

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4266

Appeal PA20-00327

Ministry of Economic Development, Job Creation and Trade

June 21, 2022

Summary: The sole issue in this appeal is whether the Ministry of Economic Development, Job Creation and Trade's searches for records were reasonable. In this order, the adjudicator finds that the appellant has not established a reasonable basis for believing that records responsive to his access request exist and that the ministry's searches for records that are responsive to the appellant's access request were reasonable. The appeal is dismissed.

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 disposes of the sole issue raised as a result of an appeal of an access request made to the Ministry of Colleges and Universities under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The Ministry of Colleges and Universities did not have any records responsive to the access request. As a result, its freedom of information office contacted the Ministry of Economic Development, Job Creation and Trade and the Ministry of Transportation to find the most appropriate ministry that could respond to the request. The Ministry of Transportation indicated that it had no responsive records.

[2] The Ministry of Economic Development, Job Creation and Trade (the ministry) determined that its former Business Partnerships and Programs Division was most likely to have responsive records within the ministry, should any exist, because the ministry

had dealings with a company referred to as Rideshark (which formed the subject matter of the access request, in part). As a result, the ministry accepted a transfer of the access request from the Ministry of Colleges and Universities.

The access request was for the following information:

- Record of all forms of communication exchange that took place between the specific branch of the Ministry of Education concerned and Seneca college, the specific branch of the Ministry of Education concerned and "Rideshark," and the specific branch of the Ministry of Education concerned and Smart Commute,
- All records of communication that took place such as verbal, email, fax, scans, meetings etc. (in regard to Smart Commute, Rideshark and Seneca Rideshare) between Seneca College and Rideshark and between Seneca College and Smart Commute,
- Unredacted documents re: the "Original Smart Commute Web Based Carpooling Service" that Seneca College's York Campus used to use, the "Rideshark carpooling app" and the "Newly Programmed Seneca Rideshare app,"
- Smart commute web base car pool service (a specified version),
- The first Rideshark app (a specified version),
- Seneca's Rideshare app (a specified version),
- Request for the above unredacted program coding, features, functions and timeline and unredacted modification requests sent from Seneca to Rideshark and in return the same document that Rideshark sent back to Seneca in regards to their rideshare app, and
- Requested Documents, including but not limited to:
 1. Software Requirements Specification,
 2. Software System Design Documents,
 3. Unified Modeling Language (UML) Diagrams,
 4. Access to the "Repository Hosting Service" used for the project (Ex. GitHub, Bitbucket, etc.),
 5. Access to all "Source Code" files relating to the project (if the above is not provided),
 6. Access to an "Issue/Feature Tracking Service" (Ex. JIRA), and

7. Software/Product Roadmap.

[3] The ministry contacted the requester and clarified the access request with him, as follows:

Records of all communication between the Ministry of Economic Development, Seneca College, Rideshark, Rideshare (a subsidiary of Seneca) and Smart Commute, including the following: funding inquiries, funding requests, funding proposals, business cases, memoranda of agreement and any supplementary documents related to the above over a specified time period,

Original Hard and digital copy of Seneca's Rideshare instruction manual (also called software user or Readme for smaller projects) provided to Seneca College (and their board of director) by Rideshark,

All financial, accounting and transaction records from Seneca's Rideshare,

All financial, accounting and transaction records from Rideshark covering the time of its operation on Seneca College (prior to it being replaced by Seneca's Rideshare),

Copy of the original term of agreement and contract between Seneca and Rideshark Inc. in regard to the Rideshark carpooling app (prior to them replacing it with Seneca's Rideshare),

Copy of the original term of agreement and contracts between Seneca and Rideshark Inc. in regards to Seneca's Rideshare,

A copy of all the recorded minutes from meetings that took place between Seneca and Rideshark Inc. in regards to making use of the Rideshark carpooling app on Seneca Colleges, A copy of all the recorded minutes from meetings that took place between Seneca and Rideshark Inc. in regards to making use of the Seneca Rideshare carpooling app on Seneca Colleges,

A copy of all records minutes from the meetings that took place between Seneca's Rideshare board of directors and Rideshark Inc., and

A copy of the recorded minutes concerning a meeting that took place with a Project Manager, an Assistant Project Manager, the appellant and 2 other unidentified senior staff members who were also present at a specified date. The minutes should include the date and time of the meeting, the names of attendees, as well as absent participants, the acceptance of, or amendments made to, the previous meeting's minutes, and the decisions made regarding each item on the agenda.

[4] The ministry then issued a decision to the requester, advising him that no responsive records were located. The ministry's decision also stated the following:

As this request includes records produced by Seneca College, another institution under the *Act*, you may wish to consider making an access request to Seneca.

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

[6] During the mediation of the appeal, the appellant advised the mediator that he believes responsive records exist. The ministry maintained its decision that no responsive records exist. As a result, the issue of reasonable search formed the basis of the appeal.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. Both the ministry and the appellant provided representations to the IPC.

[8] For the reasons that follow, I find the ministry's searches for records that were responsive to the appellant's access request were reasonable and I dismiss the appeal.

DISCUSSION:

[9] As previously stated, the sole issue in this appeal is whether the ministry conducted a reasonable search for records responsive to the appellant's access request. 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 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.

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

[11] 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.⁴

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

[12] 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.⁵

[13] 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.⁶

Representations

[14] The ministry's position is that its search for records was reasonable in that it made a reasonable effort to identify and locate all responsive records within its custody or control. It argues that its searches were conducted by knowledgeable employees using key search terms in areas where responsive records were likely to be located.

[15] The evidence the ministry submitted to the IPC consists of representations, as well as four affidavits sworn by the Director of the Business Advisory Services Branch, Trade Policy, Industry and Investment Division, the Senior Policy Advisor in the Science and Research Branch of the Data, Research and Innovation Division, the Team Lead at the Pandemic Response Secretariat and the ministry's Freedom of Information Coordinator (the FOI coordinator).⁷

After receiving the appellant's access request, the FOI coordinator contacted the appellant in order to work with him to clarify the access request, which was done, and is set out above.

[16] The ministry submits that it searched emails and the relevant record retention systems maintained in the respective program areas in response to each iteration of the scope of the request by using key search terms. The ministry further submits that it has been in the practice of generating and receiving digital program records with very few exceptions (for example, if the record was created as part of a paper-based process). Given the request's timeframe parameters, all records generated and received during this time period would likely have been in electronic format and, accordingly, it was reasonable for the ministry to have limited its searches to electronic database locations.

[17] With respect to who conducted the searches, the ministry submits that knowledgeable employees, whose responsibilities include communicating with and overseeing transfer payment funding to third parties to administer the ministry's programs and services, conducted the searches. These searches involved using key search terms drawn from the clarified request itself, for example, "Rideshark," "Seneca

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ The representations and affidavits note that the affiants have personal knowledge of the facts sworn to, except where they were informed of facts by others (including colleagues and former colleagues), and that where facts were provided by others, they identified the source and believe it to be true.

Ride Share," "Rideshare" and "Smart Commute."

[18] In particular, the ministry submits both in its representations and in the affidavit evidence that the following searches for records responsive to the access request were conducted:

- The former Research, Science and Commercialization Division, now the Data, Research and Innovation Division was contacted because it was organized within the ministry during the relevant time period set out in the access request, and because its mandate is to encourage research and commercialization of discovery through research funding programs in the post-secondary sector. The division conducted a search for records and advised the FOI coordinator that it had no responsive records,
- The Science and Research Branch of the Data, Research and Innovation Division of the ministry was contacted and its digital research funding database, the Ministry Commitment Reporter, was searched by a Senior Advisor. This database included archived digital data for funded research- related projects. No responsive records were located in that database. Emails and the branch's internal shared drive were also searched. No responsive records were located,
- The Director and Manager of the Research Programs Unit of the Science and Research Branch each conducted searches of their respective emails. No responsive records were located in their emails,
- The Manager of the Research Programs Unit of the Science and Research Branch conducted an additional search in the branch's internal shared computer drive. No responsive records were located in this drive,
- A Senior Business Advisor with the Business Advisory Services Branch of the former Business Partnerships and Programs Division conducted a search for electronic records in the Client Relationship Management System (the eCRM), which stores records of communications and engagements with external entities, and in Microsoft Outlook. The Senior Business Advisor confirmed that she had no dealings with Rideshark that involved Seneca College, and that all communications with Rideshark consisted of general ministry resource support. No responsive records were located,
- The Eastern Regional Manager of the Business Advisory Services Branch and the Director of the Business Advisory Services Branch conducted searches of the eCRM. Records were located, but they were not responsive to the access request. For example, there were some records of communication between the branch and Rideshark, but these records were unrelated to Seneca College or Smart Commute. The Director of the Business Advisory Services Branch also

conducted a quality check on these records, and confirmed that they were not responsive to the access request, and

- The Funding Administration Branch of the former Regulatory Modernization and Business Relief Division, now the Pandemic Response Secretariat, conducted searches for responsive records. A Senior Program Advisor who routinely checks two relevant electronic databases to oversee, administer, design and improve the ministry's Regional Development Program was assigned to conduct the search. The Senior Program Advisor searched two databases, namely Transfer Payment Ontario and Microsoft Power Business Intelligence using the search terms "Rideshark," "Seneca Ride Share," and "Smart Commute." No responsive records were located.

[19] The ministry also submits that it conducted an additional search after it issued its access decision in case it had overlooked responsive records during its previous search attempts. This search did not yield responsive records. The ministry goes on to submit that it also suggested possible alternative institutions to the appellant, such as Metrolinx and Seneca College, to assist him in obtaining the records he seeks.

[20] The appellant's position is that the ministry did not provide sufficient evidence to demonstrate that it had made a reasonable effort to identify and locate responsive records that are reasonably related to his access request. In addition, the appellant submits that the ministry unilaterally and illegally limited the scope of his request, without consulting him or explaining it to him, to only records between Rideshark and Seneca College.⁸ The appellant goes on to argue that the introductory wording of the clarified access request is "Records of all communications between the Ministry of Economic Development . . ." which means that the request was not limited solely to communication between the ministry and Rideshark relating to Seneca College. In addition, with respect to the punctuation of the same paragraph, the appellant states:

Furthermore, the inserted commas between Rideshark, Seneca College, Rideshare and Smart Commute leave no doubt to the readers that the search of exchanges between the Ministry and each entity mentioned were to be treated separately.

[21] The appellant is of the view that the steps taken in the search were not correct, that the search was closed prematurely and that the nature of his request was "falsely interpreted" into something without his consent of knowledge. With respect to the records that the ministry did locate, the appellant submits that although the ministry identified these records as not responsive to his access request, they are in fact

⁸ The first paragraph of the clarified access request reads: Records of all communication between the Ministry of Economic Development, Seneca College, Rideshark, Rideshare (a subsidiary of Seneca) and Smart Commute, including the following: funding inquiries, funding requests, funding proposals, business cases, memoranda of agreement and any supplementary documents related to the above over a specified time period . . .

responsive because the ministry narrowly interpreted his clarified access request.

[22] Concerning the affidavit evidence provided by the ministry, the appellant argues that some of the affidavits were signed by staff who did not conduct the actual searches, and that the names of all of the staff who conducted searches should have been identified in the ministry's representations.

[23] Lastly, the appellant argues that the fact that two ministry staff members' employment status changed (one retirement and one reassignment) during this appeal process and the fact that the ministry requested extensions in which to provide its representations in this appeal, demonstrates a "disturbing misinterpretation" of his original request to that of the ministry's choosing, and that the IPC should be able to see through this.

Analysis and findings

[24] As previously stated, the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, it 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

[25] The appellant's position is that the ministry misinterpreted and unilaterally limited the scope of the clarified access request. I note that the appellant had the opportunity to articulate his interpretation of the clarified access request during the request stage with the ministry's FOI coordinator, and also during the intake and mediation stages of the appeals process with staff at the IPC, but chose not to do so. In addition, I find the appellant's arguments about his interpretation of the sentence structure of the first sentence and of the punctuation of the first paragraph of the clarified access request to consist of unsubstantiated assumptions. Based on the evidence provided by the parties and my own review of the clarified access request itself, I find that the ministry's interpretation of the clarified access request for records was reasonable, and that its position that the records it did locate were not responsive to the request is also reasonable.

[26] I also find, based on the representations and the affidavit evidence provided by the ministry, that it has provided sufficient evidence to demonstrate that it made reasonable efforts to identify and locate records that were responsive to the clarified access request. In particular, based on my review of the ministry's representations and the affidavit evidence, it appears that the ministry conducted eight separate searches across at least four branches/divisions for records, not including the additional search it conducted after it issued the decision letter to the appellant, and that all of these searches were conducted by experienced and knowledgeable staff. As a result, I find that the search efforts made by the ministry were reasonable.

⁹ Orders P-624 and PO-2559.

¹⁰ Order PO-2554.

ORDER:

I uphold the ministry's searches for records responsive to the appellant's access request as reasonable and I dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ June 21, 2022