

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4356

Appeal PA21-00364

Ministry of the Solicitor General

February 21, 2023

Summary: The appellant alleges that the Ministry of the Solicitor General (the ministry) failed to conduct a reasonable search for records responsive to her access request and challenged the description of the issues on appeal in the IPC Mediator's Report. The ministry took the position that it conducted a reasonable search for responsive records in compliance with its obligations under the *Freedom of Information and Protection of Privacy Act*. The adjudicator finds that the Mediator's Report properly defined the scope of the appeal and that the ministry conducted a reasonable search for responsive records within its custody or control. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 24.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to:

All police reports and evidence submitted by [the appellant] to Ontario Provincial Police and Smiths Falls Police Service concerning her allegations of sexual harassment and assault by [specified individuals] including but not limited to all cell phone messages, pictures, social media messages [and] video statements.

[2] After clarifying the request with the appellant, the ministry identified responsive

records and granted partial access to them. The ministry relied on sections 14(1)(a) (interfere with a law enforcement matter), 14(1)(l) (facilitate the commission of an unlawful act), 19 (solicitor-client privilege), 49(a) (discretion to refuse to disclose requester's information) and 49(b) (personal privacy) of the *Act* to deny access to the portions it withheld. In addition, the ministry took the position that some withheld information was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). The parties entered mediation, at the conclusion of which the mediator prepared a Mediator's Report setting out the remaining issues for adjudication. This report was sent to the parties to point out any errors or omissions and none were identified.

[4] As set out in the Mediator's Report, during mediation the appellant advised the mediator that she was not seeking access to the information withheld under sections 14(1)(a), 14(1)(l), 19, 49(a) and 49(b) or the information withheld as not being responsive to the request.

[5] However, the appellant took the position that the ministry failed to identify all the responsive records that exist. Specifically, the appellant believes that the ministry failed to identify information downloaded from a cellular phone including text messages, pictures and social media messages. As set out in the Mediator's Report, the ministry conducted an additional search but advised that no additional records exist. The appellant maintained her position that these records ought to exist. As a result, as set out in the Mediator's Report, the reasonableness of the ministry's search for responsive records became the sole issue in the appeal.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[7] I decided to conduct an inquiry. I first sought representations from the ministry on the facts and issues set out in a Notice of Inquiry. The ministry provided representations. I then sought responding representations from the appellant on the facts and issues set out in this Notice of Inquiry as well as the ministry's representations. In her representations the appellant took issue with the results of mediation as set out above. This is addressed in issue A below.

[8] In this order I find that the Mediator's Report properly defined the scope of the appeal and that the ministry conducted a reasonable search for responsive records within its custody or control. The appeal is dismissed.

ISSUES

A. What is the scope of the appeal?

B. Did the ministry conduct a reasonable search for records?

DISCUSSION

Issue A: What is the scope of the appeal?

[9] Before moving to adjudication, the appellant's appeal went through the mediation process of this office. That involved opportunities for parties to communicate directly with a mediator about the appellant's request. A partially redacted mediation log on file shows that this occurred.¹

[10] As provided in the IPC's *Code of Procedure*,² at the close of a mediation, the mediator issues a report (the Mediator's Report), and provides a copy to the parties. With a Mediator's Report, the mediator sends the parties a letter, which states, in part:

The mediation stage of this appeal has now been completed. Enclosed please find a copy of the Mediator's Report setting out any issues that have been resolved and the issues that remain in dispute.

The purpose of the Report is to provide the parties to an appeal with a record of the result of mediation and to provide the Adjudicator with information regarding records and issues that remain to be adjudicated.

Please review the Report and if there are any errors or omissions, please contact me no later than [specified date]. I will consider your comments and determine whether the Report should be revised. You need not contact me unless there are errors or omissions.

[11] These steps were taken at the conclusion of the mediation of this appeal.

[12] The Mediator's Report identified the sole issue remaining as that of reasonable search.

[13] There is no evidence before me that the appellant attempted to have the Mediator's Report corrected to include any issue other than reasonable search.

[14] During my inquiry the appellant asserted that the scope of the appeal includes the exemption claims that were initially at issue in the appeal. The appellant says that the mediator incorrectly concluded in her report (the Mediator's Report) that the only matter at issue was the reasonableness of the ministry's search for responsive records.

[15] The appellant's representative states:

¹ I am not privy to any communications between the mediator and the parties to which mediation privilege applies.

² See sections 6.04 to 6.07.

Neither my client or I remember having told the mediator that she is not interested in obtaining the information that was withheld by the Ministry pursuant to s. 14(1)(a), 14(1)(l), 19, 49(a) and 49(b) nor do either of us remember being asked this [sic] specifically by the mediator whether we wanted this information. Our discussions did focus heavily on the information on my client's phone as this was direct evidence of the harassment and sexual assaults from the perpetrators themselves. She never waived her interest in the other information, and in fact, told the mediator that she wanted to pursue this appeal in order to get as much information about these incidents as possible from the OPP.

[...]

To be clear, the appellant is interested in obtaining, as is stated in the [ministry's] decision letter, any and all information that she is entitled to obtain concerning the sexual assaults that she reported to the OPP in [specified year] that she is entitled to receive and would appreciate it if your office could review these documents and determine whether they truly do fall under the exemptions or whether they should be provided.

Analysis and Finding

[16] As described above, at the conclusion of mediation, the Mediator's Report was provided to the appellant's representative and she had a specified time limit to provide comments, but none were received. The first time the appellant disputed the scope of the issues on appeal as defined in the Mediator's Report was in her representations in the inquiry.

[17] As set out above, the Mediator's Report identified the sole issue remaining as that of reasonable search. There is no evidence that the appellant attempted to have the Mediator's Report corrected to include any issue other than reasonable search.

[18] The IPC has previously considered the role of mediation in the appeal process. It has taken the approach that, generally, the results of mediation define the scope of the issues left to adjudicate.³ Parties are provided a Mediator's Report that defines the remaining issues and, "[i]n the absence of clearly articulated disagreement from a party regarding the results of mediation, the appeal will proceed to inquiry on that basis."⁴ The rationale for this was explained in Order PO-1755:

In my view, it is too late to make such a claim [that the results of mediation should not be respected] at this stage in the process [adjudication]. In so finding, I am not saying that a party may not change his or her mind and back away from an agreement made in mediation, but

³ See, for example, Orders MO-2778, MO-3733-R, PO-1755 and PO-3126.

⁴ Order PO-1755.

that a decision must be made in a timely fashion and within the procedures which have been established by this office and which have been clearly communicated to the parties. To find otherwise would not only delay the inquiry process in that I would be required to essentially start the inquiry over again in order to introduce the new issues, but it would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[19] Although the adjudicator's discussion in Order PO-1755 relates to an appellant reneging on an agreement made at mediation, I agree with the approach and I find that it is applicable to the appeal before me. In my view the time to challenge the scope of the issues on appeal set out in the Mediator's Report has passed. Including issues that were removed from the scope of the appeal would significantly expand the scope of the inquiry and require a further exchange of representations specifically on the ministry's application of exemptions, resulting in inevitable delay. I would be required to essentially start the inquiry over again in order to introduce additional issues relating to the possible application of exemptions. I find that doing so at this late stage would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[20] I will now turn to the sole issue in the appeal, the reasonableness of the ministry's search for responsive records.

Issue B: Did the ministry conduct a reasonable search for records?

[21] As explained in the Overview, the appellant believes that the ministry's search failed to locate records downloaded from a cellular phone (the cellular phone records). 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*.⁵ 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.

[22] 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.⁶

[23] 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;⁷ that is,

⁵ Orders P-85, P-221 and PO-1954-I.

⁶ Order MO-2246.

⁷ Orders P-624 and PO-2559.

records that are "reasonably related" to the request.⁸

[24] 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.⁹ 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.¹⁰

The ministry's representations

[25] The ministry maintains that it has conducted a reasonable search for the cellular phone records within its custody or control and that no additional records exist.

[26] The ministry submits that there is an explanation as to why the cellular phone records do not exist:

[...] we advise that the cellular phone in fact belongs to an affected third-party individual, who has not been notified of this appeal or provided with an opportunity to respond to the Notice of Inquiry.

The fact that the affected third-party individual both claimed and subsequently provided proof of ownership of the cellular phone explains why there are no responsive records. The cellular phone was initially handed over to the OPP, with the intention of the OPP downloading records from the cellular phone. However, this did not occur because the affected third-party individual claimed and provided proof of ownership of the cellular phone and demanded that it be returned to the individual. It was subsequently returned, and the OPP therefore did not obtain any records from the cellular phone.

In other words, the Ministry never obtained custody or control of the records, because we never downloaded them from the cellular phone, and that is why we do not have responsive records.

The appellant's representations

[27] The appellant's representative provided no specific submissions on the reasonableness of the ministry's search for responsive records other than to state that the request was clarified with the appellant by an analyst, which is inconsistent with a statement in the ministry's submissions that they did not contact the appellant to clarify the request.

⁸ Order PO-2554.

⁹ Orders M-909, PO-2469 and PO-2592.

¹⁰ Order MO-2185.

Analysis and finding

[28] In all the circumstances, I find that the ministry properly understood that the appellant sought access to the cellular phone records and I find that, based on the information before me they made a reasonable effort to locate them. I accept the ministry's explanation for why it does not have the cell phone records within its custody or control. With the ministry's explanation, I find that there is no reasonable basis to find that further searches would yield the cellular phone records that the appellant seeks.

[29] Accordingly, I find that the ministry has conducted a reasonable search that is in accordance with the requirements of the *Act*.

ORDER:

I uphold the reasonableness of the ministry's search for responsive records and dismiss the appeal.

Original Signed By: _____
Steven Faughnan
Adjudicator

February 21, 2023 _____