

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3976-I

Appeal PA17-395-2

Ministry of the Attorney General

July 31, 2019

Summary: The appellant made a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* for access to records that would confirm the existence of instructions within the ministry to coordinate responses to him and the misplacement of his 2014 access request.

In this interim order, the adjudicator orders the ministry to conduct a search for a separate file about the appellant related to the existence of instructions within the ministry to coordinate responses to him from the date of his last request for this information until the date of the current request. The adjudicator upholds the ministry's search for records about the misplacement of the appellant's 2014 request and a specific fee waiver granted to him.

Statutes Considered: *Freedom of Information and Protection of Privacy*, R.S.O. 1990, C. F.31, as amended, section 24(1).

Orders Considered: Order PO-3058.

OVERVIEW:

[1] The appellant made a request to the Ministry of the Attorney General (MAG or the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for a request for records that would confirm the existence of instructions within

the ministry to coordinate responses to him and the misplacement of his 2014 FOI¹ request.

[2] The request at issue in this appeal set out three items of interest, namely:

1. All documentation referencing [the requester] and contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, of any date.
2. All documentation pertaining to the handling of communication from or directed by him, from any date and more specifically from September 21, 2009 to the present time, contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format.
3. All documentation pertaining to his Freedom of Information Request ("Request") dated July 25, 2014, from any date and more specifically from July 25, 2014 to the present time, contained within or produced by the MAG, including documentation created by an MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, including, more specifically, any and all documentation pertaining to the temporary loss, mishandling or misplacement of the request and of the decision not to process the fee supplied as a cheque by [the requester], and to the drafting of the letter from [named individual] to [the requester] dated April 14, 2015...

[3] The ministry granted partial access to records responsive to item 3 of the request with severances pursuant to the discretionary solicitor-client privilege exemption in section 19 of the *Act*. With respect to items 1 and 2 of the request, the ministry indicated that it did not intend to conduct a search for responsive records as these items were previously addressed in IPC Order PO-3058.

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

[5] During the course of mediation, the appellant advised the mediator that he was of the view that additional responsive records should exist with respect to item 3 of the request and that the ministry should conduct a search for items 1 and 2.

[6] The ministry advised the mediator that it had located all responsive records and

¹ Freedom of information.

provided some information with respect to searches it undertook to locate records. This information was communicated to the appellant.

[7] The appellant sought further clarification from the ministry regarding its search for records. The ministry provided additional information regarding its search for records to the appellant.

[8] The appellant advised the mediator of his view that the ministry's explanation was inadequate and he sought additional information regarding its search for records as well as its refusal to undertake a search for records responsive to items 1 and 2 of the request.

[9] The ministry advised the mediator that it did not have anything further to add to the explanations it previously provided to the appellant.

[10] The appellant advised the mediator that he was of the view that the ministry did not conduct a meaningful search for records, nor did it provide an adequate explanation with respect to the searches it conducted for responsive records.

[11] The appellant then indicated that he would like to pursue the appeal at adjudication on the basis that additional responsive records should exist.

[12] At adjudication, representations were sought and exchanged between the parties in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction 7*.

[13] In this interim order, I order the ministry to conduct a search for a separate file about the appellant responsive to items 1 and 2 of the appellant's request for the date range of January 2, 2011 until June 12, 2017. I also uphold the ministry's search for records responsive to item 3 of the appellant's request.

DISCUSSION:

Did the ministry conduct a reasonable search for records?

[14] 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 24.² 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.

[15] The *Act* does not require the institution to prove with absolute certainty that

² Orders P-85, P-221 and PO-1954-I.

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.³ To be responsive, a record must be "reasonably related" to the request.⁴

[16] 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.⁵

[17] 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.⁶

[18] 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.⁷

Representations

[19] Concerning items 1 and 2 of the appellant's request, namely the existence of instructions within the ministry to coordinate responses to the appellant, the ministry states that in 2011 the appellant made essentially the same request for a separate file about him.

[20] The ministry states that on June 12, 2017 it received the request at issue in this appeal from the appellant.⁸

[21] The ministry states that the current request refers to the appellant's contention that there exists within the ministry instructions to coordinate the handling of his correspondence, his belief that the ministry maintains a separate file on him and his suggestion that the ministry interfered with his legal matter.

[22] The ministry notes that as the appellant's 2011 request raised, in essence, the same concerns as those raised in the current request, a search for responsive records in the current request would lead to the identification and processing of the same records. The ministry points out that in Order PO-3058, Adjudicator Frank DeVries found that the search carried out for the 2011 request was reasonable. It states that in response to the 2011 request, the ministry undertook an extensive search, which resulted in the

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

⁷ Order MO-2246.

⁸ The 2017 request is also referred to as "the current request" in this order.

identification of 170 pages of records responsive to the request. Some responsive records were exempt from disclosure pursuant to sections 13(1),⁹ 19(a)¹⁰ and 21(1)¹¹ of the *Act*. In addition, at the conclusion of mediation of that appeal, the ministry reviewed and expanded its exercise of discretion and disclosed an additional 24 pages of records.

[23] The ministry also notes that the 2011 request was very broad and, in effect, requested any document containing the appellant's name or concerning him. It states that the current request is equally broad and, in effect, requests all documents that refer to the appellant or pertain to the processing of communication from him or to him. The ministry submits that, any documents pertaining to the processing of communication from or to the appellant would, by necessity, contain his name.

[24] The ministry submits that it conducted a reasonable search for documents in response to the 2011 request, as confirmed in Order PO-3058. Therefore, it is the ministry's position that it is not reasonable to believe that additional documents would be located for the current request. For these reasons, the ministry declined to repeat the search for records.

[25] Concerning item 3 of the request, the misplacement of the appellant's 2014 FOI request, the ministry states that its Court Services Division (CSD) carried out a search for all documentation. It states that it asked 20 people, consisting of all staff, along with their supervisors, managers and directors involved in this request, to search for responsive records. The search parameters included the log file number and the appellant's name.

[26] The ministry believes that the search did identify all responsive records and that any further searches would not identify any additional records. It states that since, in this case, the appellant is seeking documents pertaining to a previous search, a review of the responsive documents provided to the appellant as a result of the search clearly sets out the details of the search and provides a clear record of the reasonableness of the ministry's search.

[27] The ministry states that in response to item 3 of the request, a search was also carried out in the ministry's FOI office. This search was conducted by the program analyst for the FOI office, who is now the senior program analyst (the analyst) for the office.

[28] The ministry provided details of how a request is processed in the FOI office. It states that in an effort to locate records responsive to item 3 of the request, the analyst

⁹ The advice or recommendations exemption.

¹⁰ The solicitor-client privilege exemption.

¹¹ The personal privacy exemption.

searched the hard copy file and the electronic file, as the appellant indicated in item 3 of his request, and also searched the folders opened in 2014 on the shared drive.

[29] The ministry submits that the fact that no records dated prior to March 2015 were found pertaining to item 3 is reasonable and supports the ministry's view that the request dated by the appellant on July 25, 2014 was not received by the ministry until March 17, 2015. The ministry states that it is unable to explain the gap between the July 25, 2014 date on the request and the March 17, 2015 date the request was received by the ministry.

[30] The ministry further submits that the fact that no records were found referring to the waiver of a processing fee is reasonable, as in many cases, where the processing fee is too small to justify payment, the processing fee is not charged. It submits that it is also reasonable that the routine decision to not charge a processing fee would be reflected only in the letter to the appellant providing the results of the search and not necessarily in any other records of the office.

[31] The appellant provided extensive representations. He states that the ministry should have records regarding the existence of instructions within MAG to coordinate responses to him. He states that:

...the fact that the ministry is correlating uncorrelated communications about the appellant strongly suggests that it has a file, instructions, a software program, etc. by which it is accomplishing this. Furthermore, since this is de facto not normal expected behavior, it suggests that the ministry may be placing undue attention on the appellant. Given the inherent power within the ministry over the citizens of Ontario, there is a strong justification provided ... for the ministry to conduct a search for [items] 1 and 2 of the 2017 request.

[32] The appellant submits that the ministry's appeal representations do not offer rational grounds for its refusal to search for information under items 1 and 2 of the request under the *Act*. He states that it is simply not possible that the 2011 request could have raised concerns about events that arose in 2016 and are a subject of the 2017 request.

[33] The appellant submits that new evidence that arose in 2016 would support a different finding today than the one Adjudicator DeVries made in Order PO-3058 based on the information before him. He states that since there is now evidence that infers that the ministry is maintaining special instructions or a file about him, and the appellant cannot know when this practice arose within the ministry, the search ought not to be limited by Adjudicator DeVries' 2012 order, especially absent some contrary precedent that can be cited.

[34] With respect to item 3, the appellant states that the records he received do not provide evidence of a search for records in the pertinent timeframe during which the

2014 request was lost within the ministry or with respect to two individuals named in the request. Nor, he submits, were staff asked to search for "documents pertaining to the temporary loss, mishandling or misplacement of the Request."

[35] The appellant submits that for item 3 he should have been provided with a search template providing a record of who searched, what repositories were searched, when the search was performed, how the search criteria were applied and what the results were. He also submits that MAG's fax machine that receives FIPPA requests should be searched for records of faxes he sent to this fax machine in early 2015. He also states that:

It seems that one of, if not the best source of prospective records would be central email repositories, since emails are accurately date and time stamped, and can also be efficiently searched for key words, senders and recipients. Given that the appellant has requested contextual information about the temporary loss of a FIPPA request, and about how that lost FIPPA request was subsequently found, a search of central or at least local email repositories and archives, as applicable, was expected.

[36] The appellant states that he spoke over the telephone with the Acting Program Analyst at MAG's Freedom of Information and Protection of Privacy Office on March 16, 2015 and that during that conversation, she informed him that his (2014 request) had been put in a drawer by a summer student and had, at the time of conversation, been found. She also informed the appellant that the ministry had his cheque.

[37] In reply, the ministry states that it is clear from the 2017 request that the appellant did not agree with the decision of the adjudicator in Order PO-3058, which found:

- a. that there was no evidence of a separate file being kept, and
- b. that the ministry's search was reasonable.

[38] The ministry submits that the appellant is suggesting that Order PO-3058 be disregarded and that the ministry should search again for 'evidence of a separate file', this time from 2009 to 2017. It states the ministry did not conduct a further search as requested as the issue raised in the June 2017 request was essentially the same as the issue raised in the 2011 request. The ministry submits that having dealt with the issue in the 2011 appeal, there was no reason to believe that repeating the search carried out in response to the 2011 request and extending that search to 2017 would provide any evidence of a separate file or instructions regarding the handling of his correspondence.

[39] It is the ministry's position that the letters referred to by the appellant not only do not provide evidence of a separate file about him, but provide evidence that the appellant's correspondence was processed in accordance with the ministry's standard practices and procedures. The ministry provided a detailed explanation about how it

processes correspondence, including the correspondence referred to by the appellant in his representations.

[40] The ministry states that it is not suggesting that the search carried out in 2011 and the subsequent decision of the adjudicator on appeal would have identified records created in 2016. Instead, the ministry's position is that the issue raised by the appellant in his 2011 request, that the ministry maintains a separate file on him, was resolved in Order PO-3058. It submits that with no evidence of a separate file being found in the search conducted in 2011, it is unlikely that searching the 2009 to 2011 records again and expanding the search to include records from 2012 to 2017 would yield a different result. It submits that it is not reasonable to require that the ministry carry out an extended search in order to resolve the appellant's concern for a second time.

[41] The ministry also submits that the appellant's heavy reliance on the exchange of letters in 2016 to support his position that a further search is warranted was driven by his mistaken belief that the correlation of the letters was 'de facto not normal expected behaviour' and proof of a separate file. The ministry states that the letters show that the process applied to his letters was in accordance with the ministry's practice and procedure and was the same process as is applied to all generic correspondence.

[42] For item 3, the ministry disputes the appellant's submission that the 144 records identified by the ministry do not provide evidence of a search for records in the period during which he alleges the ministry lost, mishandled or misplaced the 2014/2015 request. It reiterates the search it undertook, as set out in its initial representations.

[43] In its reply representations, the ministry clarified that the search for all documents pertaining to the appellant's request dated July 25, 2014 was performed by CSD staff who specifically searched for the requested documents pertaining to the temporary loss of the appellant's request and the decision not to process the fee.

[44] The ministry submits that:

The FOI office process tracks all aspects of a request once the request is received by the office. If a request is not received by the office, the process is not engaged. It is possible, as the applicant suggests, that he had telephone conversations with members of the staff and even sent correspondence to the staff. However, with no request received, the telephone conversations and correspondence would not be entered into the office processes and might not have been 'correlated' to the request when it was received months later on March 17, 2015.

It is possible that the appellant did not send the request on July 25, 2014. It is also possible that the ministry received the request and misplaced it until March 17, 2015. In any event, it appears that the location of the request from July 25, 2014 to March 17, 2015 cannot be determined. The ministry is, however, confident that in accordance with the FOI office's

electronic and hardcopy systems for processing a request received by the office, all possible electronic and hardcopy locations within the FOI office have been thoroughly searched.

[45] The ministry also submits that all possible electronic and hardcopy locations within the FOI office have been thoroughly searched for records referring to the fee waiver. No records were identified. It states that this outcome is reasonable given that the waiver of processing fees is routine.

[46] In sur-reply, the appellant repeats much of the information from his initial representations. I asked the appellant to specifically identify what responsive records he believes have not yet been located by the ministry. He does not identify any records that have not yet been located, but believes that he has not been provided with sufficient information about the technology used by the ministry for recovering archived and deleted emails.

[47] The appellant wants the ministry to search for all email records sent to (including where copied or blind copied) or from the email account of each individual in the "List of Individuals." This list of individuals includes 28 named individuals and numerous other individuals including:

All summer students or full time students who worked in the Ministry of the Attorney General FIPPA office in 2014, [and] all individuals who supervised or managed the "Identified Individuals" and the "Summer Students" at any time between July 25, 2014 - January 31, 2015...

[The shared accounts of the] Minister's Communication Unit, the Office of the Minister, the Office of the Assistant Deputy Attorney General, the ministry FIPPA office, and the CSD.

[48] The appellant also wants the date range to be searched for item 1 dated as early as 2009 and wants the search to include all email records, including copied or blind copied emails. He also wants the ministry to search for text messages sent to or from any phone, text messaging device, phone number, or PIN with text messaging capabilities used by each individual or group of individuals listed in his representations.

Analysis/Findings

Items 1 and 2

[49] If I find that a reasonable search has already been conducted by the ministry for records responsive to items 1 and 2 of the appellant's current request, I will uphold the ministry's decision with respect to these two items. If I am not satisfied that the ministry has already conducted such a search for records responsive to items 1 and 2 of the appellant's request, I will order it to conduct this search.

[50] Items 1 and 2 of the appellant's request concern the existence of a separate file about him regarding instructions within the ministry to coordinate responses to the appellant. Respecting such instructions, the appellant asks that the ministry provide:

1. All documentation referencing [the requester] and contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, of any date.
2. All documentation pertaining to the handling of communication from or directed by him, from any date and more specifically from September 21, 2009 to the present time, contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format.

[51] The ministry has refused to process this request as it claims that it is the same as the appellant's 2011 request, which was dealt with in February 2012 in Order PO-3058. In that order, the appellant's request was also for a separate file that the ministry had on him and asked the ministry to search for:

1. A copy of all documents associated with [a referenced file number] as indicated in the January 14, 2009 communication from [a named individual].
2. A copy of all Ministry records pertaining to [a specific legal action] from the Oshawa Superior Court of Justice, Family Court Division, in Oshawa, Ontario, the Divisional Court at 50 Eagle Street in Newmarket, Ontario, and the Court of Appeal for Ontario in Toronto, Ontario from 2003 to the present time.
3. Copies of all emails or documents that make direct or indirect reference to [the appellant], searched under [two specific names referenced in the specified court action] in the subject or message, sent to or received by any Ministry staff and specifically: [four named staff members]

[52] The ministry's search in response to the 2011 request located 170 pages of responsive records. This search was upheld as reasonable in Order PO-3058.

[53] The ministry has refused to search for records responsive to items 1 and 2 of the current request. Its position is that items 1 and 2 of the current request also refers to the appellant's contention that there exists within the ministry instructions to coordinate the handling of his correspondence, his belief that the ministry maintains a separate file on him and his suggestion that the ministry interfered with his legal matter. The ministry's position is that the 2011 request raised, in essence, the same concerns.

[54] In response, the appellant states that he received correspondence from the ministry in 2016 that correlates correspondence received by the ministry from him. As such, this appears to him to demonstrate that a separate file about him exists at the ministry.

[55] Based upon the wording of items 1 and 2 of the current request and the request that resulted in Order PO-3058, I find that other than item 3 of the current request, the appellant's two requests seek essentially the same information: namely, a separate ministry file about the appellant. I note, however, that the current request is for information up to the date of the request, namely, June 12, 2017.

[56] The ministry's representations focus on its 2011 search for a separate file on the appellant and its submission that there is no evidence that a separate file existed then or now exists. The ministry did not conduct a search for records in response to items 1 and 2 of the current request.

[57] Even if items 1 and 2 of the current request and the 2011 request are essentially the same, the ministry has not conducted a search for information responsive to the current request from the date of the previous 2011 request until the date of the current 2017 request. The appellant is entitled to seek access to information that does not encompass the time-period set out in his previous request.

[58] I find that MAG has not conducted a reasonable search for records responsive to items 1 and 2 of the current request for the time-period subsequent to the date of the appellant's 2011 request, up until the date of the current request.

[59] Both the 2011 request and items 1 and 2 of the current request seek records concerning a separate file about the appellant in the ministry's custody or control. As the ministry conducted a search for this information up to the date of the previous request, January 1, 2011, I find that it is not required to search for information that existed prior to January 1, 2011 that is responsive to items 1 and 2 of the current request.

[60] Therefore, I will order the ministry to conduct a search for information responsive to items 1 and 2 of the current request from January 2, 2011 up until the date of the current request, which was June 12, 2017.

Item 3

[61] Item 3 of the appellant's request concerns a search for records pertaining to the temporary loss, mishandling or misplacement of the appellant's July 25, 2014 request between that date and March 17, 2015. This item also concerns a request for records related to a fee waiver granted to the appellant. In response to the searches undertaken for this item, the ministry did not locate any responsive records.

[62] The ministry's position is that the physical location of the request form from July

25, 2014 to March 17, 2015 cannot be determined. It could have been lost within the ministry or it may not have been submitted to the ministry until March 17, 2015. Its position about the fee waiver aspect this portion of the request is that the fee waiver in this case did not generate any additional records.

[63] Based on my review of the parties' representations, I find that the ministry has conducted a reasonable search for records responsive to item 3 of the request.

[64] Besides documents related to a fee waiver provided to the appellant by the ministry, item 3 concerns the whereabouts of the appellant's request dated July 25, 2014 up to March 17, 2015. According to the appellant, his July 25, 2014 request concerned "...the subsequent removal of the MAG letter dated September 21, 2009 from the court file, as indicated in a letter from [the] Assistant Deputy Attorney General Court Services Division, dated April 28, 2014."

[65] The ministry provided extensive representations as to the extent of the search for records responsive to item 3 of the appellant's request, including details of who conducted the searches, the databases searched and the expertise of the persons who conducted the searches.

[66] I find that this search was conducted by individuals with extensive knowledge of the ministry's record holdings and was focused on locating the requested records.

[67] I disagree with the appellant that the ministry's search for records responsive to item 3 of the request was not reasonable. I find the appellant's expectations about the required search to be unrealistic and unreasonable. For example, he expects the ministry's search to include numerous individuals that most likely would not now have responsive records, such as individuals who may no longer work at the ministry or may have had nothing to do with his 2014 request. He also expects the ministry to search through databases that appear to have nothing to do with the alleged misplacement of his July 25, 2014 request, such as unrelated shared databases. I conclude that such efforts were not warranted to conduct a reasonable search for the purpose of section 24 of the *Act*.

[68] The appellant was specifically asked to identify any records he believes have not been located in response to item 3 of his request. He did not identify any records that have not yet been located.

[69] I also disagree with the appellant's assertion that there is insufficient information about the ministry's search for records responsive to item 3, as well as information about the ministry's technology for recovering archived and deleted emails. I find that the ministry has provided sufficient evidence for me to find that a reasonable search has been undertaken with respect to item 3 of the request.

[70] As set out above, there are a number of explanations provided by the ministry as to why records responsive to item 3 of the appellant's request may not have been

located, such as the appellant's request dated July 25, 2014 not being actually submitted by the appellant until March 17, 2015 or the request having been lost at the ministry. Even if this request was temporarily lost at the ministry, the ministry has provided sufficient evidence as to the search it undertook to locate records about this loss.

[71] As set out above, 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. The *Act* does not require the ministry to prove with absolute certainty that further records do not exist.¹²

[72] I find that with respect to item 3 of the appellant's request, experienced employees knowledgeable in the subject matter of that part of the request expended a reasonable effort to locate records reasonably related to item 3 of the request.

[73] I find that the ministry has provided sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to item 3 of the current request.

[74] Accordingly, I find that the ministry is not required to conduct another search for records responsive to item 3 of the appellant's request, and I uphold this search as reasonable.

ORDER:

1. I uphold the ministry's search for records responsive to item 3 of the request.
2. Regarding items 1 and 2 of the appellant's request, I order the ministry to conduct a search for a separate file about the appellant related to the existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017. I order the ministry to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. 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;

¹² See Order MO-3577.

- c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - d. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - e. the results of the search; and
 - f. if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
3. If responsive records are located as a result of the search referred to in Provision 2, I order the ministry to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
 4. The affidavit referred to in Provision 2 should be forwarded to my attention and may be shared with the appellant, unless there is an overriding confidentiality concern.
 5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original Signed by _____

Diane Smith
Adjudicator

July 31, 2019 _____