Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4430

Appeal PA21-00181

Ministry of the Solicitor General

August 23, 2023

Summary: The appellant requested records relating to concerns or complaints of noncompliance with COVID-19 Emergency Orders in Ontario. The ministry responded by stating the requested record is not included in the definition of *record* on the basis of section 2 of Regulation 460 of the *Act*, because the process of producing the record would unreasonably interfere with the operations of the ministry. This order upholds the ministry's decision.

Statutes Considered: *Freedom of information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of *record*), Regulation 460, section 2.

Orders and Investigation Reports Considered: Orders P-50, PO-2752, and PO-4283.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry) for

> All records, recordings, or transcriptions regarding documented/reported public concerns and complaints of noncompliance to COVID-19 Emergency Orders received at [a specified number] or in writing [via a specified website], throughout the province of Ontario, from the dates: March 17, 2020, through to July 6th, 2020. Receiving copies in electronic form is preferred.

The appellant also requested a fee waiver based on sections 57(4)(b) and (c) of the *Act*. The appellant indicated he is low income and the disclosure of the information would benefit public health or safety.

[2] The ministry issued an access decision to the appellant denying him access to the records, in full. The ministry stated,

> … it is the position of the Ministry that section 2 of regulation 460 under the *Act* is applicable in the circumstances of your clarified request…. It is the position of the Ministry that in the circumstances of your request and given the manner in which OPP incidents relating to COVID 19 province-wide are stored in Niche RMS and their Provincial Communications Centres producing the requested data would unreasonably interfere with the operations of the Ministry.

[3] The ministry also advised the appellant it consulted with experienced and knowledgeable Ontario Provincial Police (the OPP) regarding the search and preparation of responsive records. The ministry explained the work involved as follows:

> The [OPP] estimates that approximately 5,400 COVID 19 related incidents stored in Niche RMS would need to be retrieved and reviewed in order to identify data responsive to your request. It is anticipated that approximately 15 minutes would be required for an experienced OPP employee to retrieve and review each incident for responsiveness to your request. Approximately 1,350 hours would be required for this task.
>
> The OPP employs 10 Eventide NexLog IP-based communications recorders which are specifically designed for Mission Critical 24/7 emergency call-taking and dispatch communications environments. Two of these records are deployed at each Provincial Communications Centre (PCC); in a primary and secondary configuration. The records record all phone traffic into and out of the PCC, and all radio traffic within their zone of responsibility. Resiliency and security features are employed to ensure there is no break in recording, user access is controlled, and geo-diverse data archiving is maintained.
>
> The OPP anticipates, locating the audio recordings on the server, create [*sic*] playlists, extract and upload the PCC audio associated with these 5400 occurrences to the Niche RMS occurrences would take approximately 120 minutes per call received. They anticipate it would take approximately 10,800 hours to extract the information you have requested.

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

[5] During mediation, the ministry confirmed its position that section 2 of Regulation

460 of the *Act* is applicable and producing the requested data would unreasonably interfere with its operations.

[6] The appellant confirmed he was not satisfied with the ministry's response and remains interested in obtaining access to the records responsive to his request.

[7] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I am the adjudicator in this appeal and I began my inquiry by inviting the ministry to make submissions in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. The ministry submitted representations. I then invited the appellant to submit representations in response to the ministry's, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. In his representations, the appellant advised he had narrowed his request to the initial reports created on the Niche RMS program by the OPP in relation to the approximately 5,400 incidents related to COVID-19. The appellant also "requested information on how the Niche RMS program relates to other identified information named by the OPP." It appears the ministry clarified this relationship in its representations, which I summarize at paragraphs 16 and 17, below.

[8] I shared the appellant's clarified request with the ministry and invited it to submit representations in response. The ministry submitted reply representations and maintained its position that the production of responsive records would unreasonably interfere with the operations of the OPP. I sought and received sur-reply representations from the appellant in response to the ministry's reply representations. Finally, I sought and received further supplementary reply submissions from the ministry.

[9] In the discussion that follows, I uphold the ministry's decision and dismiss the appeal.

DISCUSSION:

Do the records, if they exist, fall outside the definition of *record* because of section 2 of Regulation 460?

[10] The term *record* is defined in section 2(1) of the *Act*. This definition states, in part,

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other

> information storage equipment and technical expertise normally used by the institution;

[11] In its decision, the ministry relied on section 2 of Regulation 460, which states,

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Representations

[12] As background, the ministry states the Province of Ontario declared a state of emergency pursuant to the *Emergency Management and Civil Protection Act* to control the transmission of COVID-19 on March 17, 2020. The rapid evolution of COVID-19 and the threat it posed evolved during the time period of the request, which the ministry submits necessitated the provincial government issuing different emergency orders to reflect the changing nature of the threat.

[13] The ministry states the time period of the request corresponds to the first wave of the COVID-19 pandemic, when the number of cases grew significantly and an increasing number of provincial emergency orders were issued throughout Ontario for the purpose of imposing increasing restrictions to control transmission of COVID-19 and to address the economic and social harms it caused. For example, the ministry states the province enacted the following orders in March 2020:

- March 17 – schools, childcare services, libraries, dine-in bars, restaurants, etc. were ordered closed.
- March 23 – "non-essential businesses" as prescribed were ordered closed; the list of essential businesses was narrowed on April 3.
- March 28 – gatherings were restricted to 5 people. An anti-price gouging order was also issued.
- March 30 – outdoor recreational facilities were ordered closed.

[14] The ministry states the nature of the threat posed by COVID-19 changed quickly. As such, the nature of emergency orders issued also changed. The ministry submits there is a correlation between the kinds of responsive records it expects to locate and the nature of the pandemic threat at the time the records were created.

[15] The ministry submits the OPP used a non-emergency telephone line to receive public concerns and complaints about noncompliance with the emergency orders. The OPP determined there are three databases that would need to be searched to locate responsive records: Niche Records Management System (RMS), Hexagon Computer-Aid

Dispatch (CAD) and Eventide Nexlog (NexLog). The ministry described the records stored in each of these databases as follows:

- RMS stores records related to a police occurrence. For example, records relating to an OPP investigation of alleged noncompliance with an emergency order would be stored in RMS.

- CAD contains records such as notes an OPP police dispatcher would take during a call, which would then be used to dispatch police to attend or investigate an occurrence. For example, dispatchers' notes taken during a call from the police alleging noncompliance with an emergency order would be stored in CAD.

- NexLog records phone traffic in and out of OPP provincial communications centres. For example, NexLog stores calls from the public alleging noncompliance with an emergency order, or calls dispatching members of the OPP to investigate potential noncompliance with an emergency order.[1]

[16] The ministry submits both RMS and CAD are large, complex, relational databases that contain multiple tables lined by fields. As such, the ministry submits navigating them is complex and requires training. Furthermore, the ministry notes RMS and CAD are incident-centric databases, which means a single incident could yield vast amounts of information on related information, such as investigations and charges.

[17] The ministry states it considered the following factors in determining that producing the responsive records meets the requirements of section 2 of Regulation 460:

- *The size and breadth of OPP operations*: The ministry states the OPP delivers front line policing services in 322 municipalities operating out of 166 detachments located throughout the province. The ministry anticipates responsive records will be generated throughout the province since the number identified in the request is available toll-free across the province.

- *The timeline of the request*: The request covers the entire first wave of the pandemic. The ministry acknowledges the first wave was only a few months long. However, the ministry submits the situation evolved rapidly and this resulted in changing emergency orders. As such, the ministry submits a large number of records were created and designing appropriate searches for the responsive records will be challenging.

- *The large number of records:* The ministry estimates there are approximately 5,400 COVID-related occurrences on RMS and CAD. The ministry submits these

[1] During the inquiry, the appellant narrowed his request to exclude the information contained on NexLog. As such, I will not include any further discussion on this database in my discussion or summary of the ministry's representations below.

occurrences could yield multiple responsive records, depending on the number of police involved, the scale of the investigation, whether charges were laid, etc.

- *Limited staff resources:* The ministry submits specially trained technical support analysts must conduct the searches. Currently, the ministry submits there are only four of these analysts in the OPP who can design this type of search. The ministry states not all analysts are trained on all the databases and they also support front-line law enforcement operations. The ministry submits these analysts are currently working at full capacity. The ministry submits outside analysts or other employees from the ministry are not provided with access to these databases due to security concerns.

- *Unique search challenges:* The ministry submits technical support staff working with RMS and CAD will have to create a customized search capability. Once this capability has identified records, the technical support staff will have to go through each record to confirm responsiveness. The ministry estimated it will take 15 minutes for an experienced technical support analyst to retrieve and review each record on RMS and CAD to determine responsiveness.

- *Harmful effects of removing technical support staff from law enforcement duties:* The ministry reiterates that technical support staff would have to be removed from their existing front-line policing duties to conduct the searches in response to the request. The ministry submits this would unreasonably interfere with OPP front-line policing.

[18] The ministry is concerned an order to produce the records responsive to this request could set a precedent leading to similar requests for bulk data from OPP databases. The ministry submits this would negatively impact OPP operations.

[19] The ministry submits the IPC previously found that this type of bulk request would unreasonably interfere with institutional operations. The ministry refers to Order MO-1488, which found that government organizations are not obligated to retain more staff than required to meet its operational standards. Similarly, the ministry submits the OPP should not have to train and potentially hire additional staff to produce records responsive to this request. The ministry refers to Order PO-2151, which accepted that producing Ministry of Transportation (MTO) records required the use of internal specialized staff, whose time and services were *in high demand*, to locate responsive records would reasonably interfere with the operations of MTO. The ministry submits the technical support analysts for RMS and CAD are similarly specialized and in high demand. Finally, the ministry submits that Orders PO-2752 and PO-3280 found that an estimate of 1,377.5 and 2,334 hours, respectively would unreasonably interfere with government operations. The ministry submits that this request with an estimated 10,800 hours of search time far surpasses the thresholds set by Orders PO-2752 and PO-3280.

[20] In his representations, the appellant submits the OPP did not clearly or precisely identify the records he requested and included records and time/resource estimates not relevant to his request. The appellant states he narrowed his request to the 5,400 COVID-19 related incidents stored in RMS on February 3, 2021.

[21] The appellant also included sample records and an access decision from the City of London (the city) he received in response to a similar request he submitted for COVID-19 complaint records. The appellant states the city responded with 5,247 pages of records and granted his fee waiver request.

[22] The appellant submits the ministry did not provide sufficient evidence to demonstrate why responding to his request would unreasonably interfere with the operations of the OPP. He has narrowed his request with the OPP and submits it has grossly overestimated the time and resources required to respond to his request.

[23] The appellant refers to Order PO-2752, in which the adjudicator noted an institution may not be able to rely on *limited resources* as a basis for claiming unreasonable interference with institutional operations. The appellant submits the ministry failed to provide sufficient evidence beyond stating that extracting information would take time and effort to support its claim.

[24] The appellant submits the 1,350-hour estimate for search is a "gross overestimate of time to fulfil this request." The appellant submitted the city provided a rate of 1 minute per record for 5,247 equivalent records. The appellant submits the ministry should be able to significantly reduce its search time for the search and transcription of audio records.

[25] The ministry confirmed its position that the production of data responsive to the appellant's narrowed request would still unreasonably interfere with the operations of the OPP. As such, this data does not constitute *records* for the purpose of the *Act*.

Analysis and Findings

[26] I reviewed both parties' representations and uphold the ministry's decision and dismiss the appeal. The appellant narrowed his request to the records stored in RMS relating to approximately 5,400 COVID-19 related incidents. The ministry's decision states as follows:

> The [OPP] estimates that approximately 5,400 COVID 19 related incidents stored in Niche RMS would need to be retrieved and reviewed in order to identify data responsive to your request. It is anticipated that approximately 15 minutes would be required for an experienced OPP employee to retrieve and review each incident for responsiveness to your request. Approximately 1,350 hours would be required for this task.

[27] The issue of whether a requested record will qualify as a *record* under the *Act*

was recently considered in Order PO-4283. In that decision, the adjudicator considered whether the number of full-time permanent and contract faculty as well as part-time faculty broken down by department falls under the definition of a *record* in section 2(1)(b) of the *Act*. Reviewing IPC jurisprudence, the adjudicator in Order PO-4283 stated that a requested record will qualify as a *record* under the *Act* if two conditions are met. First, a record will qualify as a *record* under the *Act* if can be produced using computer hardware and software or any other information storage equipment and technical expertise normally used by the OPP. Second, a record will qualify as a *record* under the *Act* if the process of producing it would not unreasonably interfere with the institution's operations.

[28] In Order PO-4283, the adjudicator found that the responsive information is a *record* within the meaning of the *Act*. The adjudicator based his decision on the following considerations:

- The university had produced similar records in the past to institutions such as Statistics Canada, even though not broken down in the same level of detail;
- The university acknowledged its human resources databases contains the relevant information, although a small amount is in piecemeal or fragmentary form;
- The university has the programming and other technical expertise to produce the record.

Given these circumstances, the adjudicator found it was possible for the university to create a responsive record, thereby satisfying the first requirement for whether a record will qualify as a *record* under the *Act*.

[29] In the circumstances of this appeal, there is no dispute the ministry could create the record responsive to the appellant's request. The information is stored in RMS and the appellant seeks access to the records themselves. He did not ask the ministry to create a new record with the information contained in RMS. Therefore, the only issue before me is whether the production of the record would unreasonably interfere with the operations of the OPP. In the specific circumstances of this appeal, I am satisfied it would.

[30] Based on my review of the ministry's representations, I am satisfied it provided sufficient evidence to demonstrate that 1,350 hours is a reasonable estimate of time required to review the 5,400 COVID-19 related incidents on the RMS database.

[31] I note the appellant's skepticism regarding the OPP's estimated search versus the search for records conducted by the City of London in response to a similar request. However, the city's decision letter refers to 5,247 *pages* of records; the ministry's decision refers to 5,400 COVID-19 related *incidents*. The ministry submits that RMS stores records related to a police occurrence, including records related to an OPP

investigation of alleged noncompliance with an emergency order. The ministry submits a single law enforcement incident could yield a large amount of information on the investigation(s) and charge(s). This description of the types of records suggests that at least some of the 5,400 COVID-19 related incidents would contain more than one page. Therefore, I find the appellant's assumption that a search conducted by the OPP should be similar to the one conducted by the City of London does not reflect the reality of the type of information he seeks access to in this request.

[32] I find the appellant did not provide any further evidence to demonstrate the ministry inflated its time estimate to respond to his request. As such, I accept the ministry's estimate of 1,350 hours to retrieve and review the 5,400 COVID-19 related incidents in RMS.

[33] A number of IPC orders have addressed the issue of whether the process of producing a record would unreasonably interfere with the operations of an institution under section 2 of Regulation 460. This issue was first addressed in Order P-50, where the adjudicator determined that,

> What constitutes an "unreasonable interference" is a matter which must be considered on a case-by-case basis, but it is clear that the Regulation is intended to impose limits on the institution's responsibility to create a new record.

[34] The IPC has adopted the case-by-case basis of reviewing the circumstances. In Order PO-2752, the adjudicator noted that IPC decisions have confirmed that, to establish *interference*, an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities."[2] These orders have also noted that, where an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on *limited resources* as a basis for claiming interference.[3] Although government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed,[4] an institution must provide sufficient evidence beyond stating that extracting information would take *time and effort* in order to support a finding that the process of producing a record would unreasonably interfere with its operations.[5] I agree with the approach taken in Order PO-2752 and will follow it in this appeal.

[35] In the more recent Order PO-4283, discussed above, the adjudicator found that section 2 of Regulation 460 of the *Act* was not engaged because he was not satisfied the university provided sufficient evidence to demonstrate that the process of producing

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[2] Referring to Orders P-850 and PO-2151.
[3] See Orders MO-1488 and PO-2151.
[4] See Order M-583.
[5] Reference to Order MO-1989, upheld in *Toronto* (*City*) *Police Services Board v. Ontario* (*Information and Privacy Commissioner*), [2009] O.J. No. 90 (C.A.); reversing [2007] O.J. No. 2442 (Div. Ct.).

the record would unreasonably interfere with its operations. In that appeal, the university submitted it would take up to 210 hours to manually collate and edit the information sought by the appellant. However, the adjudicator found the university did not address the ability of computer software to assist in organizing the information in the databases together with other information that might exist in each department. Furthermore, the adjudicator noted the university's website states it has been teaching computer science for 25 years at the graduate and post-graduate level, and offers courses in artificial intelligence algorithms. As such, it was apparent to the adjudicator that the university has the technical expertise normally used to compile the responsive record. Finally, the adjudicator found it difficult to accept that the university and/or its faculties would not have and maintain a list of teaching staff and their corresponding positions in an electronic format that could be manipulated and collated in the categories recognized by the appellant. Given all of these circumstances, the adjudicator found the process of producing the records would not unreasonably interfere with its operations and that section 2 of Regulation 460 of the *Act* was not engaged.

[36] Based on my review, I find the ministry provided detailed evidence to support its estimate of the number of hours required to produce records responsive to the appellant's request. The level of detail of the ministry's evidence contrasts with the evidence before the adjudicator in Order PO-4283. The ministry identifies the reasons why it would take 1,350 hours to complete the search, including the variety of customized searches that will need to be designed and conducted, the nature of the searches and the expertise of the small number of personnel required to conduct the searches. As the ministry indicates, the OPP delivers front-line policing services in 322 municipalities, which means producing responsive records would be a larger undertaking than it would be for a single municipality. Furthermore, I accept the time period of the search (March to June 2022) was rapidly evolving due to the COVID-19 pandemic and resulted in a large number of different and changing emergency orders. I accept these factors will reasonably result in a large number of records that will need to be reviewed for responsiveness. I also recognize there are only four technical support analysts with the OPP who have the technical skills to complete the searches. I also acknowledge the ministry's submission that these analysts support front-line policing operations and conducting these searches could reasonably expect to result in interference with the OPP's operations. The ministry also identified the impact these searches would have on its law enforcement operations.

[37] In the circumstances and upon review of the parties' submissions, I accept the ministry's estimate of the approximate number of hours it would take to produce the records responsive to this request. I also accept the ministry's statements regarding the technical expertise required by the individuals conducting the searches and producing the records, and that producing the records would unreasonably interfere with the ministry's operations.

[38] Therefore, I am satisfied the ministry established that producing the record

responsive to the appellant's request would unreasonably interfere with its operations. Accordingly, even if a record is capable of being produced in response to the appellant's request, it does not fall within the definition of *record* because the process of producing it would unreasonably interfere with the ministry's operations.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: August 23, 2023

Justine Wai
Adjudicator