Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3983-F

Appeal PA17-164

Ministry of the Attorney General

August 16, 2019

Summary: The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for correspondence, memos, letters and emails sent and received by a specified employee where the appellant is mentioned or referenced. In Interim Order PO-3942-I, the ministry was ordered to conduct a further search for responsive records. In this final order, the adjudicator finds that the ministry's search was reasonable and dismisses the appeal.

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

OVERVIEW:

[1] A request was made to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> A copy of all correspondence, memos, letters and emails, sent or received by a specified employee of the Ministry of Attorney where the requester is mentioned and/or referenced from February 2015 until present.

[2] After conducting a search, the ministry issued a decision granting partial access to the records, with some information withheld pursuant to sections 13(1) (advice to government) and 14(1) (law enforcement) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the course of mediation, the mediator had discussions with the ministry

and the appellant about the issues on appeal. The ministry provided an explanation of the exemptions claimed, specifying that it is relying on section 14(1)(b) for the law enforcement exemption. The appellant raised the issue of reasonable search with the mediator, asserting that additional responsive records should exist.

[5] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[6] In Interim Order PO-3942-I, I found that neither the exemption at section 49(a) in conjunction with sections 13(1) nor the section 49(a) exemption in conjunction with 14(1) applies to the withheld information and the ministry was ordered to disclose the information to the appellant. In addition, I found that the ministry had not conducted a reasonable search and ordered it to conduct a further search. The main reason for my finding regarding the ministry's search was that the appellant referred to nine emails in his representations that should have been located in the search but were not located. He also provided evidence of the existence of these nine emails as he already has copies of them in his possession. The appellant's representations were provided to the ministry who in turn provided a reply. However, since the ministry failed to address why it did not locate these emails, I ordered the ministry to conduct a further search for responsive records.

[7] The ministry conducted its further search and provided evidence of same. It submits that it was unable to locate the emails referenced by the appellant.

[8] The ministry's representations were provided to the appellant who continued to be of the view that further responsive records should exist.

[9] In this order, I find that the ministry's search was reasonable and dismiss the appeal.

DISCUSSION:

[10] The only remaining issue in this appeal is whether the ministry's search resulting from the interim order was reasonable.

[11] As stated in Interim Order PO-3942-I, where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24 of the *Act*.[1] If, after conducting an inquiry, the adjudicator is satisfied that the institution carried out a reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the

[1] Orders P-85, P-221 and PO-1954-I.

adjudicator may order further searches.

[12] 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 made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be reasonably related to the request.[3]

[13] 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 that are reasonably related to the request.[4] An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[14] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[6]

[15] After completing its search, the ministry provided an affidavit as ordered. In this affidavit, counsel at the ministry affirms that she oversaw the subsequent search. She submits that since June 2014, her responsibilities include overseeing searches and preparing recommendations for access requests under the *Act* involving the court services division. She also submits that she has held a counsel position with court services since 2001 and therefore has knowledge of the roles and responsibilities of staff and managers of the division and of the computer drives used by staff and managers. She submits that she also has knowledge of the ministry's record storage and filing systems and of record retention policies.

[16] The affiant submits that the scope of the request and the documents the appellant was seeking were clear and she was able to conduct a reasonable search without requiring additional clarification.

[17] The affiant notes that as the search was specifically for records sent or received by a specified manager, the search was focussed on the electronic and hard copy records maintained by that manager. The affiant submits that hard copy records were maintained in filing cabinets, desk drawers and on various surfaces in the office. The organization of these records was clear and documents were clearly labelled and placed in common folders. The affiant submits that after a search of all hard copy records, she

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[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.

was satisfied that no further records responsive to the request were located.

[18] The affiant submits that the second stage of the search was arranged with the regional systems manager, in order to access the specified manager's computer as this was the most likely location for records given the request. The affiant submits that after an exhaustive search of the manager's computer, no further responsive records were located other than the ones located previously.

[19] The affiant confirms that she was unable to locate the nine emails that the appellant referred to and provided. The affiant submits that the only reasonable explanation for not locating the missing emails is that they were inadvertently deleted. The affiant points out that the contents of the emails that were located and ultimately released to the appellant are not significantly different that the emails that it can not locate, suggesting that it is not reasonable to believe that the specified manager purposely withheld or deleted these emails and that the most reasonable explanation is that they were deleted inadvertently.

[20] The ministry's affidavit was forwarded to the appellant who continued to be of the view that the search was not reasonable as the referenced emails were not located. In his representations, the appellant submits that he spoke with a technology expert working in an Ontario ministry who provided information that all ministry emails are automatically saved and if an email is deleted, at minimum, there will remain an archived copy. The appellant submits that the emails in question still exist but that the ministry has not searched in the correct location (i.e. back-up tapes) to locate them.

[21] The appellant also submitted that other responsive records (emails) may be located if the ministry searched its back-up tapes.

[22] The appellant also seems to take issue with the individual who completed the subsequent search. He submits that the ministry employed someone whose expertise is at semantics and writing persuasive arguments, not carrying out a technological search.

[23] The appellant's representations were forwarded to the ministry for response. The ministry submits that the *Freedom of Information and Protection of Privacy Manual* (the manual) sets out that with respect to electronic records, a search "should be undertaken where such records may reasonably exist in the electronic record keeping environment established by an institution, including email accounts, shared drives, electronic archives, and other electronic storage system." The ministry submits that in accordance with the manual, its search was carried out in the electronic recordkeeping environment that it established.

[24] The ministry submits that the manual sets out that "[e]xceptionally and in extraordinary circumstances, a search of a system maintained for disaster recovery purposes (e.g. back-up tapes) may be considered, for example, where evidence exists that responsive records may have been deleted or lost out of the normal recordkeeping environment and the lost records are likely to be located on the back-up tapes." The

ministry submits that the fact that the appellant already has in his possession all nine emails that it was unable to locate, "takes this case far outside even the most generous definition of 'exceptionally' and 'extraordinary circumstances.'"

[25] With regard to the appellant's assertion that more records may be located if the back-up tape is searched, the ministry submits that the appellant has not provided a basis for this belief and submits that its search was reasonable and that there is little likelihood of further records existing.

[26] The appellant was provided with the ministry's reply representations and provided further representations on the issue. The appellant submits that the ministry does not reference the data centre archive where deleted emails will be located. He submits that the manual actually supports that when records are deleted this provides the impetus to search the archive.

[27] The appellant submits that the ministry is attempting to avoid an expensive search but that it is a result of its "multi-layered negligence" that the only place left to search is the off-site data centre. The appellant submits that as a result of the ministry's "illegal actions of destroying records," it must now conduct an expensive search of its back-up tapes.

Analysis

[28] As noted, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the ministry conducted a reasonable search for records as required by section 24 of the *Act*. If I am satisfied that the ministry's search for responsive records was reasonable in the circumstances, the ministry's search will be upheld. If I am not satisfied, I may order that further searches be conducted.

[29] In Interim Order PO-3942-I, I ordered the ministry to search for nine emails which the appellant has in his possession and should have been located in the search, and if it is unable to locate same to provide an explanation. The ministry conducted its search but was unable to locate the emails. I accept its submission and find that the emails it was unable to locate were deleted inadvertently. I accept the ministry's explanation about the emails based on its submission that those emails are not significantly different from the emails that it did locate and ultimately provide to the appellant. I agree that this suggests the specified manager did not purposely delete or withhold these emails and that the most reasonable explanation is that they were deleted inadvertently.

[30] In addition, I do not accept the appellant's submission that it is incumbent upon the ministry to conduct a search of its back-up tapes. In examining the manual, I agree with the ministry that it sets out that only in "[e]xceptionally and in extraordinary circumstances" a search of the back-up tape may be considered. In my view, the circumstances in this appeal are not extraordinary or exceptional. The appellant already has copies of the emails that he is asking the ministry to locate. Given that he already

has a copy of this information, I find that this is not a case that presents "extraordinary circumstances" and the ministry is therefore not required to search its back-up tapes.

[31] Further, as noted above, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the appellant's representations, I find that he has not provided a reasonable basis for me to conclude that other records might exist, other than the emails he refers to, if the ministry searched its back-up tapes.

[32] Finally, the appellant suggests that the counsel who conducted the search was not qualified to do so. I disagree. The appellant has not provided a reasonable basis for me to conclude that counsel at the ministry was not qualified to complete the search. In my review of the affidavit concerning the search, it is clear that counsel searched in the relevant hard and electronic records retained by the manager specified in the request. I note that the counsel has been with court services since 2001 and therefore has knowledge of the roles and responsibilities of staff and managers and knowledge of the ministry's record storage and filing systems. Further, I note that the counsel who conducted the search has been overseeing searches and preparing recommendations for access requests since June 2014, and since that time has overseen searches and responses to over 100 access requests. Therefore, I find that the counsel who conducted the search was an experienced employee knowledgeable in the subject matter of the request who expended a reasonable effort to locate responsive records.

[33] Accordingly, I find that the ministry's search is reasonable.

ORDER:

The appeal is dismissed.

Original signed by
Alec Fadel
Adjudicator

August 16, 2019