

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4483-I

Appeal PA23-00110

Ministry of the Environment, Conservation and Parks

February 21, 2024

Summary: The Ministry of the Environment, Conservation and Parks (the ministry) received a request under the *Act* for access to records provided to or sent from the ministry to the Office of the Mayor of the City of Sault Ste. Marie and to the office of a named M.P.P. at the City of Sault Ste. Marie between 2019 to 2020.

The ministry issued an access decision advising that it had not located responsive records. The appellant appealed this access decision to the IPC on the basis that the ministry did not conduct a reasonable search for responsive records.

In this interim order, the adjudicator determines that the ministry has not provided sufficient evidence to established that it conducted a reasonable search for responsive records. Therefore, she orders the ministry to conduct further searches and to provide affidavit evidence detailing its efforts to search for and locate responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 24 and 52(13).

OVERVIEW:

[1] This interim order addresses the ministry's failure to provide evidence as to its search efforts in response to an access request.

[2] The Ministry of the Environment, Conservation and Parks (the ministry or MECP) received a request under the *Freedom of Information and Protection of Privacy Act* (the

Act) for access to records:

...provided [to] or sent from the ministry to the City of Sault Ste. Marie, to the Office of the Mayor [named mayor], and to [the] Sault Ste. Marie's Office of the M.P.P.¹ [named M.P.P.] from 2019 to 2020.

[3] In the decision, the ministry informed the requester that a thorough search through the files of the ministry's Environmental Investigations and Enforcement Branch (EIEB) produced no records responsive to the request. Further, the ministry advised that the requested records, if they exist, may be part of an ongoing court proceeding, and as such, are not presently in the custody or control of the ministry.

[4] The requester, now the appellant, appealed the ministry's decision to the information and Privacy Commissioner (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[5] During mediation, the appellant informed the mediator that he was of the view that email correspondence and reports should exist. He explained that the ministry had disclosed some records as part of a previous appeal, and some of those records should have been identified as responsive to this request. He also pointed out to the mediator information in these records that he believes demonstrates that there should be additional records responsive to the request in this appeal.

[6] The ministry advised that it would provide the records disclosed as part of a previous appeal to the appellant again.

[7] The ministry agreed to conduct additional searches and located responsive records. The ministry did not issue a decision letter with respect to these records. Further, it advised that though it believes additional records exist, it is unable to retrieve them or to provide a timeline by which it may retrieve them.

[8] The parties were unable to resolve the issues of the appeal through the process of mediation. The appellant advised the mediator that he would like to pursue the appeal at adjudication where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sent the ministry a Notice of Inquiry and sought its representations on its search efforts. The ministry provided a brief response.

[9] As, the ministry did not provide representations on its search efforts in response to the Notice of Inquiry, I find that it has not established that the search it conducted for records is reasonable. Below, I order it to conduct further search(es) for responsive records and to provide affidavit evidence detailing all of its efforts to search for and locate responsive records. If the ministry locates additional records during its search(es) or determines that records might exist that are not in its custody or under its control, I order

¹ Member of Provincial Parliament.

it to issue an access decision with respect to these records.

DISCUSSION:

[10] The sole issue in this appeal is whether the ministry has provided sufficient evidence to establish that it conducted a reasonable search for records responsive to the request.

[11] Section 52(13) of the *Act* provides that in an inquiry:

The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50(3)² shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

[12] In accordance with section 52(13), I sent the ministry a Notice of Inquiry (NOI) seeking its representations, requesting that it provide a written explanation of all steps taken in response to the request. The NOI included a number of specific questions about the ministry's response to the request and the searches that were conducted. The ministry was also asked to identify and explain whether responsive records might previously have existed and whether responsive records might exist but are not within the ministry's custody or control.

[13] The ministry was asked to provide this information in an affidavit from the person or persons who conducted the search or searches.

[14] The ministry was also advised that if responsive records exist that are not in its possession, the ministry may still have an obligation to search for them because, under section 10(1) of the *Act*, the right of access applies to any record that is in the custody or under the control of an institution.³ For records not in the ministry's possession, the question is whether the records are under the ministry's control.

[15] The ministry was advised that the courts and the IPC have applied a broad and liberal approach to the custody or control question.⁴ In deciding whether a record is in

² Section 50(3) reads:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the Municipal Freedom of Information and Protection of Privacy Act, of the notice of appeal.

³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁴ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.⁵

[16] The ministry was advised that if responsive records exist that are not in its possession it should explain whether they are under the control of the ministry for the purpose of section 10(1).⁶

The ministry's response

[17] The ministry's sought a number of extensions for the submission of its representation and ultimately provided its response to the NOI on February 5, 2024, in a letter stating, in part:

The Ministry of the Environment, Conservation and Parks (MECP) has undertaken thorough searches through the email accounts of its past employees. The MECP reasserts its position as indicated in its Decision Letter of February 8, 2023, that no records, responsive to the request, exist.

[18] The ministry's access decision of February 8, 2023, referred to in its letter of February 5, 2024, states:

...After a thorough search through the files of the ministry's Environmental Investigations and Enforcement Branch (EIEB), no responsive records related to your request were located. As the records you are seeking, if they exist, may be part of an ongoing court proceeding, are not presently in the custody or control of the ministry. This file is now closed...

[19] I asked the ministry⁷ to confirm whether I was to consider its letter of February 5, 2024, as its representations submitted in response to the NOI. The ministry confirmed that it was.

[20] I did not seek representations from the appellant in response.

Findings

[21] 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*.⁸ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision.

⁵ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁶ The ministry was advised in the NOI about the factors relevant to determining "custody or control" when another individual or organization holds the record. It was asked in detail in the NOI to provide specific representations on these factors.

⁷ Via email through the Adjudication Review Officer on February 5, 2024.

⁸ Orders P-85, P-221 and PO-1954-I.

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.⁹

[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;¹⁰ that is, records that are “reasonably related” to the request.¹¹

[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.¹² 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.¹³

[25] As noted above, the ministry did not provide substantive representations that addressed the issues set out in the NOI. Instead, it provided a blanket statement that it has undertaken searches and that no responsive records exist.

[26] Although requested to do so in the NOI, the ministry did not provide a written explanation of all steps taken in response to the request. It also did not respond to the specific questions in the NOI to provide details of its searches.

[27] The ministry’s February 5, 2024, letter that it requested I consider as its representations merely states that it has undertaken searches through the email accounts of its past employees and that no responsive records exist.

[28] The ministry refers to its February 8, 2023, access decision in its February 5, 2024, letter where it indicates that it had responsive records, but they were not then in its custody or control. The NOI specifically asked the ministry to respond to detailed questions as to whether it has custody or control of responsive records. It did not do so.

[29] As well, if responsive records are not currently in the ministry’s custody they may still be in the ministry’s control. These records should have been identified as responsive and a decision should have been provided with respect to access to those records.

[30] Based on my review of its February 5, 2024, letter, which the ministry has provided as its representations, as well as its February 8, 2023, access decision letter which it relies upon to support its search, I find that the ministry has not provided sufficient evidence

⁹ Order MO-2246.

¹⁰ Orders P-624 and PO-2559.

¹¹ Order PO-2554.

¹² Orders M-909, PO-2469 and PO-2592.

¹³ Order MO-2185.

to show that it has made a reasonable effort to identify and locate responsive records. Specifically, I am not persuaded by the ministry that no responsive records exist.

[31] As the ministry has not provided 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, I will order it to conduct further searches for responsive records and to provide me with representations as to the searches it has undertaken including providing affidavit evidence.

ORDER:

1. I order the ministry to conduct further searches for records responsive to the appellant's request, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*.
2. I order the ministry to provide me with affidavit evidence describing its search efforts, including a response to the questions in the Notice of Inquiry, by **March 22, 2024**. The affidavit(s) should also include the following:
 - The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
 - The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
 - Whether it is possible that responsive records existed but no longer exist. If so, the ministry must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and
 - If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.

The ministry's affidavit(s) will be shared with the appellant unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in *Practice Direction Number 7*, which is available on the IPC's website. The ministry should indicate whether it consents to the sharing of its affidavit with the appellant.

3. If the ministry locates additional records as a result of its further search(es), if it does not locate such records, or if it identifies that responsive records should exist that are not in its custody or under its control, I order it to issue an access decision

to the appellant, with a copy to me, in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request for the purpose of the procedural requirements of the *Act*.

4. I remain seized of this appeal to deal with issues arising from order provisions 1, 2 and 3.
5. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed with the access decision referred to in order provision 3.

Original signed by: _____
Diane Smith
Adjudicator

February 21, 2024 _____