

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4626-I

Appeal PA22-00443

Ministry of Infrastructure

March 27, 2025

Summary: Under the *Freedom of Information and Protection of Privacy Act*, an individual asked the Ministry of Infrastructure for access to reports from third-party advisers. The ministry issued a decision stating that records responsive to the appellant's request do not exist. The individual believes more records should exist. In this order, the adjudicator determines that the ministry has not conducted a reasonable search for responsive records and orders it to conduct a further search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

OVERVIEW:

[1] The Ministry of Infrastructure (the ministry) received a four-part access request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to a specific investigation into serious allegations of misconduct.

[2] The ministry issued a decision advising that parts 1, 3 and 4 of the request were transferred to Infrastructure Ontario (IO) under section 25(1) of the *Act*.

[3] Part 2 of the appellant's request is for:

All reports from the third-party adviser(s) appointed by the ministry in relation to the same matters, as referenced in the same response by the

minister on September 29, 2015. (During the meeting of the Legislature's Standing Committee on Estimates on November 17, 2015, [the identified minister] identified the third-party adviser as [an identified individual]).

[4] With respect to part 2 of the request, the ministry stated:

Please be advised that Ministry staff conducted a search for responsive records and no records were located.

Based on this, we believe that the work undertaken by the third party advisor was for the Minister and/or Minister's Office staff only. As such, any records related to this would be a part of previous administration's records.

Upon change in the administration, the records of the previous administration are transferred to Archives of Ontario.

[5] The ministry suggested the requester connect with the FOI office at the Archives of Ontario (the archives) for the records of the previous administration.¹

[6] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[7] During mediation, the ministry agreed to undertake another search for all four parts of the appellant's request. The ministry issued a supplementary decision advising that it did not locate any additional records.

[8] The appellant confirmed that he takes issue with the reasonableness of the ministry's search as he is of the view that the records responsive to part 2 of his request should exist. He also advised that should the records not exist, he believes that they may have been inappropriately destroyed.

[9] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry in which I sought and received representations from the parties about the issue of reasonable search.

[10] During the inquiry, IO responded to parts 1, 3, and 4 of the appellant's request and responsive records were located. The appellant appealed IO's access decision, which resulted in a separate IPC appeal. As a result, the appellant acknowledged that this separate appeal would most likely resolve parts 1, 3, and 4 of his request and he limited his representations on search in this appeal to part 2 of his request. Accordingly, only the ministry's search relating to part 2 of the appellant's request remains at issue in this

¹ The appellant made a request for the same information from the archives and that request is being considered in Order PO-4625.

appeal.

[11] In this order, I find that the ministry has not conducted a reasonable search for reports from the third-party advisers, and I order it to conduct a further search.

DISCUSSION:

[12] The sole issue in this appeal is whether the ministry conducted a reasonable search for responsive records. Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.² If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[13] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.³ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related (responsive) to the request.⁴

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.⁵

Representations, analysis and findings

[15] For the reasons that follow, I find that the ministry has not conducted a reasonable search for reports from the third-party advisers.

[16] As noted above, only part two of the appellant's request remains at issue in this appeal. Therefore, I will not address the ministry's search relating to the other three parts of the appellant's request.

[17] The ministry submits that it conducted a reasonable search for responsive records and no responsive records were located. In support of its position, the ministry provided an affidavit from a Senior Corporate Advisor (advisor) in the Corporate Services Division whose responsibilities include processing Freedom of Information (FOI) access requests. The ministry's representations and affidavit describe where it searched, the results of the search, and the staff involved in the search. Other relevant portions of the ministry's

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2246.

representations are as follows:

- The ministry advised the appellant that it is the ministry's belief that the work undertaken by the specified adviser was for a former minister's office and that the ministry would not have custody of responsive records, as they would have been transferred to the archives following the change in government in 2018.
- The advisor contacted all divisions and program areas of the ministry that could possibly hold records responsive to the appellant's request including: the Minister's Office; the Deputy Minister's Office; the Corporate Services Division; the Legal Services Branch; the Communications Branch; the Transit-Oriented Communities and Agency Oversight Division, which has responsibility for the oversight of IO's activities including its governance; the Infrastructure Strategy, Policy and Research Division; the Realty Division; and the Infrastructure Program and Projects Division. Except for the current minister's office, each of these divisions and program areas existed in some iteration at the time that responsive records would have been created.
- Each of the divisions and program areas employed persons knowledgeable about the subject matter of that division or program area's work, as well as about its records management systems, to consider the request and conduct searches of relevant repositories.
- It was possible that the Legal Services Branch of the current Ministry of Economic Development, Job Creation and Trade (MEDJCT) might have responsive records, so the ministry contacted the MEDJCT to ask that it conduct a search for records responsive to the request. The MEDJCT undertook a search but found no responsive records.

[18] The appellant's representations provide a lot of background information about his request and the circumstances that led to it. I will only summarize the portions most relevant to the issue of reasonable search. The appellant's representations also address custody or control of the records under section 10(1) of the *Act*. However, custody or control is not at issue in this appeal because the ministry's decision states that records responsive to part 2 of the appellant's request do not exist in its record holdings. As noted above, the sole issue in this appeal is whether the ministry conducted a reasonable search for responsive records, so I will only address portions of those representations that relate to the issue of search.

[19] The appellant takes the position that records responsive to his request should exist. He submits that a specified third-party adviser was hired to be the ministry's "eyes and ears" on an investigation into serious allegations of misconduct that called into question the integrity of a major government procurement. He submits that this role would entail providing reports to the minister or the ministry that would be responsive to part two of his request. The appellant submits that these records should have been

retained by the ministry or the archives for a variety of reasons, such as their relevance to ongoing litigation and police investigations (and subsequent criminal charges), as well as what the minister acknowledged as the public's interest in the investigation.

[20] The appellant submits that in response to his request to the ministry, it advised that any responsive records it once had would have been sent to the archives following the 2018 provincial election. The appellant submits that the ministry did not dispute that the specified adviser submitted reports responsive to part two of his request, but that such reports would have been transferred to the archives. The appellant submits, however, that the archives has claimed that it did not locate any responsive records or "any evidence the ministry ever transferred the records to them" and the ministry is likely aware that the archives was unable to locate responsive records.

[21] The appellant submits that the ministry's response also indicates that records past their retention date may have been destroyed, as if to explain why the ministry was unable to locate the specified adviser's reports. He submits there is no evidence that these records were past their retention date and presumably, it would have been inappropriate or illegal to destroy reports that are relevant to ongoing litigation and police investigations. He further submits that despite the importance of these records, there is no evidence that the ministry attempted to find out what became of these records once they were confirmed to be missing.

[22] The appellant submits that even if the reports were lost or destroyed after being received by the ministry or archives, copies could have been requested from the specified adviser or his firm. He submits that the ministry did not contact individuals who might have direct knowledge of the specified adviser's reports and what became of them, including the specified adviser. He also submits that the ministry did not contact the specified adviser or his law firm to obtain copies of the reports or to get any other information about who received the reports.

[23] The appellant submits that the ministry should conduct a reasonable search that includes reaching out to the specified individuals with direct knowledge of the reports and what became of them, including the specified adviser. He submits that all responsive records should be obtained and identified, whether or not they are in the ministry's physical custody.

[24] In response to the appellant's representations, the ministry submits:

- The appellant asserts that the specified adviser would have submitted reports and that these reports would have been responsive records and should be in the ministry's record holdings. However, the ministry argues that this does not establish a reasonable basis for concluding that the report(s) exist.

- The retention and disposal of government documents is governed by the *Common Records Schedule Minister's Public Records*⁶ (Common Records Schedule) in accordance with section 11 of the *Archives and Recordkeeping Act, 2006 (ARA)*.⁷
- If responsive records exist, the records would have been created for the former Minister of Infrastructure (formerly the Minister of Economic Development, Employment and Infrastructure). In accordance with the Common Records Schedule, these records would have been transferred to the archives, rather than destroyed, due to the government change in 2018. Once transferred to the archives, records are no longer within the custody or under the control of the ministry.
- The ministry is not obliged to create a record in response to a request under the *Act*, where one does not currently exist. This well-established principle extends to replacing or generating documents the appellant believes ought to exist.⁸

[25] Based on the representations of the parties, I am not satisfied that the ministry conducted a reasonable search for responsive records. As noted above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.⁹ I find that there is sufficient evidence before me to establish a reasonable basis to conclude that records responsive to the appellant's request should exist. I agree with the appellant that since the specified adviser was hired to be the ministry's "eyes and ears" on the investigation, it would be reasonable that some records were created as a result of this role.

[26] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related (responsive) to the request.¹⁰ While the ministry consulted with various divisions and program areas within the ministry and the MEDJCT's Legal Services Branch, I am not satisfied that these employees were knowledgeable in the subject matter of the appellant's request. I agree with the appellant that it would have been reasonable for the ministry to reach out to individuals with knowledge of the records to confirm whether the report(s) in fact were created, and if so, what became of them. Based on the evidence before me, I am not satisfied that the ministry has done so.

[27] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records,¹¹ and I find that

⁶ Under sections 11 and 12 of the *ARA*.

⁷ *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A.

⁸ Orders P-99, MO-1422, and MO-2630.

⁹ Order MO-2246.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Orders P-624 and PO-2559.

it has not done so. I acknowledge that it was the ministry's predecessor that appointed the specified adviser to observe the relevant investigation. However, the current ministry is the one with the obligation to respond to the access request in this appeal by conducting a reasonable search. I am not satisfied that it is reasonable that the ministry has not reached out to individuals with knowledge of the records to confirm whether the report(s) the appellant seeks access to were created by the specified adviser and simply cannot be located, or if they do not exist at all.

[28] For the reasons set out above, I find that the ministry has not conducted a reasonable search for responsive records, and I order it to conduct a further search.

ORDER:

1. I do not uphold the ministry's search. I order the ministry to conduct a further search for records responsive to the appellant's request, in accordance with the findings in this order, including but not limited to whether the specified third party adviser created any records responsive to the appellant's request for the ministry.

2. I order the ministry to issue an access decision to the appellant with respect to any responsive records located because of the search ordered, in accordance with the *Act*, taking into consideration the notice provisions. The ministry should treat the date of this order as the date of the request for administrative purposes.

3. I order the ministry to provide me with a copy of the decision sent to the appellant in accordance with order provision 2.

4. The ministry shall send its representations on the new search and an affidavit outlining the following, by **April 30, 2025**:

a. the names of the individuals who conducted the further search;

b. information about the nature and location of the search, and the steps taken in conducting the further search, including any individuals consulted, and specifically:

i. whether the specified third party adviser was consulted;

ii. If so, what has the specified third party adviser said about the existence or creation of such records; and

iii. Whether the ministry itself has any knowledge of whether such records were created.

c. the results of the further search; and

d. details of whether the records could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

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

5. I remain seized of this appeal to deal with any other outstanding issues arising from provisions 1 to 5 of this interim order.

Original Signed by: _____
Anna Truong
Adjudicator

_____ March 27, 2025