



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-532

Appeal M-9400607

Metropolitan Toronto Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Metropolitan Toronto Police Services Board (the Police). The appellant is a corporation which operates a towing services company in competition with two other towing companies referred to in the request. The request sought access to records regarding allegations by the two named companies against the appellant, in connection with tenders for towing services with the Police.

Access was granted to a substantial number of records. The sole remaining issue in this appeal is whether additional responsive records exist.

A Notice of Inquiry was sent to the appellant and the Police. Representations were received from the Police only.

PRELIMINARY ISSUE:

The Notice of Inquiry indicated that the sole issue to be decided in this case is whether the Police conducted a reasonable search for records. To that end, the Police were asked to provide a written summary of the steps taken to locate responsive records. In particular, the Notice of Inquiry asked the Police to

... provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches.

The Police did not provide this information in any form in their representations. Instead, the representations submitted by the Police question, as a "preliminary issue", the applicability of section 17 of the Act in the circumstances of this appeal.

Section 17(1) states as follows:

A person seeking access to a record shall make a request for access in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, **upon a reasonable effort**, to identify the record. (emphasis added)

The language of section 17(1) is the basis for the standard required in searches for records, namely that the efforts to locate responsive records must have been reasonable in the circumstances (Orders M-226 and M-315).

The representations submitted by the Police in response to the Notice of Inquiry explain their position as follows:

... the [appellant] has not indicated that he believes the institution possesses additional records relative to the request, nor has he challenged any adequacy of search or process.

You mention in the first paragraph of page 2 [of the Notice of Inquiry] that "... the appellant indicated ... that additional records should exist". I can only understand from this statement that additional records - in the opinion of the appellant - **should** exist and he is not saying or implying that they do, in fact, exist, or that the institution is wilfully withholding records from this file. ... He is not saying, apparently, that we actually possess records which we are ignoring, or deliberately denying him access to; he is simply saying that we **should** have the records that he seeks (perhaps if we recorded the proper information or stored the records according to his ideas of what should have - ideally - transpired).

...

Thus it is the position of this institution that there are no issues to be contested.

In correspondence to the Commissioner's office dated January 25, 1995, the appellant's counsel indicated that he believes certain records exist but have not been disclosed. This view arises from parts of Record 35, a memorandum sent to the Police Services Board by the Metropolitan solicitor, which was disclosed to the appellant. In particular, the appellant's counsel takes the position that it would be reasonable to expect the Police to have copies of the following records:

- (1) the allegations mentioned on page 1 of Record 35, concerning allegations "previously received", relating to an alleged contravention of the rule that no one bidder would be awarded more than one contract;
- (2) the "brief of materials" referred to at the top of the second page of Record 35, in which these allegations are expanded upon; and
- (3) the "fresh allegations" mentioned near the top of the second page of Record 35, concerning the relationship between [the appellant] and [one of the companies named in the request].

In my view, the contents of the appellant's correspondence of January 25, 1995, referred to above, is at odds with the position taken by the Police. This letter makes it quite clear that the appellant believes that the Police possess additional records, and the nature of those records is specified in some detail. In order to ensure that the Police had an opportunity to consider and respond to the position taken on behalf of the appellant in this correspondence, I wrote to them in response to their representations and stated,

In fact, the appellant has been quite specific in stating what additional records he thinks the Police are likely to have. As a result, **I will be considering the reasonableness of the search conducted by the Police in this case.** (emphasis added).

I then provided with the Police with the summary outlined above in items (1), (2) and (3), concerning the appellant's views as to what additional records the Police are likely to have. I then offered the Police an opportunity to submit representations describing the steps taken to locate responsive records. The deadline

for the Police to submit these representations passed several weeks ago (on April 20, 1995), and no representations have been received in response to my invitation.

I have carefully considered the representations which the Police provided on this preliminary issue, in response to the Notice of Inquiry. In my view, there is sufficient evidence before me to suggest that additional records may exist. For this reason, I find that the issue of the reasonableness of the search conducted by the Police is properly before me, and I will resolve it in this order.

REASONABLENESS OF SEARCH:

Where the requester provides sufficient details about the records which he is seeking and the Police indicate that such records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

In this case, despite the fact that the Police have been given two opportunities to provide evidence concerning their search, no such evidence has been provided. Accordingly, in the circumstances of this appeal, I am unable to conclude that the search undertaken for the records specified by the appellant was reasonable.

ORDER:

1. I order the Police to conduct a further search for the records described in items (1), (2) and (3) on page 2 of this order, and to communicate the results of this search to the appellant in writing. Subject to Provision 2, below, I further order the Police to provide an access decision to the appellant with respect to any responsive records located as a result of this search, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.
2. In the event that notification is required under section 21 of the Act with respect to any records identified as a result of the search mentioned in Provision 1, I order the Police to comply with the requirements of section 21, **for those records only**, treating the date of this order as the date of the request, and to provide a final access decision to the appellant in accordance with the timing requirements set out in section 21(7).
3. In order to verify compliance with Provision 1 of this order, I order the Police to provide me with a copy of the correspondence referred to in Provision 1 within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. In order to verify compliance with Provision 2 of this order, I order the Police to provide me with a copy of the correspondence referred to in Provision 2 within sixty-five (65) days after the date of this order. This should be sent to my attention, at the address shown in Provision 3.

Original signed by: _____
John Higgins
Inquiry Officer

_____ May 18, 1995