Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3908-F

Appeal PA15-266

Ministry of the Attorney General

December 5, 2018

Summary: In this final order, the adjudicator considers whether the Ministry of the Attorney General (the ministry) has complied with the requirements of Interim Order PO-3858-I and section 24 of the *Freedom of Information and Protection of Privacy Act* (the *Act*) in respect of its search for records responsive to a request made under the *Act*. The adjudicator concludes that, through its additional search efforts, the ministry has conducted a reasonable search for responsive records. As a result, she dismisses the remaining issue in the appeal.

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

Order Considered: Order PO-3858-I.

OVERVIEW:

[1] This final order follows Interim Order PO-3858-I, in which I upheld, in part, the decision of the Ministry of the Attorney General (the ministry) in response to a request made by the appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act*). I found that the appellant had raised a reasonable basis for concluding that additional records responsive to his request may exist. As a result, I ordered the ministry to conduct further searches for responsive records, and to provide the appellant and me with representations on those searches and a decision on access in respect of any additional records located through those searches.

[2] In response to Interim Order PO-3858-I, the ministry conducted further searches

but did not locate any additional records. The ministry provided supplementary representations describing its search efforts, which I shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction 7*. The appellant provided detailed representations in response. While I will only refer to relevant portions of his representations in my discussion, below, the appellant can be assured that I have considered them in full in arriving at my decision.

[3] In this final order, I conclude that, through its additional search efforts, the ministry has conducted a reasonable search for responsive records. I dismiss the appeal.

DISCUSSION:

[4] The following background is helpful to place the appellant's arguments in context. Some of this information was also set out in Interim Order PO-3858-I.

The request, ministry decision and appeal

[5] The request giving rise to this appeal relates to the appellant's discovery of ministry correspondence in the court file of a proceeding before the Ontario Divisional Court in which he was involved. The appellant had a number of concerns about the inclusion of these documents in the court file, including because (he alleges) the documents contain inaccuracies, and may have been put before a panel of judges hearing an appeal.

[6] The appellant reports that he raised these concerns with a number of bodies, including the ministry. In February 2011, an Assistant Deputy Attorney General for the Court Services Division of the ministry wrote to the appellant, stating, among other things, that the type of correspondence described by the appellant would not be put before an appeal panel. In April 2014, the appellant received a letter from a different Assistant Deputy Attorney General, advising that the documents identified by the appellant had been "immediately removed from the file in January of 2011" after the appellant brought this matter to the ministry's attention.

[7] The appellant then made a request to the ministry under the *Act* for access to the following:

> All documentation, including records of telephone conversations and emails concerning the removal of documents from [an identified Divisional Court file], in January of 2011.
>
> The scope of the search is all departments and personnel within the [ministry]. ...
>
> This is not a request for information from a court file. This request concerns information about the removal of documents from a court file.

[8] The ministry located a number of records responsive to the request, and granted partial access to them. The appellant was dissatisfied with the ministry's denial of access to certain records and portions of records; he also believed that additional records must exist. On these bases, he appealed the ministry's decision to the Office of the Information and Privacy Commissioner/Ontario (this office, or the IPC).

[9] On June 18, 2018, I issued an interim order that disposed of some of the issues in the appeal.

Interim Order PO-3858-I

[10] In Interim Order PO-3858-I, I upheld the ministry's denial of access to certain records and portions of records on the grounds claimed by the ministry. Access to that information is no longer at issue in this appeal.

[11] I concluded, however, that the appellant had raised a reasonable basis for his belief that additional responsive records may exist. In particular, I found persuasive the appellant's evidence that senior levels of the ministry had been aware of his concerns about the contents of his court file in early 2011, and that this led to the removal of the identified documents from the court file around that time. While I found it reasonable to expect the ministry to have generated records on this topic during this time period, the searches conducted by the ministry had not identified any responsive records from this time period, and none directly addressing the decision to remove the identified documents from the court file. I concluded that the absence of such records raises questions about the reasonableness of the ministry's search.

[12] I also identified specific deficiencies in the searches conducted by the ministry to that point. The ministry had provided evidence of searches conducted by staff of the Court Services Division Regional Office for the region in which the appellant's court matter was heard, and by legal counsel and staff in the ministry's Family Policy and Programs Branch and the Civil Policy and Programs Branch. I observed that the searches had not included the office of the Minister (the Attorney General), to whom the appellant had addressed a letter on this topic in January 2011, or of the Assistant Deputy who responded to the appellant on the Attorney General's behalf in February 2011, or the different Assistant Deputy who first informed the appellant, in 2014, that the identified documents had been removed from the court file in 2011. Given their involvement in this matter, I found the failure to include these offices to be a defect in the ministry's searches. I therefore ordered the ministry to conduct a search for responsive records in the offices of the Attorney General and the Assistant Deputy Attorney General.

[13] I also ordered the ministry to conduct further searches of the Family Policy and Programs Branch and the Civil Policy and Programs Branch of the ministry. While the ministry had located emails from 2014 in which ministry legal counsel and staff referred to having dealt with the appellant's matter in 2011, it had located no responsive records from those same individuals from that time period. I found the ministry's evidence regarding its searches in these two branches to be insufficiently detailed to conclude

that this was the outcome of a reasonable search.

[14] I also acknowledged the possibility that responsive records may no longer exist, given the passage of time or for other reasons. If the ministry determined that additional responsive records existed (or might have existed) in the above-noted offices or ministry branches, it was to provide me with details of when such records were destroyed, including information about relevant record maintenance policies and practices.

[15] Finally, if the ministry located additional records as a result of the further searches, it was to provide the appellant with an access decision in accordance with the requirements of the *Act*.

Ministry's search, and parties' representations

[16] In response to Interim Order PO-3858-I, the ministry conducted searches of the Minister's Correspondence Unit, the Office of the Assistant Deputy Attorney General for Court Services Division and the Operational Support Branch of the ministry. While the ministry did not locate any additional responsive records as a result of these further searches, it provided representations describing these searches, which I summarize as follows.

[17] In respect of my order for a search of the Office of the Attorney General, the ministry responds that, based on the ministry's practice for handling correspondence addressed to the minister (the Attorney General), it instead conducted a search of the Minister's Correspondence Unit. The ministry explains that correspondence addressed to the Attorney General is generally delivered to the Communications Branch and handled by staff in the Minister's Correspondence Unit, rather than directly by the Minister's office. Among other tasks, staff in the Correspondence Unit assign the correspondence to the appropriate division for a response from the Attorney General, the Deputy Attorney General or the division's Assistant Deputy Attorney General or Director, as the case may be. The response prepared by the relevant division is returned to the Correspondence Unit for editing and formatting before being sent for signature by the appropriate individual.

[18] Based on this practice, the ministry states that the appellant's January 2011 letter addressed to the Attorney General, and the February 2011 response to the appellant, signed by the then-Assistant Deputy Attorney General for Court Services Division, would have been handled by that division and the Minister's Correspondence Unit, rather than directly by the Attorney General. Given this, there is no reason to believe that any internal communications regarding these letters would be found in the Attorney General's office. In view of this, the ministry conducted a search of the Minister's Correspondence Unit rather than a search of the Office of the Attorney General. The ministry located no additional responsive records as a result of this search.

[19] The interim order also required the ministry to conduct a search of the Office of the Assistant Deputy Attorney General. The ministry acknowledges that in view of the

fact the appellant received responses in 2011 and 2014 from the Assistant Deputy Attorney General at the time, it is reasonable to expect that a search of that office may yield responsive records. The ministry reports, however, that its search produced no additional records (beyond the two response letters, both of which are already in the appellant's possession, and only one of which is responsive to the request).

[20] The ministry maintains that this result does not mean the search was unreasonable. In some cases, correspondence is signed by the Assistant Deputy Attorney General after she is given a formal briefing or provided with a memorandum setting out the background and context for the correspondence; in those cases, records regarding the preparation of the correspondence could reasonably be expected to be found in the Office of the Assistant Deputy Attorney General. In other cases, however, a formal meeting or briefing is unnecessary, and the background and context to the correspondence is provided to the Assistant Deputy Attorney General by way of an oral briefing. After an extensive search yielding only the two response letters addressed to the appellant, the ministry believes that any briefings given to the Assistant Deputy Attorneys General at the relevant times must have been done orally, and on an informal basis. Any briefing notes or other records related to the response letters, if they exist, would have been located with the letters (and they were not), and there is no reason to believe that any such records were destroyed.

[21] Finally, in respect of my order for a search of the ministry's Family Policy and Programs Branch and the Civil Policy and Programs Branch, the ministry reports that it carried out a further search of the Operational Support Branch (which is the name of the new branch combining those former branches since 2016). These search efforts included searches by current members of the branch. It also included searches of the files of two former members of the Court Services Division who were involved in the original search. These latter searches were conducted by the search coordinator, a lawyer with the Court Services Division who is responsible for freedom-of-information requests involving the division.

[22] The coordinator explains that in the case of the former employees, she obtained technical support to access their inactive email accounts, which contained emails dated after 2015. In order to access emails pre-dating 2015, the coordinator requested technical support to access the former employees' "home folders," to which those emails might have been saved. The coordinator reports that she obtained access to and searched the home folder of one former employee, and located no additional responsive records. The home folder of the other former employee could not be located by a technical support specialist with the Treasury Board Secretariat, who explained that such folders are sometimes transferred to alternate servers to create space for newer folders. In that case, the destination server should have been recorded; however, there is no such record for this former employee's home folder. As a result, the coordinator was unable to search his email records pre-dating 2015. She notes, however, that this former employee was involved in the original search for responsive records, and she has no reason to believe the original search was not reasonable. She also states that all the individuals who participated in the further search were asked whether they believe

that records responsive to the appellant's request might have been deleted or destroyed, and that all indicated that they do not delete or destroy records.

[23] One of the individuals who was asked to conduct a further search reports that she recalls having dealt with the two former employees in connection with the appellant's matter in 2011. This individual, a lawyer with the Operational Support Branch, provides a potential explanation for the absence of records addressing the removal of the identified documents from the appellant's court file. She explains that she and another lawyer with whom she consulted on this matter worked in nearby offices at that time, and that it is not unreasonable to believe that she consulted orally with him on this issue. She also states that it was clear that the documents identified by the appellant contained erroneous information, and, as a result, it is reasonable to believe that she contacted the supervisor of court operations by telephone to ask that they be removed from the court file.

[24] The ministry's representations were accompanied by affidavits signed by the lawyer with the Court Services Division who coordinated all the searches, and the lawyer with the Operational Support Branch who was involved in the appellant's matter in 2011 (as described directly above). These affidavits set out additional details about the search efforts undertaken by these individuals, which I have summarized above.

[25] The appellant provided responding representations in which he maintains his position that additional records must exist. He identifies a number of ways in which he believes the ministry's further searches were unreasonable.

[26] One of the appellant's main criticisms concerns alleged deficiencies in the ministry's affidavit evidence regarding its further search efforts. For example, while the coordinating lawyer provided the names and positions of 21 individuals who conducted searches in the Minister's Correspondence Unit, the Office of the Assistant Deputy Attorney General and the Operational Support Branch, the appellant observes that the ministry only provided affidavits from the coordinating lawyer and one other individual. He argues that by its failure to provide affidavits from each of the 21 individuals who conducted a search, the ministry has failed to comply with the terms of my interim order. He also argues that the affidavits provided by the two individuals lack sufficient information to answer the interim order's requirement for specific details about the searches carried out.

[27] Order provision 4 of Interim Order PO-3858-I states:

> I order the ministry to provide me with representations on the searches described in order provision 3. I ask the ministry to provide these representations to me, in writing, by July 11, 2018.
>
> The ministry's representations should include an affidavit signed and sworn or affirmed by each person who conducts the searches, which describes, at a minimum:

> (a) the name and position of the person who conducted the search;
>
> (b) details of the searches carried out, including: the dates of the searches; what places were searched; who was contacted in the course of the search; and what types of files were searched;
>
> (c) the results of the searches; and
>
> (d) whether it is possible that responsive records existed but no longer exist. If so, the ministry must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules.
>
> The ministry's representations may be shared with the appellant, unless there is an overriding confidentiality concern.

[28] I acknowledge that order provision 4 refers to affidavits signed by "each person who conducts the searches." I am satisfied, however, that the ministry has provided sufficient information through its representations and the affidavit of the person who coordinated the various searches to fulfil this order requirement. The coordinating lawyer's affidavit evidence provides additional details to supplement the ministry's representations on this topic, including, among other things, the names and titles of each of the individuals who were asked to conduct searches, the parameters of those searches, additional instructions provided to the searchers, and the steps taken by the coordinating lawyer to search the record-holdings of two individuals who were no longer employed at the ministry. I do not accept the appellant's argument that the absence of affidavits from each of the individual searchers leads inexorably to the conclusion that the ministry's further searches were unreasonable. I have, however, considered the appellant's other arguments in support of his belief.

[29] The appellant objects to the ministry's decision to conduct a search of the Minister's Correspondence Unit, rather than a search of the Office of the Attorney General, based on the ministry's explanation about its practice for handling correspondence addressed to the minister. The appellant questions whether the ministry's practice for handling correspondence might have been different in early 2011. Even if not, the appellant proposes that a search of the Office of the Attorney General may still be warranted in this case—because it is possible, for example, that one or both former Assistant Deputy Attorneys General communicated with the then-Attorney General about the appellant's matter, given its seriousness. He reports that the former Attorney General once sent him a letter in 2009; he states that this indicates the minister was personally involved in the appellant's matter at one time.

[30] The appellant also takes issue with the ministry's explanation for the absence of responsive records in the Office of the Assistant Deputy Attorney General. If it is true that the 2011 and 2014 responses to him did not generate written records within the

office because they were preceded by oral briefings, rather than by more formal briefings, he suggests that this method was chosen in order to limit the creation and transmission of records in the appellant's matter. He asks that I issue an order to address this type of practice.

[31] Lastly, in respect of the ministry's further searches of its Operational Support Branch, the appellant's objections have mainly to do with the impropriety, in his view, of ministry staff having removed the identified documents from his court file without having obtained a judge's order or otherwise complying with applicable rules around maintaining the integrity of a court file. He asks whether it is plausible that, on the one hand, multiple ministry lawyers conferred directly about this issue and, on the other, that the matter was of such low significance that it did not generate any records. The appellant reiterates his suspicion that the ministry implicitly or explicitly directed its staff to avoid recorded communications about his matter in order to defeat access requests made under the *Act*.

[32] Finally, for each component of the ministry's further searches, the appellant objects to the ministry's failure to provide evidence about the record maintenance policies or practices in place for the relevant area, or to demonstrate any attempt to identify and recover deleted, archived or back-up records or to involve electronic records retrieval professionals in the searches. He suggests that these are additional deficiencies in the ministry's searches.

Analysis and findings

[33] For the reasons that follow, I am satisfied that the ministry has addressed the defects in its original searches that I identified in Interim Order PO-3858-I and that, through its further searches, it has made a reasonable effort to locate responsive records in fulfillment of its obligations under the *Act*. I am not persuaded by the appellant's arguments that additional records could reasonably be expected to exist.

[34] First, despite the appellant's objection, I find it reasonable for the ministry to have conducted a search of the Minister's Correspondence Unit, in place of the Office of the Attorney General, in light of the ministry's usual correspondence-handling practices. I have no reason to believe that this practice was not in effect at the relevant times, being 2011 and 2014. The appellant has proposed that his letter addressed to the Attorney General might have received a different treatment, given its subject matter, but I am not persuaded of the likelihood of this claim. In any event, even if the Attorney General had been personally involved in the Assistant Deputies' responses to the appellant, the ministry has explained that correspondence handled directly by the Attorney General would be routed through the same Correspondence Unit that was part of the ministry's further search. I would also expect copies of any responsive records generated as a result of a personal involvement by the Attorney General in matters handled by an Assistant Deputy to exist in the Office of the Assistant Deputy Attorney General; that office was also part of the ministry's further search. The ministry's searches of these areas did not turn up any additional responsive records.

[35] The appellant proposes that the absence of additional records in these areas, and in the ministry's Operational Support Branch, is the result of ministry efforts to evade its obligations under the *Act* by using oral communications rather than written communications in dealing with the appellant's matter. I find no reasonable basis for this claim. I observe that through its initial search efforts, including searches of the two ministry branches that now make up the Operational Support Branch, the ministry located 38 pages of responsive records, and disclosed the majority of these to the appellant.

[36] The ministry's failure to locate additional responsive records does not, in itself, mean that its further searches were unreasonable. On the contrary, I am satisfied by the ministry's evidence that it made reasonable efforts to search areas that would be expected to contain such records, through searches conducted by experienced employees knowledgeable in the subject matter of the request.[1] The appellant's broader complaints about ministry staff's handling of the court file, and about the responses he received when he raised his concerns with senior ministry staff, are not matters for adjudication under the *Act.* They also fail to establish a reasonable basis to believe that additional responsive records exist. Furthermore, in the absence of a reasonable basis to believe that responsive records may once have existed, but have since been destroyed, I find unwarranted the additional search efforts proposed by the appellant, including searches of deleted, destroyed and back-up records and the appointment of an auditor to oversee further search efforts.

[37] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist; however, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] Based on the information before me, I am satisfied that the ministry has met this obligation under the *Act*. I dismiss the appeal.

ORDER:

I uphold the ministry's further searches. I dismiss the appeal.

Original Signed by: December 5, 2018
Jenny Ryu
Adjudicator

[1] Orders M-909, PO-2469 and PO-2592.
[2] Orders P-624 and PO-2559.