

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4070-F

Appeal PA19-00395

Ministry of the Solicitor General

September 29, 2020

Summary: This final order disposes of the only remaining issue in this appeal: whether the Ministry of the Solicitor General (the ministry) conducted a reasonable search in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specified incident that was investigated by a named Ontario Provincial Police officer. The record at issue was the audio recording of a statement he made to the police. The ministry advised that the audio recording was unintentionally deleted. In Interim Order PO-4054- I, the adjudicator ordered the ministry to provide this office and the appellant with an affidavit specifying further details of the record's deletion (including the applicable retention policy) and the ministry's attempts to recover the record.

In this final order, the adjudicator upholds the reasonableness of the ministry's search and dismisses 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: Interim Order PO-4054-I

OVERVIEW:

[1] In Interim Order PO-4054-I, I upheld most aspects of the search conducted by the Ministry of the Solicitor General (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a

specified incident that was investigated by a named Ontario Provincial Police (OPP) officer. The record at issue was the audio recording of a statement he made to the police. The ministry had advised that the audio recording was unintentionally deleted.

[2] However, I did not uphold the ministry's search as reasonable due to a lack of sufficient evidence regarding the deleted record. As a result, I ordered the ministry to provide this office and the appellant with an affidavit specifying further details of the deletion of the record at issue (including the applicable retention policy) and the ministry's attempts to recover the record. The ministry did so. I provided the appellant with a copy of the ministry's affidavit, and invited him to provide representations in reply to it, but he declined to do so.

[3] For the reasons that follow, I uphold the ministry's search as reasonable and dismiss the appeal.

DISCUSSION:

[4] 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

[5] 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 In Interim Order PO-4054-I, I upheld most aspects of the ministry's search for the record at issue, including the reasonable, though unfortunate, basis for the ministry's belief that the record had been deleted. Despite these findings, I stated that in a case involving a record that is believed to be deleted, there was insufficient evidence before me about the ministry's retention policies and/or recovery efforts, if any. Therefore, I ordered the ministry to provide this office and the appellant with an affidavit specifying further details of the deletion of the record at issue (including the applicable retention policy) and the ministry's attempts to recover the record.

[6] The ministry provided an affidavit with further information about the deleted record, in response to Interim Order PO-4054-I.

[7] The affidavit was that of the same employee who had previously provided an affidavit regarding the ministry's search efforts, the OPP's freedom of information coordinator for the Western Region (the FOIC). 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.³ In Interim Order PO-4054-I, I noted that the experience level of this FOIC was unchallenged and I

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Orders M-909, PO-2469 and PO-2592.

accepted that she is an employee who is knowledgeable about the OPP's record holdings and the requirements of the *Act*. I see no reason to find otherwise for the purpose of accepting her affidavit evidence in response to Interim Order PO-4054-I.

[8] In her affidavit, the FOIC explained that in response to Interim Order PO-4054-I, information technology staff in the OPP informed her that the record would have been saved to a tape and backed up when it was provided to the member of the Professional Standard Bureau (PSB). She further explained that these tapes are then overwritten periodically. In this case, since the OPP is not sure of when exactly the record was provided to the PSB, it is unsure of exactly when it was overwritten. The FOIC states that it is conceivable that the tape could have been overwritten as late as March 2019 or approximately 4 months after the record was destroyed by the member of the PSB. The affidavit also states that once a tape is overwritten, it cannot be recovered. Therefore, by the time the search was conducted for the record (in about June 2019), the tape had been overwritten was not capable of being recovered.

[9] In Interim Order PO-4054-I, I also ordered the ministry to provide information about its retention schedule. The FOIC's affidavit in response also addresses this. She states that she has been informed that the record at issue was supposed to have been kept for five years after it was last required for legal purposes (such as for court). If it was not used for a legal purpose, the record at issue was supposed to have been kept for five years after its creation.

[10] 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.⁴ Here, the appellant declined to provide further representations in response to the affidavit evidence provided by the ministry.

[11] Having considered the ministry's further affidavit evidence in response to Interim Order PO-4054-I, I am satisfied that the ministry has provided sufficient evidence regarding the circumstances surrounding the deletion of the record at issue, and the ministry's retention policies. I accept that, in light of this evidence, the record at issue cannot be retrieved. Accordingly, I will not order a further search, and I dismiss this appeal.

ORDER:

I uphold the ministry's search as reasonable, and dismiss the appeal.

Original signed by: _____
Marian Sami
Adjudicator

September 29, 2020 _____

⁴ Order MO-2246.