the total number of EIRs that were received (Question 2), but denied access to Question 3 – therefore, the chance of being reviewed also cannot be determined.
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> Similarly, the CRA report also does not provide information equivalent to Questions 4 to 8. For example, Question 8 requests the number of persons charged for offences; the CRA report does not provide this. In the CRA report under "Criminal Investigations," the report broadly describes how it [selects files] through wording such as "national strategic file selection." On results, it only explains the amount of fines that were awarded and how many individuals received prison sentences; it does not mention how many persons were charged. Individuals could be charged and not convicted; or charged but received a penalty other than a prison sentence.

[24] The ministry submits that overall, the practices of the federal government and

the CRA do not affect its own ability to claim the section 18 exemption but notes that the CRA report referred to by the appellant does not provide the depth of detail on tax reviews, assessments, collections and offences that the appellant seeks in his request. The ministry submits that although the CRA report does provide some "limited information about its operations," that information "is worded in such a way to prevent sensitive figures from being released and is worded to increase compliance."

[25] Responding specifically to the appellant's argument that, even if the ministry is correct, any losses to the $154 million collected through Estate Administration Tax would be too small to be injurious in the context of a $130 billion budget, the ministry submits that the percentage that the tax represents as a portion of the budget is irrelevant. The ministry submits that it has the duty to ensure that it makes the best effort to collect all money due on a tax passed by the Legislature. It further submits that even though the appellant may consider $154 million of EAT to be a relatively small amount of overall provincial revenues, if some of that revenue is lost it is injurious to the financial interests of the Government of Ontario. It submits that there is no requirement in section 18 that the loss meet a particular quantum before its disclosure can be considered to be injurious.

[26] In his sur-reply representations, the appellant points to arguments made by the ministry in its first set of representations where it suggests that their refusal to disclose audit information is consistent with approaches taken by other taxing authorities, including the federal government. The appellant argues that subsequently, in its reply representations commenting on his position that CRA discloses similar information, the ministry argued that what other governments do is not relevant to what the Ontario government choses to do. The appellant submits that the ministry cannot rely on both sides of its argument to support its claim that section 18(1)(d) applies to exempt the information from disclosure.

Analysis and findings

[27] I accept that the ministry has provided sufficient evidence to demonstrate that the disclosure of the information that is responsive to questions 3 to 8 of the appellant's request would be injurious to the financial interests of the Government of Ontario or its ability to manage the economy. I accept the ministry's position that disclosure of this information gives rise to a risk of harm to the broader economic interests of Ontario.

[28] Specifically, I accept that by knowing information including how many EIRs were selected for review, how many gave rise to requests for further information and how many of those led to an assessment coupled with the amount of collections, write-offs and charges for offences, individuals knowledgeable in this area could determine whether there are weaknesses in the EIR system. With knowledge of the existence of any such weaknesses, I accept that it could reasonably be expected that some of these individuals would weigh the risks of being assessed against the benefit of not filing a return or filing an incomplete or inaccurate return. Accordingly, I accept that disclosure of the information at issue could reasonably give rise to increased abuse of the system, thereby reducing the amount of estate administration tax revenues collected by the

Ontario government. In my view, the ministry has demonstrated that the risk of such harm is well beyond the merely possible or speculative.

[29] In my view, the arguments put forward by the appellant in his representations do not refute the evidence provided by the ministry. Although he submits that the CRA routinely discloses information related to its "audit functions" as part of its annual report, based on the evidence before me I am not satisfied that the type of information disclosed by the CRA in its reports is sufficiently similar to that at issue in this appeal. Also, in my view, given that the CRA is a different entity governed by different reporting protocols or policies, what it chooses or chooses not to disclose in its reports does not dictate what types of information should or should not be disclosed by the ministry, provided that the ministry's decision is made in accordance with the *Act* and any other relevant legislation.

[30] Additionally, in his representations, the appellant takes the position that because any loss in estate administration tax revenues that might occur as a result of the disclosure of the information at issue would amount to a small percentage of those revenues which in turn, amounts to a small percentage of overall provincial revenues, the ministry is disingenuous in claiming that such loss can be described as "injurious … to the ability of the Government of Ontario to manage the economy of Ontario." I disagree. Section 18(1)(d) does not and has not been read to stipulate that a harm resulting from disclosure of information must meet a particular quantum or standard for it to be determined to be either "injurious" to the financial interests of the Ontario government or its ability to manage its economy.

[31] Accordingly, I find that the ministry has established that disclosure of the information that remains at issue, that is, the answers to questions 3 through 8 of the request, could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario and is exempt pursuant to section 18(1)(d) of the *Act*.

[32] As I have found that the exemption at section 18(1)(d) applies to the information at issue, it is not necessary for me to determine whether it is also exempt under the exemptions at sections 14(1)(c) and/or (l), which the ministry has claimed for the same information.

Issue C: Did the ministry exercise its discretion under section 18(1)(d)? If so, should this office uphold the ministry's exercise of discretion?

[33] The exemption at section 18(1)(d) is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[34] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[35] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[36] In support of its exercise of discretion to apply section 18(1)(d) to withhold the information at issue the ministry states that it considered:

- Its historic practice not to disclose such information to the public.
- The sensitivity of the information and its position that disclosure of internal audit and compliance processes encourage and influence non-compliant behaviour.
- The fact that there exists a strong consensus among auditing experts that such information should not be disclosed is evident in the access to information legislation of the federal government and five other provinces through a specific enumerated exemption for information about auditing procedures and techniques.
- That while there is value to citizen oversight of government programs to ensure that they are run efficiently, it has to be recognized that in a few areas this has to take second place to the need for confidentiality to ensure that those programs are effective and tax auditing is one of those areas.

[37] The appellant disputes some of the factors considered by the ministry. Specifically, he disputes the following:

- That the ministry has provided evidence from experts. He submits that it is rather a collective opinion of a number of individuals and not "fact-based" evidence to prove the applicability of the discretionary exemptions.
- That the information that he seeks can been described as information "about auditing procedures and techniques" as described in the exemptions in the legislation of the federal government and other provinces. He states that he has not requested auditing procedures and techniques but rather, only the number of EIRs selected for review.

[38] Based on my review of the record and the parties' representations, I find that the ministry's exercise of discretion was based on proper considerations and the appellant has not established that the ministry has acted in bad faith. I find that in the context of its exercise of discretion, the ministry's considerations were relevant, including its consideration of the ministry's historic practice and the general consensus among

individuals in the auditing field not to disclose such information, as well as its consideration of the practices of the federal government and other provinces. In my view, these considerations are not irrelevant to the ministry's exercise of discretion to exempt the information at issue.

[39] Accordingly, I uphold the ministry's exercise of discretion to withhold the record from disclosure pursuant to section 18(1)(d).

Issue D: Did the ministry conduct a reasonable search for responsive records?

[40] 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.[5] 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.

[41] 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.[6] To be responsive, a record must be "reasonably related" to the request.[7]

[42] 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.[8]

[43] 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.[9]

[44] 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.[10]

Representations

[45] The ministry's representations are sworn by an Audit Manager with the ministry who submits that he is an experienced ministry employee knowledgeable in Estate Administration Tax. He submits that he conducted a search for records and contacted colleagues for additional information in order to locate records responsive to the request.

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.
[10] Order MO-2246.

[46] The Audit Manager submits that the response to question 1 was provided by the ministry of the Attorney General who has oversight for the Ontario court offices that are responsible for the issuance of the Certificate of Appointment for an Estate Trustee, which triggers the requirement for an estate representative to file an EIR with the ministry.

[47] The Audit Manager submits that questions 2 through 8 were addressed by the Advisory and Compliance Branch of the ministry. He submits that he obtained the responsive records from the electronic system and spreadsheets used to support the Estate Administration Tax program.

[48] With respect to the records responsive to question 9, the Audit Manager submits that the Divisional Financial Coordinator working in the Assistant Deputy Minister's office was contacted. He submits that responsive information represents all audit staff in the ministry Advisory and Compliance Branch conducting audits in statutes administered by the ministry. The Audit Manager states that while he understands that the appellant's position is that the information provided to him in response to question 9 is not responsive to his request and other responsive records should exist, the ministry takes the position that no additional records responsive to record 9 exist.

[49] The Audit Manager concludes his submissions on the search for responsive records by stating that the ministry's lowest tracking of costs occurs at the cost centre level and that each manager is provided a cost centre for which they are accountable. He submits that to maximize efficiencies, managers will typically have responsibility for a number of programs under their cost centre. He submits that work is then prioritized and distributed to staff based on priorities, risk assessment and legislative requirements.

[50] In his representations, the appellant states that he accepts that the ministry has no records that break down the separate cost of the audit and verification program. He also submits:

> Ontario taxpayers have a right to expect the Minister to comply with his obligation for competent, responsible and accountable stewardship of the provincial treasury. To introduce a new program without any perceived effort to assess whether the cost of the program is warranted by the additional revenues collected is antithetical to that obligation. However, if the Minister deliberately chooses not to know this, whether out of fear that it will reveal a poor decision to implement the program or for any other reason, it is evidently up to the Auditor General to hold him accountable for that egregarious (sic) failing.

Analysis and finding

[51] Having carefully reviewed the evidence before me, I am satisfied that the search conducted by the ministry for records responsive to all parts of the appellant's request, including question 9, was reasonable and is in compliance with its obligations under the

Act.

[52] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the ministry has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or under its control. I acknowledge that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter and that consultations were made to confirm the accuracy of the findings. I accept that the effort that the Audit Manager and other ministry staff members expended to locate responsive information was reasonable and in accordance with the ministry's obligations under the *Act*.

[53] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding such records exist. While it is clear that at the outset of this appeal the appellant was of the view that additional records responsive to his request, and in particular, to question 9, should exist, based on his representations it is unclear whether he continues to maintain this view. His representations on this issue comment on what he believes Ontario taxpayers have a right to expect from the ministry and how he believes they should go about doing certain things but do not provide substantive information to support a position that additional responsive records exist. In my view, I have not been provided with a reasonable basis to conclude that additional records exist.

[54] Additionally, I will also reiterate the principle outlined above that the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. Rather, the ministry's obligation under the *Act* is to demonstrate that it has made a reasonable effort to identify and to locate responsive records. In the circumstances of this appeal I accept that it has done so and has provided sufficient evidence to support its position. On that basis, I uphold its search for responsive records.

Additional Issue: continuing access to the responsive information

[55] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for continuing access to records.

[56] In his request, the appellant advised that he sought continuing access to the responsive information pursuant to section 24 of the *Act*. The ministry did not respond to the issue of continuing access in its decision letter and was not prepared to discuss it in mediation.

[57] However, in its representations the ministry agreed that, in accordance with section 24 of the *Act*, it is prepared to grant continuing access to the appellant for the types of information in the record that were disclosed to him and that are responsive to the request. It submits:

> The ministry is prepared to provide access to the information to which it has already granted access of a cumulative basis from January 1, 2015 as or each of: (i) December 31, 2015; (ii) June 30, 2016; (iii) December 31, 2016; and (iv) June 20, 2017 in accordance with the attached schedule in Tab 4 [of its representations] and with the applicable provisions in [the *Act*].
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> The ministry wishes to remind the appellant that the request fee is required prior to processing each scheduled request and any applicable fee must be paid prior to the release of the information.
>
> If the responses to Question 3 through 8 are not exempt from disclosure, then the ministry will also provide responses to those questions in accordance with the attached schedule.
>
> For Question 9, although the appellant claims that the ministry's response was not responsive to the request, the ministry is willing to make the same information available on a continuing basis to the appellant if it wishes to receive it, and in accordance with the attached schedule.

[58] It is clear from its representations that the ministry is prepared to provided the appellant with continuing access to the information that it has already disclosed to him. Accordingly, the issue of whether the ministry must provide continuing access in accordance with section 24 of the *Act* does not need to be decided.

ORDER:

I uphold the ministry's decision to withhold the information at issue from disclosure pursuant section 18(1)(d) of the *Act*.

Original Signed by: June 22, 2017

Catherine Corban
Adjudicator