

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3879-F

Appeal PA17-269

Ministry of the Attorney General

September 14, 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. In Interim Order PO-3854-I, the ministry was ordered to conduct further searches for records responsive to the request with the Corporate Planning Branch of the Court Services Division. In this final order, the adjudicator finds that the ministry's further search is reasonable.

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: Order MO-3268.

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 judge(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 judge(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. The ministry also 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.

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

[5] During 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] In Interim Order PO-3854-I, I ordered the ministry to conduct a new search for records responsive to the request with the Corporate Planning Branch of the Court Services Division.

[7] In compliance with the interim order, the ministry conducted a further search and submitted representations along with an affidavit, detailing its further search efforts.

[8] I invited and received the appellant's representations in response to the ministry's representations.

[9] In this final order, I find that the ministry's further search is reasonable.

DISCUSSION:

[10] In Interim Order PO-3854-I, I ordered the ministry to conduct a further search for records relating to mental health assessments with the Corporate Planning Branch (now the Corporate Support Branch) of the Court Services Division.

[11] Accordingly, my review of the ministry's further search is restricted to this aspect. Following the issuance of Interim Order PO-3854-I, the ministry conducted a further search for records and provided representations detailing its search efforts to this office. The ministry submitted an affidavit in support of its position that the further search was reasonable.

[12] The affidavit submitted by the ministry was prepared by counsel for the ministry, Court Services Division. Counsel advised that the additional searches were conducted by 35 named employees (including managers) of the Corporate Support Branch of Court Services Division. She also advised that each employee was provided with a copy of the request and was asked to search and retrieve all records, including but not limited to email, electronic and hard copy documents, that contain the number of accused persons ordered to undergo a mental disorder assessment by year from 2001 to 2015, the number of assessments finding the accused not fit to stand trial by year from 2001 to 2015, and the number of assessments finding the accused not criminally responsible by year from 2001 to 2015.

[13] As a result of the search, two named employees located one responsive record. The responsive record contains the total number of assessments ordered in 2012. A severed copy of the responsive record was provided to the appellant.

[14] The appellant provided representations, along with three orders of this office and a Divisional Court decision. He submits that the ministry's further search is insufficient as the ministry simply interviewed a number of parties. He states:

...What is lacking is that their job descriptions and responsibilities directly relate to making 'diversion' or pursue not criminally responsible or incapable to stand trial decisions, or the reporting or scheduling of related matters with hospitals, attorneys the Ontario Review Board, the Consent & Capacity Board and the Public Guardian & Trustee [We can find someone

on the street and interview them at length and they can swear that they do not have the information we are looking for – that does not indicate that we have met the basics to satisfy that we have not answer the access to information request – that we asked the person(s) with responsibility and control over the information.] ...

[15] I note that two of the three orders (cited by the appellant) address the issue of reasonable search. However, the Divisional Court decision and the remaining order do not deal with this issue. In any event, none of the authorities cited by the appellant are of assistance to him.

Analysis and findings

[16] 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.

[17] 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.² To be responsive, a record must be "reasonably related" to the request.³

[18] 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

[19] 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

[20] 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

[21] In Order PO-3854-I, I found that the ministry did not conduct a reasonable search because the Issues Coordinator did not provide an explanation for why the ministry was unable to perform a similar manual count of all assessments as it did for

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.

⁶ Order MO-2246.

2012 and 2014. As well, the ministry's representations or its affidavit did not explain why the number of assessments conducted in a specific year could not be found and provided to the appellant.

[22] I have reviewed the ministry's representations, along with its supporting affidavit, and am satisfied that the ministry's further search was conducted by experienced employees knowledgeable about the subject-matter of the request, and a reasonable effort to locate responsive records was expended. In particular, the affidavit states the affiant's qualifications and years of experience in her current position. It also provided the names and position of the 35 employees involved in the further searches.

[23] Moreover, I accept the affiant's explanation that the Court Services Division and the Corporate Support Branch have not and do not collect and/or maintain statistics on the number of accused mental disorder assessments requested, the outcome of the assessments or the justice stakeholder(s) requesting the assessment.

[24] Furthermore, I accept the following statements from the affiant about the 2012 and 2014 manual process:

The [2012] manual process that was developed relied on the invoices that were submitted by persons appointed to carry out the assessments. When an assessor completed an assessment, he or she would submit an invoice to the court office where the case was heard. In order to obtain these invoices for analysis, it was necessary to contact the approximately 165 court offices and request that they manually retrieve all assessment invoices submitted in 2012 and deliver copies of the invoices to the Corporate Support Branch. The total number of invoices received from the court offices for 2012 was 847.

Each of the 847 invoices obtained from the court offices were reviewed to determine, to the extent possible, the type of assessment carried out, the number of assessments carried out, the cost of the assessments and the hourly pay rate charged by the assessors. The information to be provided on invoices had not been standardized at that time and almost one-fifth of the invoices did not contain sufficient information to determine the type of assessment that had been ordered.

This manual process took approximately one year to complete and involved hundreds of staff hours to search for and analyse the invoices.

[For 2014], the Corporate Support Branch used the Integrated Financial Information System to estimate that 940 assessment-related invoices had been submitted during 2014. An assumption was then made that each invoice covered one assessment. This resulted in an estimate that approximately 940 assessments had been carried out. It was recognized

that this assumption would significantly affect accuracy since it was known from the 2012 project that some invoices were for assessment-related attendances in court and that many invoices included multiple assessments. As a result, it was stressed to Criminal Law Division that this number was an extremely rough approximation of the number of assessments actually carried out and was appropriate for internal use only. No records pertaining to the estimated number of assessments for 2014 were found in the searches carried out and it is expected that a report was not required and that Criminal Law Division was orally provided with the number of invoices.

[25] Previous orders of this office has found that section 24 of the *Act* does not, as a rule, obligate an institution to create a record where one does not currently exist.⁷ As such, I find that the ministry has expended a reasonable effort to locate records which are related to the appellant's request, and is not obligated to create a record where one does not currently exist.

[26] Although the appellant maintains his position that a reasonable search was not conducted, he has not provided a reasonable basis for concluding that such records exist. He argues that the ministry simply interviewed a number of people at length, and accepted that they do not have the information requested. It appears that the appellant misread or misunderstood the ministry's affidavit. The affiant is clear that 35 named employees were asked to *search* and *retrieve* all records, including but not limited to, email, electronic and hard documents, which relate to mental health assessments from 2001 to 2015.

[27] Accordingly, I find that the ministry's further search was reasonable.

ORDER:

I find that the ministry's further search was reasonable, and dismiss the appeal.

Original Signed by: _____

Lan An
Adjudicator

September 14, 2018

⁷ Orders P-50, MO-1381, MO-1442, MO-2129, MO-2130, PO-2237, O-2256 and MO-2829.