Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4222

Appeal PA19-00149

Ministry of the Attorney General

December 22, 2021

Summary: The appellant requested under the *Freedom of Information and Protection of Privacy Act* (the *Act*) records relating to correspondence he sent to the ministry and records referred to by the Toronto police in a newspaper article. The ministry sought clarification and conducted a search for responsive records. In its decision, the ministry granted full access to all responsive records. The appellant, however, challenged the ministry's search as unreasonable. In this order, the adjudicator upholds the ministry's search for records relating to the appellant's correspondence but orders the ministry to conduct a further search for the Canada wide warrant, informations and indictments in its record holdings.

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

Orders Considered: Orders P-994 and MO-3070.

OVERVIEW:

[1] The appellant made a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> I request access to records related to my personal correspondence sent to the Attorney General(s) seeking access to records known to exist, and publicly referred to by the Toronto Police in the media and in court

> transcripts, but withheld by the Crown, contrary to the obligations outlined in *R.* v. *Stinchcombe*. This request will include records of the receipt of my personal letters of request to the Minister(s), as well as records of searches made or ordered made for the documents requested, all response and replies made, whether by letter, inter- or intra-office electronic means, or by memoranda or informal notes through which the files associated with all relevant or ancillary departments and personnel within the Ministry were reviewed, answered and filed. The request will include not only responsive records (as defined in the Act) held in the Office of the Attorney General about my personal files and copies of the originals, but also the records available from the Deputy Attorney General and any Assistant Attorney Generals, as well as the Crown Law (Criminal) Office, the ministry's relevant Court Services Division, the Correspondence Division of the Attorney General and the managers of the Records Storage Facility. The primary dates of the request are bracketed by the years 2011 – 2017, but the requested records subject of my letters to the minister are of an imprecise date, but reported to the media in the year 2001, and their existence confirmed, but not disclosed by the Crown in 2003.

[2] The ministry responded to the appellant asking that he clarify what records the Toronto Police referred to in the media and in court transcripts, specific to the ministry. The ministry also suggested that the appellant provide copies of the media articles that identify the records in question.

[3] The appellant responded to the ministry providing copies of a court transcript, a newspaper article and referring to a previous decision of this office.[1]

[4] The ministry subsequently issued a decision granting partial access to the responsive records and withholding information under sections 13(1) and 19 of the *Act*. The ministry noted that court records fall under the custody and control of the Superior Court of Justice and the Ontario Court of Justice, and are therefore not subject to the *Act*. The ministry advised the appellant that these records may be accessible from the originating courthouse and provided their contact information. The ministry also referred the appellant to the Archives of Ontario, for further responsive records.

[5] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, the appellant advised the mediator that he was seeking access to the withheld information and believed that further responsive records exist at the ministry. The mediator conveyed the appellant's further search request to the ministry.

[7] The ministry subsequently issued a revised decision granting full access to the

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[1] Order MO-3107-F.

previously withheld records. The ministry also conducted a further search for records and noted in their revised decision, that no additional records were located. The ministry provided the appellant with a description of their searches in the revised decision letter.

[8] The appellant indicated to the mediator that he maintains his belief that additional responsive records exist at the ministry. The appellant also advised that he sought access to the responsive records at the Superior Court of Justice and the Ontario Court of Justice, as he was referred to the courts in the ministry's decision. The appellant noted that both courts advised him that the responsive records are in the custody or control of the ministry. Mediation did not resolve the appeal and the file moved to adjudication.

[9] The adjudicator assigned to the appeal sought and received representations from the ministry and the appellant, which were shared between them in accordance with Practice Direction 7 and the IPC's *Code of Procedure*. The appeal was then transferred to me to continue the adjudication of the matter. I reviewed the file and I determined that the ministry should have the opportunity to respond to the appellant's representations and I provided a copy of these representations to the ministry.[2] I received the ministry's reply representations and provided a copy of them to the appellant. I invited the appellant to provide sur-reply representations which he did.

[10] In this order, I order the ministry to conduct a search in their record holdings for the Canada wide warrant and any informations and/or indictments that led to the appellant's arrest. I uphold the ministry's search for records relating to the appellant's correspondence sent to the ministry offices.

DISCUSSION:

[11] As seen in my discussion below, I find that while the ministry's search for records relating to the appellant's correspondence was reasonable, I order the ministry to conduct a search for a Canada wide warrant, informations and/or indictments relating to the appellant.

[12] The sole issue in this appeal is whether the ministry conducted a reasonable search for responsive records. Where an appellant 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 required by section 24.[3] 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.

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

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[2] I did not provide the ministry with a copy of the appendices to the appellant's representations. In my finding below, I address the appellant's procedural fairness concern regarding my decision not to share his appendices with the ministry.

[3] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[14] 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.[6] 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.[7] 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.[8]

Representations

Ministry's representations

[15] The ministry was asked to provide a written summary of all steps taken in order to respond to the request. In support of its search, an affidavit was provided by an Assistant Crown Attorney with the ministry. The affiant details her credentials that qualify her to coordinate the search for responsive records. She notes that upon receiving the appellant's request, the ministry wrote to the appellant seeking clarification in relation to the records that the Toronto Police had referred to in the media and in court transcripts. The appellant was also asked to provide any copies of media articles that related to his request.

[16] While waiting to receive the appellant's clarification, on January 28, 2019, counsel to the Assistant Deputy Attorney General, Criminal Law Division, commenced a search for responsive records. The affiant states:

> Noting that the [appellant] referred to his correspondence with the ministry, [counsel] forwarded the original request to [named individual], Acting Correspondence and Issues Officer in the Criminal Law Division. [Same named individual] responded that records that dated pre-2017 were in archives and a request would have to be made to the Archives Office. Despite this members of the Criminal Law Division continued to search for any records that they might have on file.

[17] On January 31, 2019, the Correspondence/Issues Officer in the Criminal Law Division, provided the following records to counsel to the Assistant Deputy Attorney

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[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.

General, Criminal Law Division:

- An email dated September 16, 2015 indicating that the email sender had received a letter from the appellant indicating he had written to the Director of the Crown Law Office but had not yet received a response. The email notes that the appellant's letter was sent to 720 Bay St. but the correspondence system does not have a record of the appellant's letter.

- An email dated September 18, 2015, where the sender indicates that she does not have a record of the appellant's letter. The email sender notes that she has no knowledge of the letter and would consult with the Director of the Crown Law office.

- An email dated December 2, 2016. The sender indicates that her office (Crown Operations) is attempting to respond to the appellant's request for identification of signatures on two court indictments. The sender is asking the recipient of the email if she can help. Also the email attaches a number of court documents.

[18] The affiant states that in light of the above identified emails, counsel for the Assistant Deputy Attorney General determined that responsive records may be located in the Office of the Toronto Regional Director of Crown Operations. A copy of the appellant's request was provided to Counsel to the Toronto Regional Director and a request was made that the Regional Office conduct searches for responsive records. This request to search was sent on February 6, 2019.

[19] The appellant's letter responding to the request for clarification of his access request was received by the ministry on February 6, 2019. The appellant provided copies of media articles and a portion of a transcript featuring a police officer testifying at a show cause hearing on August 16, 2001. The appellant's clarification states:

> As requested in your letter, I attach copies of the references made in the media, and references made under sworn testimony in Court by an identified Toronto Constable, a transcript of which is provided.
>
> As is generally known, a Canada Wide Warrant
>
> > can only be issued by a judge of a superior court and not a provincial court judge. It is provided for under s. 703.
>
> In representations made by the Toronto Police to the Information and Privacy Commissioner, leading to Order MO-3107-F, the Toronto Police stated…*the Head Crown Attorney…is consulted before a Canada Wide warrant can be issued.*
>
> A statement I rely upon in confirming that the Attorney General is in possession of specific records (as defined by the FIPP Act) and copies of

> court-issued documents, including the records related to the application to the Superior Court Judge which have been the subject of my correspondence with the Attorney General, which embraces my request for responsive records related to that correspondence.

[20] On February 6, 2019, counsel to the Toronto Regional Director provided the following documents to the affiant in relation to the appellant's request. In doing so, counsel noted that these records were located in the Office of the Toronto Regional Director of Crown Operations. The records included the following:

- An email dated December 2, 2016 where assistance is sought in identifying signatures on two court documents. The court documents are attached to the email along with letters from the appellant.
- An email chain dated December 2, 2016 referring to the matter above.
- An email dated December 2, 2016 referring to matter above.
- An email dated December 6, 2016 providing copies of correspondence sent by Court Services Division to the appellant dated February 15 and March 6, 2015.
- An email dated December 6, 2016 indicating that the sender had spoken to the Director of Crown Operations in Toronto who indicated that their office can not assist further and the file on this matter is marked closed.
- An email from the send to the recipient thanking the Director for her response.

[21] The affiant states that on February 14, 2019 the responsive records were identified and reviewed with respect to privacy concerns and exemptions. As several records were from the Court Services Division, that office was consulted in relation to its records and the response was that it had no issue with disclosure. On March 1, 2019, the ministry responded to the requester and provided him with partial access to thirty-six pages of responsive records.

[22] The affiant states that when the mediator informed the ministry that the appellant sought an additional search for records, the ministry conducted another search. On May 6, 2019, the affiant wrote to the Correspondence/Issues Officer in the Criminal Law Division and asked her to conduct a search of her area. The affiant also contacted counsel to the Toronto Regional Director and asked her to conduct another search. Finally, the affiant also contacted counsel in the office of the Assistant Deputy Attorney General, Criminal Law Division and asked that they conduct another search for records.

[23] The affiant indicates that on May 7 and 8, 2019, she received responses from staff at the Assistant Deputy Attorney General's office, the Correspondence and Issues Branch and the Toronto Regional Office that searches had been conducted and no additional records had been located. The affiant states:

> Given that searches were conducted in the Communications Branch, Office of the Regional Director of Crown Operations (Toronto), and Office of the Assistant Deputy Attorney General, Criminal Law Division, I am unaware of any further branches or offices in the Division that I believe would hold responsive records in relation to this request.

[24] Finally, the affiant attempts to provide the appellant with an explanation as to why additional records were not located relating to the information he is seeking.

> In arriving at this determination, I rely upon my knowledge and experience gained over my nineteen-year career in the Division. Toward that end, I am aware that requests for Crown consultations in relation to Canada Wide Warrants are a frequent occurrence and generally handled informally through a phone call. Although I cannot speak to police practices, with respect to Ministry officials, generally no records are created in relation to this procedure. The threshold in providing the "go ahead" for issuing a Canada Wide Warrant is simply a belief that the party sought might be located somewhere in Canada.
>
> As Counsel with the Ministry, it would be improper for me to provide the [appellant] with legal advice. However, one should be aware that s. 703 of the *Criminal Code of Canada* relates to procuring the attendance of witnesses at a trial. Further, in relation to [the appellant's] arrest, based on evidence in the transcript that he provided, it would appear that the officer arrested [the appellant] in Ontario. As such, he had the authority to arrest him without relying upon the Canada Wide Warrant.
>
> The appellant also seeks the identity of the Crown who signed the court Indictments back in 2003 and 2004. It is not surprising, given the passing of time, that the identity of the Crown who signed these documents cannot be determined. Clearly this issue was neither raised nor addressed during the trial. Accordingly, I believe that it can be logically inferred that these documents were properly before the court during [the appellant's] trial. [The appellant] had been committed for trial following a preliminary hearing. Indictments are prepared by a Crown following an accused's committal for trial and this document is then put before the Superior Court to maintain jurisdiction over an accused person.

Appellant's representations

[25] In addition to his representations on the reasonableness of the ministry's search, the appellant makes a number of submissions on several ancillary concerns. To the extent that his concerns relate to the search issue, I set them out below.

[26] The appellant provides the reason for his access request and notes that he is

seeking *true copies* of registered indictments, with the endorsements of the Crown and the court in order to pursue an application for Ministerial Review for miscarriage of justice under sections 696.1(2) and section 696.6 of the *Criminal Code*.

[27] The appellant reviews his past access to information requests and states:

> None of the records eventually received by the Appellant in February 2018 on Requests submitted in 2003 contained copies of the currently requested *true copies* of Warrants the Crown's Informing Officer which he claimed to have obtained through the cooperation of the Attorney General – that is, the ITO's and Returns for search warrants and wiretaps and access to the Appellant's financial records, the endorsed copies of those warrants, especially the Canada Wide Warrant. The Crown knows the Constable [conducted] no investigation before laying the charges in August 2000, and he was the only Complainant, his supposed authority the *Police Services Act*.
>
> Therefore, the sole repository where the records, which are *clearly* known to exist *on logical inference* are archives and electronic databases maintained under Section 10 of the FIPPA which remain under the care and control of the Attorney General, the Deputy Attorney General, the Crowns informing their Case Manager from the Toronto Police [named individual], and the records of the Crowns with the carriage and supervision of the case as it worked its way through the judicial system..
>
> The records requested, as the Appellant was advised by another branch of the Office of the Attorney General at 361 University, Toronto, were prepared at and are archived by the Ministerial Offices at 720 Bay, Toronto or in Cabinet records.

[28] The appellant submits that the responsive records he is seeking are in the custody or control of the ministry because of evidence of intervention on behalf of individuals at 720 Bay Street. The appellant submits that he has made every effort to obtain true copies of the records he is looking for:

> The Appellant affirms that he has made every diligent effort to obtain "true copies" of purported Warrants, Informations, Indictments and "records of convictions" through requests to the authorities at the Superior Court at 361 University Avenue, through searches of the Archives of the Ontario Court of Appeal, through Access Applications made under the appropriate and legislated Privacy Acts…
>
> None of these applications resulted in *true records* that should have been *properly before the court* after a *reasonable search* at the identified institutions. However, copies of the records disclosed, even with heavy

> redactions all point to the connection between the Crown's informing Constable and his regular communications point to the centrality of 720 Bay Street in the conduct of the prosecution of [named case] and other related [cases], including that of the appellant.

[29] The appellant submits that in 2015 – 2016, he sent four letters to the ministry and when he received copies of them through access to information requests, only one of those letters was date stamped. In these letters, the appellant sought:

- Printed name of the signatory of the first indictment
- Signed copy of the second indictment
- Copy of all files and court records, including transcripts of Crown's application for the Canada Wide Warrant
- Information and original information

[30] The appellant submits that he has not been provided with a satisfactory reason why his other letters were not date stamped. Furthermore, the appellant notes that he was never provided with an acknowledgement of the receipt of his letters, nor were any answer to his letters provided to him. The appellant submits that this is evidence of a:

> …two-year campaign of deliberate obstruction and exclusion, if not destruction, of the appellant's letters to the Attorney General sitting as Cabinet members.

[31] The appellant submits that the ministry's affidavit fails to provide a summary or explanation of missing records and no details were provided regarding the location or search for records.

[32] On the issue of the ministry's search, the appellant submits that:

> The Deponent for the Attorney General alleges, on a sworn Affidavit, that she has conducted a reasonable search for true copies of the Information(s) (all four variations) and true copies of the Indictment(s) (all four variations) and for the Canada Wide Warrant and the formal documentation attached to the Warrants, including the ITO and Returns, and has searched for the identity of the person, the Deponent alleges, was a Crown Attorney employed by the Ministry of the Attorney General at the time he or she counterfeited the holographic signature of [named individual].

[33] The appellant disagrees that a reasonable search was conducted. He submits that none of the individuals who were sent his letters were asked to conduct searches for records. The appellant submits that searches were conducted in places where responsive records would most likely not be found. The appellant submits that the Director of the

Criminal Law Division did not provide his letters to the Attorneys General when he sent them in. He submits that a proper search for records relating to his letters would be in the Office of the Attorney General or the Office of the Deputy Attorney General. The appellant states:

> …it appears that none of the principal and original file and record creators and several associated and identified Crowns alleged to have been supervising the prosecution of the appellant based on the "informations" of the [named] Constable have been asked, as part of a reasonable search, to identify the location of their records, or commit to a duty in law or professional standards to assist in recovering them, in compliance with the FIPPA, as a responsible part and efforts by which "a reasonable search" can be described as having been conducted.

[34] The appellant also submits that the ministry's representations do not indicate that a request was made by the ministry to the Archives Office for records.

[35] Finally, the appellant submits that a reasonable search would have also resulted in the location of the Canada wide warrant. The appellant submits that the ministry's explanation as to why a Canada wide warrant does not exist is unacceptable. The appellant submits that a named police constable has alluded to a Canada wide warrant and thus this record should exist in the ministry's record holdings.

[36] In support of his representations, the appellant provided a number of appendices which I have also reviewed.

The ministry's reply representations

[37] The ministry clarified that the named police constable is not the Crown's *informing officer* as labelled by the appellant. The ministry states:

> In the Canadian Criminal Justice System, it is the sole responsibility of the police to investigate criminal offences and determine whether or not sufficient grounds exist to lay charges. The police may consult with the Crown but are not beholden to accept any advice that may be provided. It is only after charges are laid and an arrest has occurred that the Crown then takes carriage of the matter. This distinction is important as the police and the Crown are two separate entities with two completely separate set of responsibilities. [Named police constable] was not the *Crown's Informing Officer*. A police officer must establish independent grounds to believe that an individual was responsible for a criminal act before making an arrest. This is an independent exercise of the officer's discretion.

[38] The ministry then provides information about the *information*, the charging document, and the indictment process. The ministry then provides an explanation of why the appellant was directed to make a request to Archives for the records he is seeking:

> When the Conservative Government came to power in Ontario in June 2018, all records related to prior Ministers were transferred to the Archives of Ontario. This was done to ensure that a new party is not affected by positions, policies, agendas, etc., of the departing governing party. Shortly after the provincial election in June 2018, all records relating to the former tenure of the departing Liberal Attorney Generals were moved to the Archives. During the [IPC] mediation process, the ministry advised that additional records may be held in the Archives and suggested that the Appellant make a request to that office; a suggestion that was reiterated to the appellant on June 18, 2019, by [the IPC's mediator]…It does not appear from the appellant's reply submissions that he has attempted to obtain any records from the Ontario Archives. It is, again, recommended that he file a request directly to that office and in doing so he should include as much detail as possible, including the dates of his correspondence and to whom it was directed.

[39] The ministry then summarized its earlier representations on its search and then provided an explanation as to why certain individuals (the author or recipient of records) were not contact to conduct a search:

> At the time of the appellant's FOI request in 2019, many of the people named by the appellant in his reply submissions were no longer in the positions that they had held at the time of the appellant's trial conviction back in 2004. Many had, in fact, left the Ministry's Criminal Law Offices altogether…This information is being shared so as to explain why these individuals were not contacted and asked to undertake a search for responsive records. Instead, each office (the Toronto Regional Director's Office, the Correspondence and Issues Office, and the Office of the Assistant Deputy Attorney General of the Criminal Law Division) conducted a search for responsive records.

[40] The ministry submits that when it conducted its search in the above-referenced offices, there was no indication that additional records might be located in any other office within the Criminal Law Division. The only remaining area that may be a holder of the records would be the Archives of Ontario.

[41] The ministry also responded to the appellant's submission that he was seeking the records (true copies of the information(s) and indictment(s)) for use in his application to the Minister of Justice pursuant to section 696.1(2) of the *Criminal Code*. The ministry states:

> As the appellant was advised by the Acting Manager of Criminal Intake and Jury Office at the Superior Court at 361 University Avenue in Toronto, court records are retained by the court of jurisdiction. Toward that end, and as was explained earlier, it is the Court that is responsible for providing copies

> of official court records such as Indictments or Informations, not the Ministry. While the Crown may prepare an Indictment, it only becomes an official record after it is perfected and placed before the Court.

The appellant's sur-reply representations

[42] The appellant argues that the ministry should have asked employees to conduct searches even though they are no longer employed by the ministry and moreover, these individuals should have responsive records as the appellant submits that all the request files and documents were either created, handled or received through all the divisions of the ministry.

[43] The appellant disputes the ministry's submission that he did not make a request to the Archives for records. The appellant submits that he made the request to the Archives and he notes that he wrote about that request in his initial representations.

[44] The appellant submits that original copies of the records he seeks should be in the ministry's offices. The appellant goes on to note that since 2013 he has made a series of requests to the offices of the Attorney General and he did not receive responses to any of these requests. The appellant state:

> In the exercise of an open and responsible government in a democratic society, it is the duty of the Minister and his subordinates and designates to acknowledge and respond to correspondence from members of the public. The letters are to be noted as received, filed and dated by the Correspondence office, and the responses filed and numbered. Although the MAG Correspondence Unit opened a file with the designation number [specified number], this protocol was not followed thereafter by that Unit.
>
> Although delivered b registered mail, and noted by Canada Post as having been received, only one of the letters bears the *received* stamp of the correspondence unit of the MAG. None of the letters elicited a timely reply…

[45] Regarding the Canada wide warrant, information and indictments, the appellant submits that his access requests to the Toronto Police resulted in "no such full copies of the official records (judicially endorsed Warrants, Informations, and Indictments showing proof of conviction) could be located on a reasonable search of that Institution". The appellant submits that he is not seeking the Crown brief but he is seeking the same records elsewhere in the files of the ministry.

[46] Regarding the search for the Canada wide warrant, the appellant, citing evidence in previously disclosed records, submits that the former Detective Sergeant testified that he had taken out a Canada wide warrant and this was the warrant used to arrest the appellant. The appellant submits that he not yet been provided with a copy of this warrant. The appellant states:

> Therefore, it is of legal importance to the Crown that the Canada Wide Warrant be produced, as the absence of such a record leads to the reasonable conclusion that the Crown's witness was engaged in willful perjury and fabricated information used by the Crown to bootstrap its case, and that the alleged "Canada Wide Warrant" did not exist, but was an imaginary invented record used by the Crown to advance the prosecution.

[47] With regard to the original Informations that the appellant continues to seek, he submits that these original documents should be at the ministry as copies of the public records including the Crown brief and the court file. The appellant submits that these Informations will show:

> The method of malicious prosecution repeatedly used by [named Crown Attorneys] between 2000 and 2006 may, when disclosed, outline the abusive methods used to bring the course of Justice into disrepute, when each Crown proceeded to prosecute fabricated, unscreened, and unlawful charges laid by the informing (or instructing) Officer…
>
> These are, of course, allegations, but they are not unreasonably grounded and are based on the evidence so far recovered, even if there have been continuing attempts to alter and destroy the records.

[48] The appellant then reviews the Informations he currently has and submits how these Informations are deficient. The appellant included a copy of the Informations below with his representations and in his representations indicated how they are not complete:

> [copy missing] Information #1: 27(?) August 2000, 12 counts (entirely missing)
>
> [green copy] Information #2: 18 February 2001, 12 counts (tracking deleted)
>
> [blue copy] Information #3: 16 August 2001, 18 counts (tracking deleted)
>
> [yellow copy] Information #3a: Undated, 19 counts (police file copy)
>
> [white copy] Information #4: 23 January 2002, 19 counts (court tracking clock starts)

[49] The appellant concludes that he requires the true copies of the documents in order to appeal to the Supreme Court of Canada, the Innocence Canada Organization or for any leave to appeal his convictions. He states that no application can be perfected or succeed without certified copies of these records. The appellant states that he should be able to get these copies of the records without having to hire a lawyer to make an application before a court to obtain the records. The appellant submits that because he is unable to get access to these records from the police and the true copies are not in the

court files, they must be with the appellant's prosecution file and the Crown brief.

Analysis and findings

[50] Before I consider the ministry's search for responsive records, I must address the appellant's procedural fairness concern raised during the inquiry. The appellant submits that because I did not provide the appendices to his initial representations to the ministry, I denied him (the appellant) procedural fairness.

[51] I did not provide the appellant's appendices to the ministry because it was not necessary to do so. The appendices were largely repetitive of the appellant's representations, which contained sufficient detail for the ministry to respond on the issues in this appeal (which it did). I also provided the appellant an opportunity to respond to the ministry's reply representations. Accordingly, given the fact that the parties were given an opportunity to have their cases heard and to respond to one another's arguments, I find that I was not unfair to either of the parties. And to be clear, while the ministry was not asked to address the appellant's appendices, I carefully reviewed all of the appellant's submissions, including the appendices in question, for the purposes of making my decision.

[52] I now turn to the substantive issue of this appeal. Based on my review of the parties' representations, I find that the ministry's search for records was reasonable for records responsive to part of the appellant's request.

[53] The appellant's access request was twofold. The appellant is looking for the letters and related records he sent to the ministry seeking the "true copies" of warrant, informations and convictions. These are letters to the Attorney's General sent to the ministry offices and were not framed as access to information requests made under the *Act*. These letters precede the appellant's access to information request which is the subject of this appeal. It is my understanding that the appellant is seeking access to any records that would reveal ministry searches for the records he is seeking including any discussions between staff members that would show that a search was conducted to respond to the appellant's letters. In the second part of his access request, the appellant is seeking access to the *true copies* of the records themselves that would exist in the Crown brief and/or in other Crown files.

[54] The appellant has set out his view of the police and Crown actions that led to his being charged and convicted. He also sets out his belief of the circumstances surrounding his arrest. I make no findings about these allegations. I understand that the appellant provided this information to support his position that further responsive records should exist relating to his request.

The ministry's search for records relating to the appellant's correspondence

[55] I accept that, before he made the access request that is before me, the appellant wrote to the ministry seeking access to the *true copies* of the records he is seeking -

informations, indictments and the Canada wide warrant. The appellant provided evidence to support his position that he sent letters to the ministry seeking these records. The ministry located records responsive to this part of the appellant's request and has disclosed them to him. Based on my review of the appellant's representations, he takes issue with the individuals who were asked to conduct the searches and the searches themselves. The appellant also believes that there should be more records detailing the ministry's response to his requests.

[56] I find the ministry's affidavit and representations establish that it conducted a reasonable search for the correspondence received by the appellant and any records relating to responses by ministry staff regarding the appellant's correspondence. I find that the ministry sought clarification from the appellant about his request and once it had received the clarification it conducted a more focused search for responsive records. I find that the searches were conducted by experienced ministry employees who would have knowledge of the ministry's records and record holdings. While the searches were not conducted by the employees who were named by the appellant, I find the employees that conducted the searches were appropriately identified as having the experience and knowledge necessary to conduct a search for responsive records.

[57] I find that it was reasonable to search for records in the Correspondence and Issues Branch of the Criminal Law Division for the appellant's correspondence given that all correspondence directed to the Minister, the Deputy Minister, the Assistant Deputy Attorney General, and the Regional Offices of Crown Operations, pertaining to criminal law matters, flow through this ministry branch.

[58] I understand the appellant's frustration that his letters to the Criminal Law Division and the Attorney's General did not generate additional responsive records. However, in the circumstances of this appeal, I find the appellant's arguments that the ministry should have responded to his letters in a certain manner are not sufficient to establish that additional responsive records exist relating to his correspondence.

The ministry's search for copies of the informations, the Canada wide warrant and indictments

[59] The second part of the appellant's request is for copies of the informations, the Canada wide warrant and indictments used in his arrest, prosecution and conviction. I also find that while the appellant submits that he is seeking *true copies* of the informations, indictments and the Canada wide warrant, his original request specifies that he is seeking copies of court-issued documents that may be in the ministry's record holdings.

[60] On this part of the appellant's request, the parties differ in opinion on the nature of the responsive records. The appellant indicates in his initial representations that because he is preparing for an Application to the Minister of Justice pursuant to subsection 696.1(2) and section 696.6 of the *Criminal Code*, he requires a true copy of the

Informations or Indictments for his application. The appellant argues that these would be in the ministry's record holdings.

[61] The ministry's position is that the responsive records, these true copies, would be in the court files or the Archives of Ontario and I note that the ministry's decision directed the appellant to contact the courthouse and/or the Archives of Ontario. The ministry states:

> As the appellant was advised by … the Acting Manager of Criminal Intake and Jury Office at the Superior Court at 361 University Avenue in Toronto, "court records are retained by the court of jurisdiction." Toward that end, and as was explained earlier, it is the Court that is responsible for providing copies of official court records such as Indictments or Informations, not the Ministry.

[62] The appellant did not take issue with the part of the ministry's decision directing him to court files and the Archives of Ontario and the appellant details the requests he subsequently made to the relevant courthouse and the Archives of Ontario. I note that the appellant did not indicate that he had not been granted access to records from the Archives of Ontario or that he appealed any decision of that institution. Further, I make no finding as to the records contained in the record holdings of the Archives of Ontario as they pertain to the appellant.

[63] Based on my review of the appellant's representations, it is evident to me that the appellant has copies of the informations and indictments in question but they are not the copies he seeks. The appellant is looking for the copies of these records in the ministry's record holdings, as opposed to the copies held elsewhere. It is the appellant's belief that the records in the ministry's record holdings are substantially different from the ones that he currently has.

[64] Past decisions of the IPC have considered whether the ministry is required to search for copies of court records. This office has considered the issue of the ministry's custody or control of "court records" in a number of other orders, including: Order PO-2446 (informations); Orders P-995, P-1397 (tape recordings of testimony and evidence); and Order P-1151 (jury roll information). With the exception of Order P-1151, the records at issue in these orders were all records that related to specific proceedings in the courts and were contained in the court file relating to the proceeding, and for those reasons the records were found not to be in the custody or under the control of the institution.

[65] However, in Order P-994, Adjudicator Laurel Cropley also noted that while the ministry does not have custody or control over records located in a court file, she found that this finding did not extend to copies of those same records that exist outside the court file. Adjudicator Cropley states:

> I am not satisfied, however, that this conclusion [about custody or control of court file records] extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the ministry and, therefore, would be subject to the *Act*.

[66] Adjudicator Cropley's rationale and approach was adopted in Order MO-3070 by Adjudicator Bhattacharjee in his determination of whether an "information" sworn by a Toronto Police officer was "court document" for the purposes of the custody or control issue. In finding that a copy of the information was in the custody and control of the police, the adjudicator stated the following:

> As noted above, almost the entire contents of an "information" are drafted by a police officer and directly relate to the police's mandate and functions, which include investigating crime and enforcing the law. In the circumstances of this appeal, I find that the "information" that is kept in a court file is not in the custody or under the control of the police. However, I find that if the police retained a copy of this *information* in their own record holdings, this record is in their custody or under their control for the purposes of section 4(1) and is subject to the Act. This would include a copy of the final version signed by a judge or justice of the peace that the police may have retained, not simply the draft unsigned version.
>
> I will, therefore, order the police to search their record holdings for a copy of the *information* and to issue a decision letter to the appellant.

[67] I agree with adjudicators' approaches in Order P-994 and Order MO-3070. Further, I also agree with the approach of Adjudicator Bhattacharjee in Order MO-3070 where he notes that the determination of whether copies of records that also exist independently of the "court file" are in the custody or under the control of an institution must be done on a case-by-case basis.

[68] In the present appeal, I find that the informations and indictments relating to the charge, arrest and prosecution of the appellant that are found in the court file are not in the custody or control of the ministry. And I find it was reasonable for the ministry to direct the appellant to seek copies of those records from the relevant court house. I further accept that the ministry's view that the true copies that the appellant seeks would be in the court file relating to the appellant at the courthouse. However, I also find that there may be copies of these same records in the ministry's record holdings including in the Crown brief or elsewhere in the Crown's files relating to the prosecution of the

appellant.[9]

[69] I find that the ministry has not established that it has conducted a search of its record holdings for copies of the informations, indictments and Canada Wide Warrant relating to the appellant. In her affidavit the Assistant Crown Attorney states that after receiving the appellant's request, the ministry commenced its search prior to receiving the clarification sought. She states:

> Noting that the [appellant] referred to his correspondence with the Ministry, she forwarded the original request to [named individual], Acting Correspondence and Issues Officer in the Criminal Law Division. [Named individual] responded that records that dated pre-2017 were in Archives and a request would have to be made to the Archives Office. Despite this members of the Criminal Law Division continued to search for any records that they might have on file.

[70] As stated above, I find the ministry's search was reasonable for the correspondence part of the appellant's request. However, the ministry's representations do not specifically address whether it expected that copies of the appellant's prosecution file including copies of the informations and indictments would be caught by its search for the correspondence records. For instance, although it is not clear, the ministry may be alleging that these are the records that would be found in the Archives Office and that for that reason, the ministry did not search its own record holdings. The ministry's representations do not address whether its searches would have found these records or if it expected that these records would only be found in the Archives of Ontario or the court files.

[71] I have carefully reviewed the ministry's representations and while the affiant provides an explanation as to why there would be no communications relating to the Canada Wide Warrant, she does not dispute that there was a Canada wide warrant nor does she specifically indicate that employees conducting the search were asked to look for copies of the informations or indictments or warrants in the ministry's record holdings. Instead the affiant provides an explanation as to why true copies of the informations or indictments would not be found in its record holdings.

[72] Accordingly, I will order the ministry to conduct a search in its record holdings for copies of the Canada wide warrant, informations, and indictments relating to the appellant that are in its record holdings.

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[9] I make no finding on whether responsive records, if located, would be accessible or exempt under the *Act*. Even if a record may be exempt under the *Act*, the institution is required to search for them if they are the subject of a request.

ORDER:

1. I uphold the ministry's search for the appellant's correspondence.

2. I order the ministry to search for copies of any informations, indictments and the Canada Wide warrant relating to the appellant that is in its record holdings and provide a decision to the appellant treating the date of this order as the date of the request for the procedural requirements of the *Act*.

Original Signed By: December 22, 2021

Stephanie Haly
Adjudicator