Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4010

Appeals PA13-490 and PA13-491

Ministry of the Solicitor General

November 26, 2019

Summary: The appellant submitted a request to the ministry for records pertaining to him and two specified addresses. In response, the ministry issued two decision letters advising the appellant that no records existed. The appellant appealed the ministry's decisions and claimed that responsive records should exist. In this order, the adjudicator finds that the ministry's searches for responsive records was reasonable and dismisses the appeals.

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

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry)[1] for:

> All records, physical and electronic, from all locations in respect of:
>
> 1) [Names used by the appellant and his date of birth];

[1] At the time the request was submitted, the ministry was known by this name. The ministry is now known as Ministry of the Solicitor General.

> 2) [Specified address in Toronto] for the period of January 1, 1989 to [the date of the request]; and
>
> 3) [Specified address in Hamilton] for the period of January 1, 1989 to [the date of the request].

[2] The ministry issued two decision letters to the appellant indicating that no responsive records relating to the addresses identified in the request exist in its record holdings.

[3] The appellant appealed the ministry's decisions to this office and a mediator was assigned to the appeal to explore settlement with the parties. However, the appellant continued to believe that records responsive to his request should exist. As no mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry.

[4] During the inquiry, I sent a Joint Notice of Inquiry for the two appeals to the parties setting out the facts and issues and inviting their written submissions. The ministry's representations was shared with the appellant in accordance with this office's confidentiality criteria. In response, the appellant provided representations accompanied by voluminous attachments. Most of these attachments provide background information that do not address the issues set out in the Notice of Inquiry. I summarized the appellant's main arguments on the issues set out in the Notice of Inquiry and invited the ministry's reply representations, which it provided.

[5] In this order, I find that the ministry's search for responsive records was reasonable and dismiss the appeals.

DISCUSSION:

[6] The sole issue before me is whether the ministry's search for responsive records was reasonable.

[7] 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.

[8] 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

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

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]

[9] 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]

[10] 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]

[11] 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 of the parties

[12] The ministry takes the position that its searches for responsive records were reasonable. In support of its position, the ministry filed an affidavit which states that:

- upon its receipt of the appellant's request, an analyst with the Ontario Provincial Police (OPP) conducted a search of its Niche RMS[8] using the names and addresses identified in the request, but did not locate any responsive records;
- during mediation, the appellant provided a copy of an OPP property report signed in 1990 and the analyst conducted a further search for responsive records in a database that preceded the Niche RMS;
- as a result of its further search in the older database, the ministry located the reference number listed in the property report provided by the appellant on the database, but did not locate any additional records;
- the analyst also consulted with staff at its Criminal Investigations Branch (CIB) who conducted a search of its CIB database, using the reference number along with the names identified in the request. However, no responsive records were identified in the ministry's record holdings.

[13] Though the ministry's searches failed to locate responsive records, the ministry

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[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] Police records management system.

advised the appellant that a box of officer's notes belonging to the officer (now retired) identified in the property report was transferred to the Ontario Archives in accordance with the ministry's regular record keeping practices. The ministry provided the appellant with the name and badge number of the officer and told the appellant that he could file a request under the *Act* to the Ontario Archives, which he did.

[14] In addition, the ministry in its representations stated:

> There are, in any event, at least three plausible reasons why there are no responsive records. First, the street addresses to which the requests relate are in the City of Toronto and the City of Hamilton. However, the OPP does not provide front line policing services to these municipalities. Second, the records being requested may be up to nearly 30 years old, and if they did exist, there is a possibility they may have been destroyed in accordance with our retention policies. Third, old records may have been transferred to the Provincial Archives, for which the Ministry has no responsibility.

[15] The appellant takes the position that the ministry's search for responsive records was not reasonable. In particular, the appellant asserts that:

- The ministry's representations and affidavit do not specify the steps it took to search for the responsive records;
- The ministry failed to provide evidence in support of its position that some of the responsive records were destroyed; and
- The OPP analyst conducting the searches was not an "experienced employee."

[16] The appellant also submits that the ministry unilaterally narrowed the scope of his request. The appellant referred to the ministry's decision letters in which it states that it "did not locate any records in their record management system of incidents pertaining to [the appellant] and [the specified address in either Toronto or Hamilton]". The appellant states that his request did not refer to the term "incidents" but rather "all records". The appellant goes on to state:

> In sum, the institution's unilateral narrowing inevitably predetermined that a broad swath of the institution's potentially responsive records caught by the scope of the [request] would be effectively ignored…

[17] Finally, a common thread in the appellant's submissions is his argument that the ministry's submissions lack specificity. For instance, the appellant argues that the ministry failed to identify each individual that was tasked with manually conducting searches of the CIB database or consulted by the OPP analyst responsible for coordinating the ministry's search.

[18] In response, the ministry restated its position that the records responsive to the appellant's request would have been created 30 years ago or more and thus "[i]t should come as no surprise that older records may have, in some cases, been destroyed". The ministry also submitted that the individual who conducted the searches was an experienced employee with a lengthy tenure at the OPP. With respect to the appellant's submission that the ministry unilaterally narrowed the scope of the request, the ministry stated:

> The affidavit clearly demonstrates that the search was for all responsive records. The fact that we referenced the term "incidents" in the original decision letter[s] does not diminish the scope or nature of the search that was conducted, which we submit met or exceeded our obligations under [the *Act*].

Decision and Analysis

[19] Having regard to the submissions of the parties, I find that the ministry's search for responsive records was reasonable and decline to order any further searches.

[20] The time period identified in the appellant's request was from January 1, 1989 to the date of the request. However, based on my review of the background information the appellant provided with his representations, it appears that most of the responsive records, if they exist, would have been created approximately 30 years ago.

[21] In my view, the ministry provided sufficient evidence demonstrating that it made a reasonable effort to identify and locate these records. In particular, I took into account the ministry's evidence that it conducted subsequent searches for the responsive records during mediation and expanded its search to include a database that predated the Niche RMS database, in addition to searching the CIB's database. The appellant submits that the ministry should be required to identify every individual consulted by the analyst to assist her search for responsive records. The *Act* does not require that, and I am satisfied that the analyst tasked with coordinating the search was an experienced employee knowledgeable in the subject matter of the request. Finally, I am satisfied that the ministry provided a satisfactory explanation of the steps it took to locate responsive records, and find that those steps were reasonable in the circumstances.

[22] I also considered the appellant's evidence and find that he has not provided sufficient evidence to establish a reasonable basis for concluding that the requested records should exist in the ministry's record-holdings. In addition, I find insufficient support for the appellant's argument that the ministry's use of the word "incidents" instead of "all records" in its decision letters demonstrate that it unilaterally narrowed the scope of his request. I reviewed the appellant's request form along with the ministry's decision letters and am satisfied that the steps the ministry explained it took to locate responsive records could reasonably be expected to capture records pertaining to the names and addresses specified in the appellant's requests.

[23] I also took into consideration the appellant's arguments that the ministry's submissions should have contained information about when certain records would have been be destroyed. However, the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. Instead, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Given the age of the records contemplated by the request and the fact that some of the records could reasonably be expected to have been stored in the ministry's now-defunct database, I do not agree with the appellant's position that a further search should be ordered because the ministry failed to identify when records that may have been responsive were destroyed. In my view, the searches conducted by the ministry were reasonable taking into consideration the age of any responsive records and the high probability that the records were either destroyed or transferred to Archives.

[24] Having regard to the above, I am satisfied that the ministry's search was reasonable and I find that it has fulfilled its obligations under the *Act*. I decline to order any further searches, and I dismiss the appeals.

ORDER:

I uphold the reasonableness of the ministry's search for responsive records and dismiss the appeals.

Original signed by: November 26, 2019
Jennifer James
Adjudicator