

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3854-I

Appeal PA17-269

Ministry of the Attorney General

June 8, 2018

Summary: The ministry received a request, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to mental health assessments. It initially issued a decision stating that the records are not in its custody or control. Subsequently, the ministry issued another decision indicating that following contact between the requester and the court-designated person, a search of the Corporate Planning Branch of the Court Services Division was conducted and it was determined that there were some records in the custody or control of the ministry. The ministry disclosed the records it had located with this decision. The sole issue in this appeal is whether the ministry conducted a reasonable search. In this order, the adjudicator finds that the ministry did not conduct a reasonable search, and orders it to conduct further searches.

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

BACKGROUND:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

A summary report by year-number of accused mental disorder assessments for 2001-2015 period request [sic] by:

- 1) pre-trial made by the crown attorney: justice of the peace, defence counsel or presiding judges (s) [specified number]
- 2) pre-trial made by the crown attorney; the justice of the peace, defence counsel or presiding judges [specified number]
- 3) pre-trial con-jointly made by the crown attorney, the justice of the peace, defence counsel or presiding judges [specified numbers] of the number of assessments finding the accused not fit to stand trial
- 4) made by the crown attorney, justice of the peace, defence counsel or presiding judges(s) [specified number]
- 5) made by the crown attorney, justice of the peace, defence counsel or presiding judge(s) [specified number]
- 6) con-jointly made by the crown attorney, the justice of the peace, defence counsel or presiding judge(s) [specified numbers] of the number of assessments finding the accused not criminally responsible
- 7) post trial made by the crown attorney, justice of the peace, defence counsel or presiding judge(s) [specified number]

[2] The ministry issued a decision indicating that a search was conducted and no responsive records were located "because the requested records are not in the custody or under the control of the ministry." The ministry further indicated that records that are filed in a court proceeding are in the custody or control of the court in which they are filed, and provided to the requester the name of the court-designated person for the purpose of seeking the information.

[3] Subsequently, after speaking with the appellant, the court-designated person contacted the Corporate Planning Branch of the Court Services Division, and was advised that the ministry had performed a manual count of all assessments ordered in 2012 and 2014 for the purpose of addressing an audit recommendation and that these records were in the custody and control of the ministry. Consequently, the ministry issued another decision, and disclosed the records it had located with it.

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

[5] During the course of mediation, the ministry indicated that it had granted full access to all the records it had located and was no longer taking the position that it did not have custody or control over them. However, the appellant indicated that he believes additional records should exist.

[6] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts a written inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the ministry and the appellant. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, a copy of the ministry's representations was shared with the appellant.

[8] In this order, I find that the ministry did not conduct a reasonable search for records, and order further searches.

DISCUSSION:

[9] The only issue in this appeal is whether the ministry conducted a reasonable search for records.

[10] 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.

[11] The *Act* does not require the ministry 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.² To be responsive, a record must be "reasonably related" to the request.³

[12] 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

[13] A further search will be ordered if the ministry 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

[14] In its representations, the ministry asserts that it conducted a reasonable search. In support of its assertion, the ministry attached an affidavit sworn by the Issues Coordinator for the Court Services Division (Issues Coordinator), whose job includes coordinating searches in response to requests under the *Act*. The affidavit referred to the scope of the appellant's request and noted that due to her experience and knowledge she believed that responsive records pertained to court cases, and, therefore, would likely be found in court files. As the courts are not designated an institution in the *Regulations* and *Act*, the Issues Coordinator recommended that the

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

appellant speak to a named employee who is the designated Ontario Court of Justice contact for requests under the *Act* for court records and statistics.

[15] Subsequently, the court-designated person advised the Issues Coordinator that the appellant had contacted him. After their discussion, the court-designated person conducted a search through the court's case management system. He found that there were no court records responsive to the appellant's request.

[16] The court-designated person also advised the Issues Coordinator that he had contacted the Corporate Planning Branch of the Court Services Division who advised that the ministry had performed a manual count of all assessments ordered in 2012 and 2014 for the purposing of addressing an audit recommendation. He further advised that those records pertaining to the manual counts were in the custody and control of the ministry. These records were then disclosed to the appellant.

[17] Although the appellant provided representations with numerous attachments, his representations and attachments did not address whether the ministry conducted a reasonable search. It appears that the appellant's concerns on this appeal are two fold. First, he believes there is a systemic problem with how mental health assessments are conducted in this province. Secondly, he believes that he experienced errors and incompetence during his own mental health assessment.

[18] From my review of the parties' representations, including the affidavit filed, I find that the ministry did not conduct a reasonable search. In her affidavit, the Issues Coordinator affirmed that the ministry performed a manual count of all assessments ordered in 2012 and 2014. This resulted in records indicating the total numbers of assessments completed in those two years. However, the Issues Coordinator did not provide an explanation for why the ministry is unable to perform a similar manual count of all assessments for the remainder of the years listed in the appellant's request. I acknowledge that the records resulting from the manual count for those two years did not break down the number of assessments by the party requesting the assessment, which is what the appellant requested. However, the number of assessments conducted in a specific year is reasonably related and thus responsive to the appellant's request.

[19] Moreover, the ministry's representations or its affidavit do not explain why the number of assessments conducted in a specific year could not be found and provided to the appellant. As stated above, the ministry must provide 'sufficient evidence.' In this case, I find that the ministry has not satisfied me that it made reasonable efforts to locate the number of assessments by year. Accordingly, I find the ministry's search was not reasonable and I will order additional searches for this information.

ORDER:

1. I order the ministry to conduct further searches for records responsive to the request with the Corporate Planning Branch of the Court Services Division. I order the ministry to provide me with an affidavit sworn by the individual who conducts the search(es) by **June 29, 2018**. At a minimum, the affidavit should include information relating to the following:
 - a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
 - b. a statement describing the employee's knowledge and understanding of the subject matter of the request;
 - c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - d. details of the search;
 - e. the results of the search;
 - f. if as a result of the further searches it appears that no responsive records exist, a reasonable explanation for why such records would not exist.
2. The affidavit referred to in the above provision should be forwarded to my attention, c/o Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*.
3. I remain seized of this matter.

Original Signed by: _____

Lan An
Adjudicator

June 8, 2018