

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4237

Appeal PA19-00294

Ministry of the Solicitor General

February 22, 2022

Summary: The Ministry of the Solicitor General received a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to a specified incident. After third party notification, the ministry granted full access to the responsive records. The requesters, now the appellants, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario, because they believe that further records responsive to their request should exist. In this order, the adjudicator finds that the ministry conducted a reasonable search for responsive records and dismisses the appeal.

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

OVERVIEW:

[1] This order determines whether the Ministry of the Solicitor General (the ministry) conducted a reasonable search for records in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified incident that stated as follows:

We request copies of all email correspondence between Sgt. [named officer] and the Sault Ste Marie OPP detachment and [named company] security officials – [3 named individuals] – during the time period Dec.1, 2018 and April 30, 2019.

[2] The ministry issued an initial access decision denying access to the email correspondence it had identified as responsive.

[3] The appellants appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the ministry issued a revised decision granting partial access to the responsive records. Upon receipt of the revised decision, the appellants indicated that they were continuing to pursue access to the withheld information and they specified the information they were interested in. Once this information was conveyed to the ministry, the ministry notified a third party and upon receipt of consent, issued a revised decision granting full access to the responsive records. The third party did not appeal the decision and the ministry disclosed the records to the appellants.

[5] Upon receipt of the records, the appellants alleged that an attachment to one of the records (an email) was missing. The appellants described the missing attachment as an "investigative report" (investigative report) created by the named company and sent to the named officer (the officer) at the Ontario Provincial Police (OPP). In response, the ministry agreed to conduct another search.

[6] Subsequently, the ministry explained that the attachment to the email in question consisted of an email thread that is part of one of the disclosed records. The ministry maintained that no further responsive records exist. The appellants alleged that additional records should exist, specifically the investigative report they believe is missing from the records disclosed to them so far.

[7] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the ministry, initially. I received representations from the ministry, which I shared with the appellants. I invited and received representations from the appellants, which I shared with the ministry. I also sought and received reply representations from the ministry and sur-reply representations from the appellants.

[8] In this order, I find that the ministry has conducted a reasonable search for responsive records and dismiss the appeal.

DISCUSSION:

Did the ministry conduct a reasonable search for responsive records?

[9] Where a requester claims 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 If I am satisfied 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.

[10] 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 (responsive) to the request.²

Representations of the ministry

[11] The ministry submits that it conducted a reasonable search for responsive records. The ministry submits that the supposedly missing attachment, which the appellants described as "an investigative report created by the named company and sent to a specified officer," was in fact an email thread that had already been disclosed to them. In support of its position, the ministry submitted the affidavit of the officer who conducted the search. The relevant portions of his affidavit are as follows:

- The officer has been a member of the OPP since 1993 and he is knowledgeable in the requirements and procedures for responding to requests under the *Act*.
- This appeal relates to a request for email correspondence created December 1, 2018 – April 30, 2019, between himself, a named company, and three named individuals.
- As the only officer assigned to the specified incident, he is the only individual who would have responsive email correspondence held by the OPP.
- After receiving the request for emails associated with the incident, he searched an email folder which he had created on his computer to hold all emails related to the incident. He printed off all responsive emails and sent them to the Freedom of Information Analyst.
- Subsequently, he was advised that the request was under appeal and that there was a question about a specific email from the disclosure package that contained an attached file. He looked into the matter and determined that the "attached file" in question was an email thread and that he had already provided it as a responsive record following his initial search.
- He believes that his search was diligent and thorough, and that he searched the email folder where all responsive email records would be stored.

¹ Orders P-85, P-221 and PO-1954-I.

² Orders M-909, PO-2469 and PO-2592.

Representations of the appellants

[12] The appellants submit that the ministry has not conducted a reasonable search for records, because they have both personally seen an investigative report that has not been disclosed to them. The appellants submit that the “full version” of the attachment to the email dated January 10, 2019, including the investigative report, should be disclosed to them.

[13] The appellants submit that the ministry appears to be claiming that the whole of the investigative report consists of the email dated December 13, 2018, 5:25 PM (December email) and has already been disclosed to them. The appellants concede that the December email might form part of the investigative report attachment, but it is not the entire attachment.

[14] The appellants submit that they take this position for two reasons. First, the appellants submit that they met with the officer on January 12, 2019, and the officer showed them the material he received on January 10, 2019, including the investigative report, which they claim has not been disclosed to them by the ministry. The appellants submit that the officer allowed them to review this investigative report on his computer screen and after they had finished reviewing it, the officer discussed the contents of it with them. The appellants note that they requested a copy of the investigative report during the meeting, but their request was denied. Second, the appellants submit that since the officer had already updated them on December 19, 2018 about their case, the December 13, 2018 email did not represent any new developments, and thus, would not have prompted a meeting between them and the officer.

[15] The appellants submit that there are significant differences between the December email and the investigative report they saw on the officer’s computer screen. The appellants submit that the investigative report on the officer’s screen indicated that there had been a significant withdrawal from the specified bank account on November 26, 2018, leaving only a balance of \$250 USD in it, while the appellants claim that the December email said that it was impossible to recover the funds, because the funds had been immediately transferred to other bank accounts.

[16] The appellants’ representations provide further background information about the specified incident and the history of their request. I have reviewed this information, but I will not summarize it here because it is not relevant to my determination in this appeal under the *Act*.

Ministry’s reply

[17] The ministry disagrees with the appellants’ representations. In response to the appellants’ claim that there should be a more complete investigative report because they saw it on the officer’s computer screen when they met with him, the ministry submits that the officer denies having any knowledge of an investigative report being

attached to the email in question. The ministry submits that the officer did not prepare an investigative report himself, because he did not conduct an investigation and his role was limited to making inquiries on behalf of the appellants to assist them. The ministry submits that the officer denies receiving an investigative report from the named company and says that he only received emails from the named company, which have already been disclosed to the appellants. The ministry further submits that the officer is unaware of what record the appellants are referring to when they describe having seen an investigative report on his computer screen.

[18] The ministry submits that while the appellants claim that there was an investigative report attached to the email dated January 10, 2019, there is no reference in any of the emails, including the one dated January 10, to an investigative report. The ministry submits that if there were an investigative report attachment, one would assume that it would be referenced somewhere. The ministry further submits that there is no notation of an investigative report in the attachment line of the January 10 email heading. The ministry acknowledges that the January 10 email states that there are attachments, but these attachments correspond to the December email, which have already been disclosed to the appellants.

[19] The ministry reiterates that it has conducted a reasonable search for responsive records and that it does not have the investigative report that the appellants claim exists.

Appellant's sur-reply

[20] The appellants clarify that when they use the term "investigative report", they mean a written report that was sent by the named company to the OPP about the named company's fraud investigation. The appellants submit that they are not suggesting, contrary to the ministry's assertion, that the document they were shown by the officer on January 12, 2019 was an "extremely formal written document" with the title "Investigative Report."

[21] The appellants submit that the ministry claims that the December email was the most recent one contained in the attachment to the January 10 email, but the appellants say that cannot be true, because it is clear from the records that the named company's investigation was ongoing after that date. The appellants further submit that in the email dated January 7, 2019, an employee of the named company states that they have completed their intervention, which is not mentioned elsewhere in any of the records disclosed to them by the ministry. The appellants submit this is conclusive proof that there are additional records.

Analysis and findings

[22] In deciding the search issue, I may order a further search if the institution, the ministry, does not provide enough evidence to show that it has made a reasonable

effort to identify and locate all of the responsive records within its custody or control.³ Based on my review of the records and the representations of the parties, I find that the ministry conducted a reasonable search for responsive records.

[23] The dispute between the appellants and the ministry on the issue of search appears to be over whether an investigative report exists. The appellants claim that there is an investigative report missing from the ministry's disclosure to them. The ministry claims that all responsive records have already been disclosed to the appellants, and that it does not have an investigative report.

[24] The appellants argue that an investigative report exists, because they believe there are significant differences between the December 13, 2018 email disclosed to them as an attachment to a January 10, 2019 email and the investigative report that they claim to have seen on the officer's computer screen during their January 12, 2019 meeting. The appellants claim that the investigative report on the officer's screen indicated that there had been a significant withdrawal from the specified bank account on November 26, 2018, leaving only a balance of \$250 USD in it, while the December email said that it was impossible to recover the funds because the funds had been immediately transferred to other bank accounts.

[25] From my review of the December email, I am satisfied that it contains the same information as the investigative report that the appellants allege is missing. Furthermore, my review of the January 10, 2019 email indicates that it included an attachment and the name of the attachment listed is identical to the subject line of the December email.

[26] The appellants also argue that the January 7, 2019 email, in which an employee of the named company states that they have finished their intervention, is conclusive proof that further records exist, because the completion of the intervention is not mentioned in any of the other records disclosed to them by the ministry and the investigation was ongoing after this date.

[27] Importantly, however, whether an investigative report exists or not is not determinative of the search issue, because the appellants' arguments do not support the conclusion that the ministry must have this investigative report in its own record holdings. The ministry submits, and I accept, that the officer did not prepare an investigative report and that he only received emails, not an investigative report, from the named company. I am satisfied that if the ministry had a copy of the investigative report that the appellants allege exists, the ministry's searches should have located it.

[28] 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 it has made a reasonable effort to identify and locate responsive records.⁴ I am

³ Order MO-2185.

⁴ Orders P-624 and PO-2559.

satisfied that the ministry has done so. In support of its position that it conducted a reasonable search for responsive records, the ministry provided the affidavit of the officer, which outlines his search efforts in response to the appellants' request. The ministry has identified the individual involved in the search and provided a sufficient explanation of where he searched, how he searched, and the results of his search. I accept that the officer was also the only OPP officer assigned to the case, so I am satisfied that he would have been aware of all the records created by the OPP detachment as a result of the specified incident. Therefore, I am satisfied that an experienced employee knowledgeable in the subject matter of the request conducted the search.

[29] 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 such records exist.⁵ While the appellants claim that an investigative report exists, based on my review of the records and the appellants' representations, I find that there is insufficient evidence before me to establish a reasonable basis to conclude that an investigative report exists in the ministry's record holdings, but has not yet been located by the ministry through its searches.

[30] For the reasons above, I find that the ministry conducted a reasonable search for responsive records.

ORDER

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

Original Signed by: _____

Anna Truong
Adjudicator

February 22, 2022 _____

⁵ Order MO-2246.