Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3867-R

Appeal PA16-671

Ministry of Community Safety and Correctional Services

July 25, 2018

Summary: In Order PO-3825-I, the adjudicator ordered the ministry to conduct a further search for a property sheet requested by an inmate. In this order, the adjudicator denies the ministry's request for a reconsideration of Order PO-3825-I.

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

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) asked that I reconsider my finding in Interim Order PO-3825-I which ordered it to conduct a further search for the responsive record and provide an affidavit outlining its search efforts.

[2] Order PO-3825-I arose from the appellant's request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for a copy of an itemized property sheet relating to his transfer between two correctional institutions in 2004. In response, the ministry issued a decision denying access on the basis that no responsive record could be located. The appellant appealed the ministry's decision to this office.

[3] In Order PO-3825-I, I found that the ministry's search for the responsive record was not reasonable and ordered it to conduct a further search and provide me with a sworn affidavit outlining its search efforts.

[4] The ministry subsequently made a request for reconsideration. The ministry cites section 18.01(a) of the *IPC Code of Procedure* and takes the position that that there are at least two 'fundamental defects' in Order PO-3825-I".

[5] In this reconsideration order, I find that the ministry failed to establish a basis upon which I should reconsider Order PO-3825-I. Accordingly, I deny the ministry's reconsideration request and uphold my decision in Order PO-3825-I.

DISCUSSION:

[6] The IPC's reconsideration criteria are found in section 18 of the IPC's *Code of Procedure*, which reads in part as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.
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> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision…

[7] The ministry's reconsideration request identifies the following two grounds:

> ***Fundamental Defect #1****: The Ministry conducted a thorough search for the record, in full compliance with the direction set out in the Notice of Inquiry and the requirements of the FIPPA. The Order did not provide reasons for finding that our search was unreasonable, contrary to principles of administrative fairness, and it failed to provide necessary direction as to where an additional further search should take place, making it impossible to comply with; and*
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> ***Fundamental Defect #2:*** *The Order incorrectly defines the search for records to require an "investigation" into record maintenance policies. There is no evidence to suggest that any such investigation would locate a copy of the record.*

Ground 1: Lack of Reasons and Direction

[8] The ministry submits that Order MO-3825-I failed to provide reasons to support my decision to order a further search. In addition, the ministry submits that the order failed to provide the necessary direction as to where the additional search should take

place. In support of its position, the ministry states:

> The Adjudicator has made a determination that we should expand our search, without providing any reasoning to support it. If the Ministry's search was not reasonable, basic principles of fairness dictate that the Order should have provided us with reasons.[1] But, it did not.
>
> The Order orders us to expand our search, but the Order does not indicate how we should do so, or where the search should take place, given that we searched in the one place where we expected the record to be found, if it existed. The size of the [correctional institution] and its vast record holdings means that we could search in many places, but they would not be reasonable places, because we would not expect to find the record there. As a result, we submit it is not possible to comply with the Order.[2]
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> The lack of direction provided to us in the Order is magnified by the age of the record, which dates from 2004. Staff retirements and turnover in the 14 years since then, and inevitable fading corporate memory means that anyone who might have known where the record could be, if it in fact was not in the appellant's file, is no longer available to provide that information.
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> …
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> In *Administrative Law in Canada*, it states that *"An order compelling a party to do or refrain from doing something must tell the party specifically what it must do".*[3] We submit that being ordered to do a further search without being told where or how to search means that we have not been told 'specifically what we must do'. As a result, we have been denied basic principles of fairness, and we are therefore unable to comply with the Order. [Emphasis and footnotes in the original]

[9] 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.[4]

[10] 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.[5] A

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[1] Section 17(1) of the *Statutory Powers Procedure Act* requires that a tribunal provides reasons as part of its final decision.
[2] The ministry advises that the correction institution in question has a capacity of 1184 inmates, making it one of the larger provincial correctional institutions in Ontario.
[3] *Administrative Law in Canada*, 6th edition by Sara Blake (LexisNexis Canada Inc., 2017 at page 100).
[4] Orders P-85, P-221 and PO-1954-I.
[5] Orders P-624 and PO-2559.

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.[6]

[11] 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.[7]

Decision and Analysis

[12] The ministry takes the position that insufficient reasons were provided to support my decision to order a further search. However, paragraphs 12 and 13 of Order PO-3285-I state:

> I have reviewed the submissions of the parties and have decided to order the ministry to conduct another search of its record-holdings. Though it appears that the ministry conducted a thorough search of the appellant's paper file, it adduced insufficient evidence to demonstrate that it[s] search was expanded to other record holdings once it determined that the record was not in the appellant's file. This is despite the fact that the Notice of Inquiry sent to the ministry asked it to provide details of whether there was a possibility whether the record was destroyed. The Notice of Inquiry also invited the ministry to provide information about its record maintenance policies and practices, such as retention schedules.
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> In my view, the circumstances of this appeal are unique. The appellant was incarcerated at a provincial institution managed by the ministry during the time he received a package from the Court of Appeal. He was subsequently transferred to a federal institution but the ministry advises that it cannot locate the related property sheet. In my view, a reasonable search under the circumstances of this appeal would have also included an investigation into the ministry's record maintenance polices and practices to determine whether a copy of the record could be located elsewhere or whether the original was scheduled for destruction. Accordingly, I order the ministry to conduct a further search for the responsive record.

[13] The ministry claims that Order PO-3825-I failed to provide reasons for ordering a new search. However, paragraphs 12 and 13 indicate that it was my view that a reasonable search in the circumstances should have included search efforts outside the paper file and that making inquiries about the relevant record maintenance polices and practices would be instructive in determining whether a copy of the record could be located elsewhere or whether the original was scheduled for destruction.

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[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.

[14] I find that the ministry's argument that Order PO-3825-I failed to provide reasons or directions for it to conduct a further search is without merit. A plain reading of paragraphs 12 and 13 sets out the reasons for my decision along with directions on how to complete the further search. Though I acknowledge that the order does not direct the ministry conduct a further search in a named program area or database, it directs the ministry conduct a further search and provide an affidavit outlining a number of matters, including details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

[15] For the reasons stated above, I find that the jurisdictional defect articulated as "ground 1" in the ministry's reconsideration request has no merit.

[16] I will now address the ministry's submissions which question whether the substance of my reasons and the order provisions in Order PO-3825-I reveal a jurisdictional defect.

Ground 2:

[17] In support of its position that Order PO-3825-I "incorrectly defines the search for records to require an 'investigation' into record maintenance policies", the ministry states:

> We submit first and foremost that an "investigation" is conceptually distinct and separate from a search, the latter always having to do for looking for someone or something that is missing or lost. Moreover, section 24 of [the *Act*], which is cited as the section that supports the requirement for the Ministry to conduct a reasonable search, contains no requirement for the Ministry to "investigate" record maintenance policies. The finding that a search for records includes an investigation of record maintenance policies is therefore, in our submission, fundamentally defective.
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> The Order fundamentally ignores the evidence in the search affidavit. It states in paragraph 6:
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> > If the record in question were to exist, it should be in the appellant's file … I do not know where else the record would be located, or if the record was destroyed.
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> There is no basis for the Order to *"require us to determine whether a copy of the record could be located elsewhere"*. The experienced staff member who conducted the search has already made this determination, and he determined that a reasonable search of the appellant's file is the only place where the record could be expected to be found. The Order does not contain any reasons why a record could be located elsewhere. [Emphasis in the original]

Decision and Analysis

[18] The Notice of Inquiry sent to the ministry asked it to provide a written summary of all steps taken in response to the request. The Notice of Inquiry listed a number of questions, including the following which invited the ministry's submissions about record maintenance polices and practices:

> 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.

[19] The ministry's representations did not address this issue. Instead, the ministry took the position that once it determined that the record could not be located in the paper file that nothing further was required to discharge its obligation to conduct a reasonable search. The ministry submits that a reasonable search in the circumstances is a search for responsive records in "reasonable places". The ministry takes this position despite its advice that the relevant record holdings are vast and could involve a search of "many places" other than the paper file. The ministry states "we could search in many places, but they would not be reasonable places, because we would not expect to find the record there". In addition, the ministry cites the age of the records and fading institutional memory for reasons why expanding the search would not constitute a reasonable search.

[20] In my view, the ministry's submissions in support of its reconsideration request reveal the shortcomings of its position. The fact that the record was not located in its paper file and the ministry's record holdings are vast, contain older records and are impacted by staff changes highlights the need to make inquiries as to where the record could be located if not found in the paper file. As noted above, the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a *reasonable effort to identify and locate responsive records*.

[21] I reiterate that the circumstances of this appeal are unique. The responsive record collects information about the personal property relating to an incarcerated individual. In my view, the ministry's submission that it restricted the search for the requested property list to where it would expect to locate it fails to demonstrate that a "reasonable effort" was made to identify and locate the responsive record. The ministry was not ordered to conduct a vigorous search of its paper and electronic record holdings relating to the personal property of inmates. Instead, the ministry was ordered to review its record maintenance policies so that it could provide affidavit evidence as to determine whether a "copy of the property sheet could be located elsewhere or whether the original was scheduled for destruction". In my view, a review of its record maintenance policies may inform the ministry of whether paper or electronic copies of property lists were made and retained separately from the originals which would customarily be placed in inmates' paper files.

[22] Curiously, the ministry takes the position that if the property sheet is not located in an inmate's file then the search comes to a full stop as any other place where the record may be located is not reasonable. In my view, the ministry's reluctance to expand its search efforts given the unique circumstances of this appeal is not in the spirit of the *Act*. Furthermore, I note that section 10.1 states:

> Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirement, rules or policies, whether established under an Act or otherwise, that apply to the institution.

[23] For the reasons stated above, I find that the jurisdictional defect articulated as "ground 2" in the ministry's reconsideration request has no merit.

Summary

[24] I deny the ministry's request for reconsideration of Order PO-3825-I. As the compliance date set out in that order has passed, I have established a new compliance date set out below.

ORDER:

1. I deny the ministry's reconsideration request.

2. I lift the interim stay of Order PO-3825-I and order the ministry to comply with order provisions 1, 2, 3 and 4 within 30 days of the date of this Reconsideration Order.

Original Signed by: July 25, 2018
Jennifer James
Adjudicator