

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4111-F

Appeal PA17-300

Ministry of the Attorney General

February 19, 2021

Summary: In Interim Order PO-4067-I, the adjudicator ordered the ministry to conduct a further search for records relating to regulatory or non-criminal investigative matters, which the appellant alleges were sent to his professional regulator. In this final order, the adjudicator finds that the ministry's further search for responsive records is reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 24; *Regulated Health Professions Act*, 1991, SO 1991, c 18, section 36(3).

OVERVIEW:

[1] The appellant submitted a two-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) to the Alcohol and Gaming Commission of Ontario (the AGCO or commission).¹ The Ministry of the Attorney General (the ministry) is responsible for responding to access requests submitted to the commission. This decision addresses deficiencies I found in the ministry's search for records that are responsive to the first part of the request, which sought access to records the appellant

¹ The appellant submitted the same request to the ministry in two separate letters dated days apart in May 2017. The ministry issued one decision letter to the appellant. For the remainder of this order, I will refer to the appellant's May 2017 requests as one single request.

alleges the commission² sent to the College of Veterinarians (the college).

[2] In Interim Order PO-4067-I, I ordered the ministry to conduct a further search for records relating to regulatory or non-criminal investigation matters (non-police records), which the appellant alleges the commission sent to the college.³

[3] The ministry subsequently conducted a further search for responsive records but did not locate additional records. The ministry provided me an affidavit outlining its further search efforts which was shared with the appellant. In response, the appellant submitted representations in which he raises concerns about the ministry's search methodology. The appellant also takes the position that the record holdings of three additional individuals should have been included in the ministry's further search.

[4] In support of his position, the appellant provided copies of the index pages of three sets of disclosure briefs⁴ provided to him. The appellant says that the first two disclosure briefs labelled as "Tabs 1 and 2" were provided to him by the commission. These two disclosure briefs appear to have been provided to the appellant by the commission outside the access to information scheme.

[5] The third disclosure brief labelled as "Tab 3" was prepared by the college. This disclosure brief is accompanied by other documents the college provided to the appellant, who labelled them as "Tabs 4 to 7". Tabs 3 to 7 appear to contain information exchanged with the appellant in relation to a Health Professions Appeal and Review Board (HPARB) matter. The appellant also provided a copy of a factum the college provided to him and this document also appears to relate to an HPARB matter.

[6] There is an issue with the admissibility of the documents described above. Previous decisions of the Information and Privacy Commissioner of Ontario (IPC) have found that section 36(3)⁵ of the *Regulated Health Professions Act* (the *RHPA*) provides for a privilege over all documents prepared for proceedings under that act. Documents relied upon during HPARB proceedings, which take place under the *RHPA*, are intended to be confidential and are not meant to be relied upon in any other civil proceeding,

² The ministry advises that on April 1, 2016 (the merger date), the Ontario Racing Commission (ORC) merged with the Alcohol and Gaming Commission of Ontario (AGCO or commission). As of the merger date, the AGCO assumed the ORC's previous responsibility for the regulation of horse racing under the *Horse Racing Licence Act*.

³ I upheld the ministry's search for any police records the appellant alleges the commission sent to the college.

⁴ The disclosure brief is the copy of the evidence that a prosecuting party has collected to prosecute an individual. Typically, individuals facing a prosecution are provided with a copy of the disclosure brief, before their trial or hearing.

⁵ Section 36(3) of the *Regulated Health Professions Act* states: No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

including an appeal before this office.⁶ Applying that reasoning here, I cannot consider the contents of Tabs 3 to 7 or the factum provided by the appellant in deciding whether the ministry's further search was reasonable under section 24 of *FIPPA*.

[7] In this order, based on all of the other information before me, I find that the ministry's further search for non-police records remedied the deficiencies with its previous search in Interim Order PO-4067-I, and I uphold it. However, I order the ministry to forward a portion of the request to the Ministry of Agriculture, Food and Rural Affairs (OMAFRA).

DISCUSSION:

Did the ministry conduct a reasonable search in accordance with Interim Order PO-4067-I?

[8] The first part of the request sought access to "...documentation obtained by the Ontario Racing Commission which was subsequently disclosed to [the college]."

[9] In Interim Order PO-4067-I, I ordered the ministry to conduct a further search of its own record-holdings for regulatory or non-criminal investigation records that were sent to the college from March 1, 2013 to April 1, 2016.⁷

[10] The sole issue to be determined is whether the ministry's further search addresses the deficiencies with the ministry's previous searches, as identified in Interim Order PO-4067-I.

[11] 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 24.⁸ 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.

[12] 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.⁹ To be responsive, a record must be "reasonably related" to the request.¹⁰

⁶ In PHIPA Decision 80, Adjudicator Jenny Ryu determined that proceedings before this office under *PHIPA* are "civil proceedings" for the purpose of section 36(3) of the *RHPA* (paras 67-69). This reasoning was followed in PHIPA Decision 100 by Adjudicator Jaime Cardy (paras 19-22).

⁷ In Interim Order PO-4067-I, I found that the ministry's search for OPP records the appellant alleges the commission sent to the college was reasonable and dismissed that part of the appeal.

⁸ Orders P-85, P-221 and PO-1954-I.

⁹ Orders P-624 and PO-2559.

¹⁰ Order PO-2554.

Representations of the parties

[13] The ministry submits that its further search was reasonable. In support of this position, the commission's Manager of Information Management and Analytics (IMA Manager) submitted an affidavit describing the ministry's further search efforts. The IMA Manager oversees the commission's data management system and leads the access to information program area. The ministry states that the IMA Manager "is very familiar with record search procedures, such as knowing who to contact within the commission and determining the location of potentially responsive records." The affidavit outlines that the IMA Manager supervised and coordinated the further search, as follows:

- the individual who conducted the initial search was asked to provide names of past and current employees who might have responsive records. This individual, who is now the Director of Regulatory Compliance, identified eleven individuals. Seven of the eleven individuals are current employees;
- the Director searched through his emails, personal drive and shared drives using relevant search terms, such as the name of the requester and college, but did not locate responsive records;
- the seven individuals¹¹ still working at the commission searched their emails, personal drives and shared drives using relevant search terms but did not locate responsive records. In addition, these individuals were asked to identify any other individual who could assist with the search or may have responsive records and identified two individuals still employed with the commission – one external legal counsel and one in-house counsel;
 - the external counsel, acted as counsel on a variety of matters pertaining to the ORC and the requester since 2004. This individual searched and reviewed all files and folders associated with the requester located within his or her record holdings but did not locate responsive records;
 - the in-house counsel searched through her emails, personal drive and shared drives using relevant search terms but did not locate responsive records;
- the archived business email accounts for the three individuals who worked at the commission after the merger but are no longer commission employees were searched, using the relevant search terms, but no responsive records were located;

¹¹ These individuals currently hold various positions at the commission, such as Compliance Official, Manager of Compliance, Acting Senior Manager of Regulatory Compliance, Manager of Racing, Director of Regulatory Compliance, and Administrative Assistant.

- the record-holdings of Litigation Counsel (counsel) could not be searched as the ministry takes the position that it does not have custody or control of these records. This individual did not join the commission after the merger and the ministry takes the position that the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) has custody and control of the files of this individual; and
- the appellant's master file was retrieved and the contents were reviewed but no additional responsive records were located.

[14] The appellant takes the position that the ministry's further search was not reasonable for the following reasons:

- the ministry's search methodology was flawed;
- the ministry should have searched the record holdings of three additional individuals, including those of counsel whose records are stored at OMAFRA; and
- the further search suggests bias on the part of the commission, thus raising questions of the reliability of the search itself.

[15] For reasons stated below, I find that the ministry's further search following Interim Order PO-4067-I was reasonable. The appellant's submissions are discussed along with my analysis below.

Decision and Analysis

The appellant submits that the ministry's search methodology is flawed

[16] In his representations, the appellant appears to acknowledge that the ministry's second search in response to Interim Order PO-4067-I remedies many of the inadequacies in the initial search. He states:

It is quite clear that the methodologies used in the second search are quite specific, detailed, and involve the search of records of other employees' emails and computer records. The second search was highly refined and detailed. On the other hand, the first search did not contemplate or consider searches of records associated with other employees, and thus falls far below the standards of methodologies established in the second search.

[17] However, the appellant submits that the new search left him with a "lack of clarity" and questions about whether the search results indicate that no records related to him were located or "does it instead mean that there were no records disclosed by the employees to the College of Veterinarians of Ontario?" The appellant argues that a "correct methodology" would have first located files related to him and then "as a second part of the exercise, identify what records, if any, were sent to the [college]."

[18] The appellant says that the ministry's failure to conduct the search in this manner leaves the impression that the commission does not have "any records" related to its investigation of him. The appellant argues that many records exist in commission employees' record holdings. In support of this position, the appellant provided copies of the indexes of two disclosure briefs¹² the commission provided to him which identify numerous documents relating to the commission's investigation. The appellant argues that the ministry's failure to "clearly define that there could be files related to [him] is a blatant attempt to mislead [the IPC] and obfuscate in their response."

[19] The appellant also submits that the employees directed to conduct searches should have been provided additional key terms. The appellant says that other search terms associated with the college should have been used, such as acronyms and the names and positions of key individuals at the college. The appellant argues that the search parameters used, were "not only inadequate, but may have also been potentially biased to favour the result of no records being found."

[20] In Interim Order PO-4067-I, I ordered the ministry to "conduct a search of its record holdings for regulatory or non-criminal investigation records the commission sent the college between March 1, 2013 and April 1, 2016." Accordingly, the ministry's further search is confined to *records that the commission sent the college* during that specified time period.

[21] I ordered the further search in Interim Order PO-4067-I because I found that the ministry failed to provide a written summary of the steps taken in response to the portion of the appellant's request seeking access to such non-police records and stated:

I have reviewed the ministry's evidence and find it insufficient to demonstrate that the ministry conducted a reasonable search for records apart from the 2013 police investigation. Given the parties' evidence that the appellant was the subject of several investigations, I find that a reasonable search would have looked beyond the records created by OPP officers. The steps the ministry submits it took in responding to the request only speak to its efforts to locate OPP records. There is insufficient evidence before me to establish that a search for records that would inform the appellant about what, if any, non-police records were sent to the college. Instead, it appears that the ministry is relying merely on the claim that it would be a rare occasion for a civilian investigator to provide investigative materials to the college, which is speculative and does not support the ministry's position in this appeal.

[22] I have reviewed the ministry's evidence and am satisfied that I have been provided with sufficient information about the search terms, type of files searched, the nature and location of the searches, and the steps taken in conducting the searches. I

¹² Disclosure Briefs, Tabs 1 and 2 of the appellant's representations.

also am satisfied that the searches were coordinated and completed by experienced individuals knowledgeable in the subject matter of the request and that the ministry had provided sufficient evidence to establish that it made a reasonable effort to identify and locate responsive records.

[23] In making my decision, I reviewed the appellant's representations. In Order PO-4067-I, I noted that the ministry conceded that the appellant was the subject of "numerous regulatory, civil and investigative matters." Accordingly, one would expect that the ministry has records within its custody or control relating to non-police investigations.¹³ In my view, the appellant's argument that a reasonable search would have required the ministry to start with the location of records not captured by his request (*any* investigative records relating to him as opposed to regulatory/non-criminal investigative records the commission provided the college) is not contemplated by the scope of the search I ordered.

The appellant submits that the record holdings of a named lawyer should have been included in the ministry's further search

[24] The appellant submits that the record holdings of three additional individuals should have been searched.

[25] One of these individuals is the litigation counsel the ministry says did not join the commission after the merger. The ministry submits that this lawyer's record holdings could not be searched as it does not have custody or control of these records as OMAFRA assumed custody or control of files of this individual. The appellant's submissions appear to accept that the ministry does not have custody of the lawyer's files. However, the appellant submits that the ministry should have taken additional steps after it realized that this individual's record holdings are not in its custody or control.

[26] The appellant argues that the ministry should be ordered to expand its search to OMAFRA because sections 2 and 43 of the *Horse Racing Licence Act* specifically provides that the commission assumes all obligations of its predecessor. The appellant goes on to state that the commission "has an obligation to be responsive to any issues pertaining to the former ORC" and that there is no evidence that the commission made any inquiries to OMAFRA to comply with order provision 3 of Interim Order PO-4067-I.

[27] In response, the ministry provided representations indicating that it was not opposed to forwarding this portion of the request under section 25(1) to OMAFRA but thought that doing so before my inquiry into this matter was over would lead to confusion.

¹³ In Interim Order PO-4067-I, I found that it was not necessary for me to determine whether Ontario Provincial Police (OPP) records relating to the appellant were under the control of the ministry.

[28] Section 25(1)¹⁴ provides that where an institution receives a request for access to a record that it does not have in its custody or under its control, it shall forward the request to the institution that has custody or control of the record.

[29] I have reviewed the *Horse Racing Licence Act*, including the provisions the appellant draws to my attention. In my view, it is not necessary for me to comment on whether section 43 (or section 2) has the effect on the commission's custody or control of OMAFRA records the appellant says it does. The solution lies instead in accepting the ministry's indication that it is willing to forward this portion of the appellant's request to OMAFRA, as contemplated under section 25(1). I will order the ministry to do so.

The appellant submits that the record holdings of two additional individuals should have been included in the ministry's further search

[30] Finally, the appellant submits that the ministry should have searched the record holdings of a named Veterinarian and the commission's Executive Director. In response, the ministry states that neither individual was identified by staff as individuals "who could assist with the search or could hold potentially responsive records."

[31] The ministry went on to say that the Veterinarian was employed part-time by the commission, worked mostly from home and was compensated on a per diem basis. The ministry submits that the Veterinarian's working arrangement with the commission "explains why [commission] staff did not include [him] as an individual whose record holdings could be potentially responsive."

[32] The appellant argues that the Executive Director should have responsive records given his supervisory role. The ministry responds that individuals already identified in its search affidavit would have a greater likelihood of having responsive records as opposed to the Executive Director. The ministry explains that these individuals, not the Executive Director, are familiar with the subject-matter of the request.

[33] I find that the ministry has provided a satisfactory explanation as to why the record holdings of the Veterinarian and Executive Director were not identified for inclusion in its further search. In my view, the appellant's evidence falls short of establishing a reasonable basis for believing that responsive records exist in these individuals' record holdings. Given the ministry's explanation about the roles of these individuals, I accept that it was reasonable not to include these individuals in the

¹⁴ Section 25(1) of the *Act* states:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

ministry's search for responsive records. Again, the scope of the further search order was not for *any* investigative records relating to the appellant but instead regulatory or non-criminal investigative records the commission sent the college within a specified time period.

[34] In addition, I am satisfied that the individuals identified in the ministry's affidavit as potentially having responsive records shows that it made a reasonable effort to identify and locate responsive records. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. Instead, 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 24.¹⁵

The appellant submits that the commission is biased against him

[35] Throughout his representations, the appellant submits that the ministry failed to identify additional record holders or interpreted the search terms in a manner that would ensure that responsive records would not be located.

[36] The appellant says he has provided evidence which "clearly indicates" that there exists "responsive records, in all likelihood related to three [additional] employees" and argues that the fact that these records were not located supports his position that the ministry's further search was not reasonable.

[37] Lastly, the appellant submits that he was not provided with evidence confirming that the ministry is willing to accept and endorse the commission's further search. The appellant goes on to state that:

[t]here should be an acknowledgement or confirmation on behalf of the Ministry of the Attorney General, otherwise the process of addressing the original *FIPPA* request is flawed. This also demonstrates that the [commission] is operating without the supervisory function of [the ministry].

[38] I am not aware of any requirement for the ministry to "endorse" the further search results. The ministry is responsible for responding to access requests submitted to the commission and there is nothing improper about the ministry delegating the actual search efforts to the responsible program area that holds the records.

[39] The issue before me is not whether the commission is biased against the appellant. Rather, I am to determine whether the ministry's further search remedied the deficiencies in Interim Order PO-4067-I.

¹⁵ Orders P-85, P-221 and PO-1954-I.

Summary

[40] I am satisfied that the ministry's further search was reasonable.

[41] I have reviewed the submissions of the parties and am satisfied that the further search was coordinated and completed by experienced individuals knowledgeable in the subject matter of the request. I find that the ministry has provided sufficient evidence to establish that it made a reasonable effort to identify and locate responsive records.

[42] Finally, I accept the ministry's explanation for why it could not search the archived record holdings of the litigation counsel who is no longer employed by the commission. However, I will order the ministry to forward this portion of the appellant's request to the institution it claims has custody or control of this individual's archived record holdings.

[43] Having regard to the above, I find that the ministry's further search remedies the deficiencies in the search found not reasonable in Interim Order PO-4067-I and dismiss this appeal.

ORDER:

1. I uphold the reasonableness of the ministry's further search following Interim Order PO-4067-I.
2. I order the ministry to forward, to the Ministry of Agriculture, Food and Rural Affairs (OMAFRA), the part of the appellant's May 2017 request for regulatory or non-criminal investigation records the commission sent the college between March 1, 2013 and April 1, 2016. The ministry is to treat the date of this decision as the date of the request and is to give written notice to the appellant that this has occurred.
3. In order to verify compliance with order provision 2, the ministry is, upon request, to provide this office with a copy of its notice to the appellant.
4. The appeal is dismissed.

Original Signed by: _____

Jennifer James
Adjudicator

February 19, 2021 _____