Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4296

Appeal PA20-00785

Ontario Lottery and Gaming Corporation (OLG)

August 30, 2022

Summary: The Ontario Lottery and Gaming Corporation (OLG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the decision to allow gaming facilities in Pickering and Ajax; the scope of the request was clarified to be only for handwritten records (including printed records containing handwriting on them). OLG searched for, but did not locate, any responsive records. The requester appealed, raising concerns about OLG's retention policies, and questioning OLG's claim that no responsive records exist. In this order, the adjudicator upholds the reasonableness of OLG's search, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 , as amended, sections 24, 27(1), and 61(1)(c.1); *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A, as amended, section 2 (definition of "public bodies") and *Ontario Regulation 336/07*.

Investigation Reports Considered: Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff – A Special Investigation Report* (Toronto: Information and Privacy Commissioner, Ontario, June 5, 2013) and *Addendum to Deleting Accountability* (August 20, 2013).

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII).

OVERVIEW:

[1] The Ontario Lottery and Gaming Corporation (OLG) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*) for handwritten records relating to the Government of Ontario's decision to allow gaming facilities in Pickering and Ajax. The request was clarified and confirmed to be for the following:

> All physical handwritten records (including notes or printed copies of records with handwritten notes on them) related to the government's decision to allow gaming facilities in both Pickering and Ajax from 2017/11/01 to 2019/02/01.

[2] OLG identified thirteen employees who may have responsive records, and indicated to the requester that it anticipated nine hours were needed to search for records. OLG issued a time extension of an additional thirty days to respond to the request, with the following rationale:

> The reason for the extension is that the request necessitates a search through a large number of handwritten records. This is complicated by the fact that most of these records are onsite at our offices when most employees are working from home due to the COVID-19 pandemic.

[3] After completing its search, OLG issued a decision letter in which it stated that there are no responsive records. OLG included the following additional information to support its decision:

> Please note that handwritten notes are generally considered to be transitory records, which are records with no long-term value. Handwritten notes are usually made to assist in the creation of business records and are no longer of value once these records have been created. Following widely-accepted recordkeeping practices, OLG's Enterprise Documents and Records Management Policy stipulates that "transitory records will be destroyed or expunged on an ongoing basis from all recordkeeping systems and repositories that maintain OLG information."

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

[5] In its correspondence to the IPC, the appellant raised concerns that can be summarized as follows:

1. a failure on OLG's part to preserve records relevant to the development of provincial policy, and in particular, a concern that records are misclassified as "transitory," the destruction of which would be contrary to the principle of transparency; and

2. the claim that handwritten records are destroyed regularly would seem to contradict: OLG's recordkeeping policies, the search time in the fee estimate (which would suggest the existence of such records), and the rationale for OLG's time extension to process the request (which was the existence of "a large number of handwritten records"); if records were destroyed according to a regular schedule, OLG should have been able to inform the appellant up front about this.

[6] The appellant also cited and linked to an Archives of Ontario document regarding transitory records.[1]

[7] The IPC contacted OLG for information about its retention practices regarding handwritten notes. OLG provided its records retention policy, the Enterprise Documents & Records Management Policy (EDRM policy).

[8] The IPC subsequently determined that the appeal should proceed directly to the adjudication stage, where an adjudicator may conduct an inquiry.

[9] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to OLG.[2] I invited and received written representations in response. I then asked the appellant to provide written representations in response to the Notice of Inquiry and OLG's representations and affidavit evidence, and the appellant did so. OLG provided a reply, and the appellant provided a sur-reply.

[10] For the reasons that follow, I uphold the reasonableness of OLG's search for

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[1] This document can be found at: http://www.archives.gov.on.ca/en/recordkeeping/documents/Transitory-Records-Common.pdf

[2] It initially appeared to me that the scope of the request might be at issue, based on the limited information I had before beginning the inquiry. However, as a result of reviewing the detailed evidence provided by OLG (which is not disputed by the appellant), I am satisfied that the parties agree that the scope of the request is as I have set it out above. In addition, I will not be discussing the Archives of Ontario series document the appellant provided to the IPC, as I am now satisfied that it is not relevant to OLG. The initial Notice of Inquiry contained many questions relating to the Archives of Ontario series document. However, OLG clearly established that the Archives' series does not apply to it, in that OLG is not a *public body* as defined in the *Archives and Recordkeeping Act, 2006*. The definition of *public bodies* in this statute is:

> "public body" means,
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> > (a) The Executive Council or a committee of the Executive Council,
> > (b) A minister of the Crown,
> > (c) A ministry of the Government of Ontario,
> > (d) A commission under the *Public Inquiries Act, 2009*, or
> > (e) An agency, board, commission, corporation or other entity designated as a public body by regulation.

OLG is not any of the entities listed at paragraphs (a) to (d). It is also not as a *public body* under *Ontario Regulation 336/07*, within the meaning of paragraph (e) because OLG is not included on the list of designated public bodies in that Regulation. *Ontario Regulation 336/70* can be found here: O. Reg. 336/07: DESIGNATED PUBLIC BODIES (ontario.ca).

records, and dismiss the appeal.

DISCUSSION:

[11] The only issue to be decided in this appeal is whether OLG conducted a reasonable search for records responsive to the access request.

[12] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[3] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[4]

[14] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[5] that is, records that are "reasonably related" to the request.[6]

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[7] The IPC will order a further search if the institution 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.[8]

[16] The institution must provide a written explanation of all steps taken in response to the request, including: whether the institution contacted the requester to clarify the request, details of any searches the institution carried out (including who conducted the search, the places searched, who was contacted in the course of the search, the types of files were searched, and the results of the search), and whether it is possible that responsive records existed but no longer exist (and if so, details about destruction). The institution should provide this information in an affidavit from the person or people who conducted the search.

[17] In this appeal, some of the background relating to the processing of the request is relevant, so I will include it in my summaries of the parties' representations, below.

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Order MO-2246.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2469 and PO-2592.
[8] Order MO-2185.

OLG's initial representations

[18] OLG submits that it conducted a reasonable search for responsive records.

[19] To begin, OLG provides very detailed representations (which I only summarize here) about the correspondence it exchanged with the appellant to assist the appellant with the reformulation of its multiple access requests.[9] This led to the clarification of the scope of the request that is before me. Two of the appellant's requests overlapped in the subject matter, the types of records sought, and the date ranges, so OLG recommended that the appellant combine these requests. The appellant asked for a fee estimate for both requests, and whether OLG could release digital files first and then paper files (when OLG employees were able to return to the physical office[10]). OLG advised that the fee estimates were not based on the format of the original records, and that, in fact, it "anticipate[d] that most, if not all responsive records would be stored on OLG's network drives." The appellant ultimately decided to keep these two requests separate. The appellant also confirmed its written agreement to OLG's interpretation of the scope of "print records": handwritten physical records such as handwritten notes, or printed electronic documents with handwritten notes on them.

[20] After explaining its efforts to work with the appellant to clarify the scope of the request, OLG explains the steps it took in order to conduct a search. It appointed the Senior Freedom of Information Specialist at the OLG's Freedom of Information Office (whom I will refer to as "the affiant") to lead the search efforts. At the time of the affidavit, the affiant held his position for about 13 years. He attests that before holding this position, he was an Information and Privacy Analyst at the Archives of Ontario and a Program Assistant and a Junior Program Analyst with the Justice Cluster Freedom of Information and Protection of Privacy Office. This employee provided very detailed affidavit evidence. Attached to his affidavit are the responses of each of the fourteen program area employees identified as ones who may have had records relating to the subject matter of the request,[11] and who were therefore asked to search for responsive records. OLG also provided a detailed chart listing each program area employee, the date they responded about their search results, and the results of their respective searches, as well as corresponding affidavit exhibits. Each of the employees indicated that they did not find any responsive records.

[21] When the appellant eventually agreed to the final reformulated wording of the request, the employees were advised of this, in order to inform their searches.

[22] After the inquiry began, OLG asked these employees to answer questions

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[9] OLG states that it did so in compliance with section 24(2) of the *Act*, which require an institution to inform the requestor of any defect in the request and to offer assistance in reformulating the request so as to comply with section 24(1) of the *Act*.

[10] These discussions took place in the early days of the COVID-19 pandemic, when institutions were conducting certain aspects of their operations remotely.

[11] Initially, thirteen employees had been identified.

regarding their respective searches, in response to the Notice of Inquiry. OLG provided these responses as well, as exhibits to OLG's affidavit evidence.

[23] OLG submits that it may be that no physical responsive handwritten records (or printed records with handwriting on them) were located because:

- the records never existed (that is, OLG employees did not make handwritten notes relevant to the topic), or

- if records were created, they were considered transitory by those who created them and were disposed of once they had met their administrative purpose and before the receipt of the access request, in accordance with OLG's EDRM policy.

[24] OLG denies the allegation that any responsive records have been destroyed or expunged, and notes that its employees have stated that they did not destroy records. OLG also states that in response to a related request for *electronic* records, OLG retrieved about 480 pages; however, in this appeal, the request is for *handwritten* records (including physical records with handwriting on them).

[25] Since the request relates to a decision made by the government about a particular matter (the decision to allow gaming facilities in Pickering and Ajax), I asked OLG whether that subject matter would support a conclusion that responsive records would be "transitory records."

[26] In response, with respect to determining what a "transitory record" is, OLG explains that its employees are responsible for the creation and retention of records, under OLG's EDRM policy; an internal EDRM website provides job aids and resources for the purpose of assistance in establishing what should be kept and for how long, and is accessible to all employees. Two of those job aids are: "Records Capture Workflow Job Aid" and "Is it a Record Checklist," both of which help establish what would be considered a "transitory record." In addition, OLG notes that these resources are enhanced by *FIPPA*- related training sessions.

[27] In addition, OLG states that whether responsive records are "transitory records" is not dictated by the subject matter of the request. OLG states that the subject matter of this request (the decision to allow gaming in Ajax and Pickering) would be expected to generate records that are not transitory – and did generate non-transitory records, which OLG provided to the appellant through another access request. However, OLG notes that the agreed-upon wording of the present request was to include only *handwritten* physical records or printed records containing handwriting. OLG reiterates the above-noted two reasons that its search for such records did not result in the location of any records.

[28] Furthermore, while transitory records are not defined by their format or medium, OLG submits that physical records containing handwriting may be more likely to be considered transitory and destroyed if they are not needed to preserve evidence of a

corporate decision, transaction, or business decision, as the customary documentation of such decisions and transactions is electronic. Such was the case for the electronic records that were responsive to the appellant's related request.

[29] With respect to the retention of records, OLG explains that under its retention and EDRM policies, no OLG employee is allowed to alter, conceal, or destroy a record, or cause any other person to do so, with the intent to deny a right under *FIPPA*. OLG reiterates that the request at issue in this appeal is limited to handwritten physical records or printed records containing handwriting. OLG states that upon consultation with its program area employees, it was determined that no relevant handwritten physical records or printed records containing handwriting existed at the time of the searches conducted. OLG states that there is no information or reason to believe that such records were at some point created, and then altered, concealed, or destroyed with the intent to deny a right under *FIPPA*. To the contrary, OLG reiterates that it provided *electronic* records related to the subject, through another of the appellant's requests. OLG states that if physical records containing handwriting did exist, and were destroyed, there is no information nor reason to believe that such destruction occurred *after* the request was made, or otherwise than in accordance with OLG's EDRM policy.

[30] OLG also addresses its time extension letter in response to the access request, and in particular, this statement that was flagged by the appellant in filing the appeal: "The reason for the extension is that the request necessitates a search through a large number of handwritten records." OLG explains that once the scope of the request was clarified, its freedom of information (FOI) office sought a response to the request from relevant program area employees. The FOI office did not know if there were responsive handwritten physical records or printed records containing handwriting, but it anticipated that an extension would be required due to the need to search through 15 months' worth of physical records for a time period starting three years before the search date. The FOI office also anticipated that this would take considerable time because OLG employees had to work remotely at the time because of the COVID-19 pandemic. OLG states that this does not in any way indicate that *responsive* handwritten physical records or printed records containing handwriting existed. Rather, it indicates that it would be necessary for OLG employees to search through physical records to see *if* responsive records existed.

[31] Furthermore, regarding the wording in OLG's notice of time extension that "the request necessitates a search through a large number of handwritten records," OLG states that this language closely tracks the language in section 27(1) of the *Act*, which differentiates between the request being *for* a large number of records and the request necessitating a search *through* a large number of records:

> 27(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances where,

> (a) the request is for a large number of records *or necessitates a search through a large number of records* and meeting the time limit would unreasonably interfere with the operations of the institution[.] [Emphasis in OLG's representations.]

[32] OLG states that in this appeal, the response to the request necessitated OLG program area employees searching through physical records, which may, for example, include records such as old notebooks; it was anticipated that this would require additional time due to remote working.

[33] OLG states that there is no reason to believe that OLG program area employees chose to disregard OLG policy and the law by wrongly destroying records, either before or after the request was made to them to conduct their searches. OLG states that all of the relevant OLG program area employees responded to the retrieval request in accordance with usual and normal OLG policies and procedures.

The appellant's representations

[34] Throughout its representations, the appellant expresses concerns about OLG's statements that its employees either did not create records or disposed of them (due to their transitory nature). The appellant also expresses concerns about OLG's approach to record creation and retention policies, and submits that this warrants an IPC investigation and further observation of OLG's practices.

[35] The appellant rejects OLG's explanation for why responsive records were not found (they never existed, or were transitory and appropriately disposed of). Instead, the appellant submits that the absence of responsive records is more likely due to a failure to adhere to provincial and institutional processes, or concerted efforts to dispose of records related to a controversial decision.

[36] With respect to OLG's statement that no responsive records were found because they may have never existed, the appellant states that this is speculative and runs counter to standard practices, raising questions about OLG's record management and application of standard protocols surrounding transparency. The appellant also submits that OLG's statement that the searches had not yet been conducted when it issued the notice of time extension undermines the credibility of its claim that no records may have been created. The appellant submits that claiming that no searches had been conducted but that further time was needed suggests that OLG knew that large volumes of handwritten records were in its possession, which, in turn, relies on the standard creation of handwritten records and retention of those records. The appellant submits that the existence of voluminous quantities of handwritten records offers additional evidence of notetaking practices, undermining the credibility of OLG's claim that records may never have existed.

[37] The appellant submits that its other *FIPPA* requests, though similar to the one at

issue, are irrelevant to the issue in this appeal.

[38] However, the appellant states that it learned through a related *FIPPA* request that the decision to allow gaming sites in Ajax and Pickering was preceded by meetings with stakeholders. The appellant submits that its request is about an important government decision, so OLG's employees were required to generate detailed records of the decision- making process at those stakeholder meetings, under OLG's own EDRM policy and its *Code of Business Conduct*. The appellant states that the importance of such record generation was also noted in the IPC publication *FIPPA AND MFIPPA: Bill 8 – the Recordkeeping Amendments*.[12] Therefore, the appellant finds it difficult to believe that there are no records responsive to this access request.

[39] In addition, the appellant submits there is similarity between the circumstances in this appeal and those investigated by former Commissioner Ann Cavoukian, regarding claims by the then-Premier's Office that there were no records related to the decision-making process to close gas plants. The appellant cites the 2013 IPC Commissioner's special investigative report entitled *Deleting Accountability: Records Management Practices of Political Staff*,[13] and in particular, this analysis by the former Commissioner:

> I find it strains credulity to think that in relation to a significant government initiative such as the closing of the gas plants, no records documenting the decision-making process were ever created, and that no records whatsoever responsive to the Estimates Committee motion and the Speaker's ruling, such as emails, were retained. Even assuming that many relevant emails were copied to ministry staff who had the responsibility for their retention, or were of a transitory nature, it is simply not credible to suggest that there were no emails or other records generated on this important public initiative, that clearly should have been retained.[14]

[40] The appellant submits that in *Deleting Accountability*, the IPC affirmed the principle that records documenting important decision-making processes ought to be created and retained. Given the importance of the decision that is the subject matter of the request in this appeal, the appellant submits that, similar to the gas plants situation, it is "near impossible to believe that no records – including handwritten notes such as those taken during meetings with stakeholders and internal deliberations – were ever created." The appellant states that this it is "simply implausible" that OLG employees

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[12] This IPC document can be found at: Bill8-New-Recordkeeping-Amendments.pdf (ipc.on.ca).

[13] Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff – A Special Investigation Report* (Toronto: Information and Privacy Commissioner, Ontario, June 5, 2013). This can be found at: 2013-06-05-Deleting-Accountability.pdf (ipc.on.ca).

[14] Ontario, Information and Privacy Commissioner, *Deleting Accountability: Records Management Practices of Political Staff – A Special Investigation Report* (Toronto: Information and Privacy Commissioner, Ontario, June 5, 2013), page 15.

did not take detailed notes of this decision, given the legal and financial implications of it.

[41] The appellant also submits that the evidence of the past and present employees alludes to notetaking practices, for example, with some employees confirming the existence of notebooks. The appellant cites this example: "I maintained a log book of meetings that I attended during my time at OLG. I went back through these notes and records as requested." The appellant states that this statement would substantiate OLG's claim that significant quantities of records exist, and make it increasingly unlikely that OLG employees did not take notes during meetings about the decision that is the subject matter of the request.

[42] Furthermore, the appellant states that the employees' statements about notebooks, which the appellant states were "presumably…used at the time of the meetings," are contrary to the claim that records were discarded on an ongoing basis. Otherwise, the appellant submits, record disposal would have required the removal of specific pages from their notebooks, while choosing to keep the remainder of the book. The appellant states that OLG failed to explain why certain records, including notebooks would be retained, while other specific notes would be disposed of.

[43] As the appellant sees the idea that records did not exist is unlikely, it submits that OLG's inability to locate responsive records suggests that records were destroyed. The appellant points to the significance of the subject matter of the request, and says that the timeframe involved (November 2017 to February 2019) means that all records should have still been in OLG's possession at the time of the request. It submits that handwritten records were material and must be retained to provide sufficient access to the public, so the destruction of those records appears to be contrary to applicable procedures, guidelines, and law. Given OLG's "admission" that records may have been destroyed, the appellant submits that OLG should be subject to an investigation by the IPC.

[44] With respect to OLG's submission that one reason responsive records do not exist is that, if created at all, they were transitory in nature and disposed of after serving their business purpose, the appellant submits that classifying the records as transitory is misleading, and contrary to OLG's internal record classification scheme, the record classification scheme of the government of Ontario.[15] Given the subject matter of its request, the appellant submits that responsive records should not be viewed as transitory records.

OLG's reply

[45] OLG submits that, without foundation, the appellant's representations contain

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[15] The appellant relies on a document that can be found here: Common Schedule for Transitory Records (gov.on.ca). This document, however, cites as its authority the *Archives and Recordkeeping Act*, and, as mentioned in Note 2, the OLG is not subject to that statute.

assumptions, speculative arguments, and bald assertions that OLG employees ought to have created handwritten records, or that they created handwritten records but then allegedly improperly destroyed them. OLG also states that the appellant asserts handwritten records must exist, questioning the reasonableness of OLG's search, but without establishing any basis as to why the search was unreasonable.

[46] In support of its position, OLG provides further details about the appellant's four separate requests under the *Act* (including the request before me), all related to the decision to allow gaming sites in both Ajax and Pickering, including the results of those requests. For the purposes of this order, what is important is that only the request before me was for handwritten records; two others were for "all records," and the fourth was for electronic records. OLG states that it continues to process one of the other requests, and has released information in response to all the requests except for the one before me. Therefore, OLG submits that imputing ill intention to OLG defies common sense.

[47] In addition, OLG submits that there can be no comparison between OLG's practices in the context of this reasonable search appeal and the practices that the former Commissioner commented on in *Deleting Accountability*.

[48] In *Deleting Accountability*, the OLG notes, the former Commissioner investigated the total absence of records in relation to the closure of the gas plants – no records at all had been produced, not even emails. The IPC had also learned of certain high-level individuals in key (specified) offices making a regular practice of purging all emails and/or asking how to permanently delete emails and electronic records. The IPC concluded that the indiscriminate deletion of all emails sent and received by the Premier's chief of staff violated the *Archives and Recordkeeping Act*.[16]

[49] Unlike the facts that gave rise to *Deleting Accountability*, OLG states that it has produced emails in response to the appellant's requests related to the decision to allow gaming facilities in Ajax and Pickering. OLG also notes that it has no practice of purging email; to the contrary, its record retention policies and practices require emails to be maintained in accordance with certain defined retention periods. OLG submits that there is no evidence in this appeal that OLG intentionally destroyed any responsive records. Rather, OLG states that its reasonable and adequate search simply did not yield any *handwritten records* responsive to the request.

[50] OLG submits, further, that the question of what its employees are required to *generate* and maintain does not properly within the scope of this appeal.

[51] Nevertheless, with respect to the appellant's statements that OLG employees are required to generate detailed records of decision-making processes, OLG states that there is no requirement for any OLG employee to generate *handwritten* records. It

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[16] S.O. 2006, CHAPTER 34.

reiterates that its employees are required to document and retain certain records relating to corporate decisions, transaction, or business decisions within a prescribed period of time. OLG states, however, that in most cases, given the primary means of record keeping in collaboration is electronic, it would expect such records to be electronic.

[52] OLG also strongly objects to the appellant's allegations that its employees purposely destroyed responsive records, and states that such serious allegations (of conduct that is also criminal) are wholly unsupported. OLG notes that the addition of section 61(1)(c.1) to *FIPPA*[17] makes it an offence to wilfully destroy records that are subject to a request under *FIPPA*, and rightly so. OLG submits that the absence of records certainly does not mean that they were intentionally destroyed and that an investigation into OLG is warranted, submitting that such a suggestion is an "absurd leap in logic." Since the party making an assertion has the burden to establish it,[18] OLG submits that the appellant must prove that responsive records were improperly destroyed but has not done so. OLG relies on the IPC's fact sheet on reasonable search,[19] which states that Ontario's access and privacy laws do not require an institution to prove with absolute certainty that no additional records exist; rather, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[53] OLG reiterates that the appellant is misconstruing OLG's statement in the notice of time extension (that "the request necessitates a search through a large number of handwritten records"). OLG reiterates that this was not a confirmation of the existence of handwritten records that are *responsive* to the request, but an indication that time would be required for relevant employees to search physical locations where handwritten records may be kept (such as file cabinets). OLG states that there is no basis whatsoever to allege that its employees therefore necessarily *possessed* responsive handwritten records; the OLG FOI office simply expected that it might take a certain amount of time (especially working remotely, due to the pandemic) to *search* physical locations.

[54] Regarding the appellant's view that it is not credible that OLG employees did not take notes during any meetings regarding the casino discussions with the provincial government, OLG argues that, on the contrary, it is entirely credible that no *handwritten* records were generated in the first place, or were not retained and did not exist when the search was conducted. OLG explains that if handwritten notes were made and then later recorded electronically or used to create formal records, they would have no ongoing value and could be destroyed. OLG reiterates that it is quite

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[17] Section 61(1)(c.1) of *FIPPA* says: No person shall alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record.
[18] Order PO-2250.
[19] The IPC's *Access Fact Sheet: Reasonable Search* can be retrieved here: fs-access-reasonable-search.pdf (ipc.on.ca).

conceivable that no handwritten notes were generated in the first place because records were likely to be (and do exist) in electronic format.

[55] Similarly, OLG states that the appellant's view that it is "highly unlikely that records from specific dates are actively pursued and disposed of . . . without disposing of notebooks in their entirety," also baselessly suggests that OLG employees searched through handwritten notebooks and deliberately destroyed relevant notes.

[56] OLG states that it did not "admit" that responsive handwritten records were destroyed or expunged. Rather, it made specific inquiries about the existence of handwritten records and was advised by relevant program area employees that no responsive handwritten records (or printed records with handwriting on them) exist. It states that it is impossible to prove a negative.

[57] As for the reasonableness of its search, OLG reiterates that it has taken all steps required to conduct a reasonable search: it clarified the request with the appellant, appointed an OLG employee responsible for overseeing the search, identified OLG program area staff who might have records (erring on the side of being over-inclusive), had those staff review appropriate file formats (physical records), documented the details of the search, and then confirmed with each of the staff that their searches yielded no results and that they did not destroy any responsive records. The employees' responses are detailed, and OLG states that it has no basis for disbelieving them. OLG also notes that it does not have a repository for handwritten records. No designated individual is responsible for maintaining or storing such records either. Rather, each employee is responsible for storing any handwritten records that they might maintain, in accordance with OLG's record-keeping policies.

The appellant's sur-reply

[58] In response to OLG's reply representations, the appellant reiterates its position about its other FOI requests, the credibility of OLG's explanations as to why there are no responsive records, the relevance of *Deleting Accountability*, and its views that OLG ought to be investigated by the IPC. I have reviewed and considered these representations, but see no reason to set out these reiterated positions again.

Analysis/findings

[59] As discussed, the *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[20] that is, records that are "reasonably related" to the request.[21] Having considered the parties' representations and supporting documentation, I find that OLG has provided enough evidence to show that it has made a reasonable effort to identify and locate

[20] Orders P-624 and PO-2559.
[21] Order PO-2554.

responsive records, and that the appellant has failed to establish a reasonable basis for concluding that any responsive records exist. Since I am satisfied that the search carried out was reasonable in the circumstances, I uphold OLG's search.

[60] To begin, given the many requests made by the appellant about the same subject, and with overlapping timeframes, I find that it was reasonable for OLG to take steps to clarify the scope of the appellant's request.

[61] In my view, the appellant's representations do not challenge the scope of the searches conducted, the expertise of the employees engaged to search for records, the locations they searched, or the search terms used. This is critically important because, as mentioned, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[22] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records. However, here, I find that OLG provided detailed evidence establishing that it assigned an employee to oversee the search, and that, in turn, fourteen program area employees were asked to conduct searches, erring on the side of asking more employees, rather than fewer employees. Since these were program area employees (as opposed to employees whose work is not related to the subject of the request), I accept that it was reasonable for OLG to ask these employees to conduct a search. I also find that it was reasonable for the employees to search physical files, given the nature of records requested (handwritten records, or physical records with handwriting on them).

[62] The scope of this appeal does not include whether or not OLG's employees should have created *handwritten* records, or physical records containing handwriting on them. I do not accept the premise of the appellant's various arguments and assertions that the OLG ought to have created *handwritten* records, given the stated importance of the decision that is the subject matter of the request before me.

[63] The issue before me is the reasonableness of OLG's search for handwritten records (including physical records with handwriting on them) related to the decision to allow gaming in Ajax and Pickering, for the specified time period. While important decisions ought to be documented, I agree with OLG that there is no requirement that such documentation be *handwritten*. In an age when electronic record creation and management is the norm, I am not persuaded that the appellant has established a reasonable basis for believing that any *handwritten* responsive records (including physical records with handwriting on them) exist. In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,[23] the Ontario Court of Appeal recognized this technological norm. Although it was in the context of a decision upholding an IPC order involving the question of whether a record was a "a record"

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[22] Orders M-909, PO-2469 and PO-2592.
[23] [2009] O.J. No. 90.

under the *Act*, I find the following portion of the court's decision relevant to this appeal:

> A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information. [Emphasis mine.]

[64] In my view, this recognition of the technological reality that the Court of Appeal spoke of in 2009, is all the more relevant and applicable to the period of time covered by the request that is before me (November 2017 to February 2019). It is also a technological reality that OLG repeatedly refers to in its representations, and which informed its early communications with the appellant (saying that it expected any responsive records to the two overlapping requests would be digital). Given OLG's persuasive representations, and recognizing the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored, I find it reasonable that responsive handwritten records may never have been created. In addition, the fact that some OLG employees keep notebooks or logs for meetings does not establish that they used those notebooks or logs to take handwritten notes *related to the decision to allow gaming in Ajax and Pickering*, at meetings about this, or otherwise.

[65] Furthermore, as OLG submits, the circumstances in this appeal are not parallel to the situation that gave rise to *Deleting Accountability*. In those circumstances, the IPC investigated the total absence of any records relating to the decision to close the gas plants, even electronic records.[24] *Deleting Accountability* does not call into question the lack of handwritten records (or printed records with handwritten comments on them) in relation to a government decision; the word "handwritten" does not appear once in either *Deleting Accountability* or its *Addendum*. I find that this is in stark contrast to the undisputed circumstances here, where OLG has already located and identified records responsive to other requests which relate to the decision to allow gaming in Ajax and Pickering.[25] Given the location and identification of these records, the circumstances in Deleting Accountability and Order PO-3304 are distinguishable, and do not raise similar questions about OLG's record creation and retention practices, as the appellant suggests.

[66] I also find that the appellant has not sufficiently established a reasonable basis for believing that responsive records were destroyed after the access request was

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[24] I also observe that *Deleting Accountability* dealt with institutions that are subject to the *Archives and Recordkeeping Act*, and which were found to have violated their obligations under that statute, but here, the OLG whose search results are being called into question is not subject to that statute.

[25] The fact that OLG partially or fully redacted any of those records is an entirely different matter that is not before me (that is, access to information withheld under one or more exemptions).

made.

[67] OLG reasonably explains how it determines whether a record is transitory, and all of the resources available to its staff to consider this question. I accept that *if* handwritten records related to the request had ever been created before the appellant's request was received, and those handwritten records were transcribed or otherwise converted to electronic format, they would, in fact, qualify as transitory records.

[68] Furthermore, OLG also asked all of its employees about destruction, and I accept that it has no reason to disbelieve that their answers. The fact that destroying records responsive to a request under *FIPPA* is an offence under the *FIPPA* does not establish that the employees had reason to be untruthful in their responses to OLG, or that they were.

[69] Similarly, the fact that OLG's FOI office issued a notice of time extension because it anticipated OLG employees having to search through a large number of records does not establish that any of these records contain handwritten records, or printed records with handwriting on them, *related to the decision to allow gaming in Ajax and Pickering*. The language of the notice of time extension, as OLG points out, tracks with the language of *FIPPA*, allowing for such extensions to be made where there is a large volume of records to look *through*. It says nothing about whether those records would be responsive or not. OLG's position that looking through 15 months of physical records (let alone in the circumstances of having to work remotely) would require additional time is reasonable. It is not an indication or promise that any of these records would be *responsive*, especially since the searches had not yet been conducted. Therefore, I find no contradiction between OLG's statement in its notice of time extension and its eventual access decision indicating that no responsive records exist. I reject the argument that the language of that time extension and the eventual decision letter stating that there are no responsive records suggests that responsive records were destroyed. As OLG submits, there is no evidence to support such a serious allegation.

[70] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[26] For the above reasons, I find that the appellant has not done so. Furthermore, as I have set out above, I find that OLG has provided sufficient evidence to establish that it made efforts to search for responsive records that were reasonable in the circumstances. Therefore, I uphold the reasonableness of OLG's search, and dismiss the appeal.

ORDER:

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

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[26] Order MO-2246.

Original Signed By: August 30, 2022

Marian Sami
Adjudicator