



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1934

Appeals MA-040312-1, MA-040313-1 & MA-040314-1

Toronto Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEALS:

The Toronto Police Services Board (the Police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requests were for:

- 1) access to records related to the requester's arrest that involved [a named police officer],
- 2) access to records related to the requester's arrest that involved [a named member of the Legal Services Branch of the Police], and
- 3) access to records related to the requester's arrest that involved [another named police officer].

The Police located records responsive to the requests and denied access to all the responsive records under section 38(a) (discretion to refuse requester's own information) in conjunction with the discretionary exemptions in both section 8(1)(a) (law enforcement) and section 12 (solicitor client privilege) of the *Act*.

The requester, now the appellant, appealed these three decisions.

No issues were resolved through mediation, and these files were transferred to the inquiry stage of the process. At this stage, the Police identified that the records responsive to all three of the requests are two pages of e-mail messages. The Police also identified that these two pages of responsive records are also records at issue in another appeal file involving the appellant (Appeal MA-040099-1).

I prepared a Notice of Inquiry to be sent to the parties, and included in the Notice of Inquiry the issue of whether any useful purpose would be served in continuing with these appeals, if access to the records was being determined in another appeal. I sent the Notice of Inquiry to the Police, initially, and the Police provided representations in response. I then sent the Notice of Inquiry, along with a copy of the Police's representations, to the appellant, who also provided representations.

In his representations, the appellant addressed the issues identified in the Notice. In addition he indicated that, now that he was aware of the nature of the records responsive to his requests, he had questions regarding whether the searches for responsive records were reasonable in the circumstances. He also provided representations in support of his position that additional responsive records should exist. In light of the appellant's concerns, I invited the Police to reply to the appellant's representations, and to address the issue of whether the searches were reasonable. The Police provided reply representations, which I shared with the appellant, who provided additional representations by way of sur-reply.

DISCUSSION:

PRELIMINARY ISSUE

As noted above, the Police identify that the records responsive to the three requests are also records at issue in another appeal file involving the appellant (Appeal MA-040099-1). This

raises the issue of whether any useful purpose would be served in reviewing the issues regarding access to the records in these appeals.

The appellant takes the position that the copies of the e-mails at issue in these appeals were copies *received* by the recipients in these appeals, whereas the same records, at issue in the other appeal, were *sent* by the author of the e-mail in that appeal. The appellant therefore argues that different factors apply in the circumstances of the different appeals, and that access to the records at issue should be determined by me in these appeals, notwithstanding that they are at issue in another appeal.

I addressed a similar issue in Order MO-1920, which also involved records which had been dealt with in previous appeals. In that order I stated:

Under certain circumstances, this office will dismiss a matter that is not within its jurisdiction or where it is decided that the matter should not proceed. One such circumstance relates to appeals, or specific issues in appeals, where there is no useful purpose to proceeding with the appeal or the identified issue (Order PO-2175).

In light of the above, in my view there is no useful purpose served in proceeding with issues regarding access to the 50 records which were at issue in previous appeals. Issues surrounding access to those records were resolved in [previous orders]. Accordingly, I will not review issues regarding access to the 50 records that were the subject of those orders.

I adopt the approach to this issue which I took in Order MO-1920.

I accept the appellant's argument that, in some circumstances, there may be factors affecting access to a record that exist in one appeal and do not exist in another appeal, and that in some instances it may be appropriate to decide on access to a record in an existing appeal, even if access is also an issue in another appeal. However, in the circumstances of these appeals, I find that there would be no useful purpose served in determining access issues with respect to the responsive records.

The records at issue in the current appeals were included in the records addressed by Adjudicator Hale in Orders MO-1908-I and MO-1916-F. The identical records are at issue in all of these appeals, and the parties to the appeals are the same. Furthermore, the exemption claims, including the fact that the appellant is seeking his own personal information, are the same in all of these files. Adjudicator Hale addressed issues surrounding access to the records in Orders MO-1908-I and MO-1916-F, and in my view no useful purpose would be served in proceeding with a second adjudication of the same issues regarding access to those same records. Accordingly, I will not proceed with a review of issues respecting access to the identified responsive records.

Accordingly, the sole remaining issue in the three current appeals is whether the searches by the Police for responsive records were reasonable in the circumstances of these appeals.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in these appeals, the issue to be decided is whether the Police have conducted reasonable searches for the records as required by section 17 of the *Act*. If I am satisfied that the searches carried out were reasonable in the circumstances, the decisions of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

In these appeals the appellant takes the position that additional records responsive to all three of the requests ought to exist.

The appellant begins by positing that these three requests for information relate to particular proceedings involving the appellant, and that therefore additional records should exist. In response, the Police argue that the requests were clear and specific – they were for information relating to three identified individuals, and not for information relating to particular proceedings. The Police further identify that all records relating to the particular proceedings were at issue in earlier appeals involving the appellant and the Police, and were addressed in Order MO-1908-I. The Police state that the searches conducted in the three current appeals were based on the three original requests, not on what the appellant now claims he was interested in. Furthermore, the Police identify that all records responsive to his “expanded” requests were addressed in previous appeals.

The appellant responds to the position of the Police by indicating that his requests were for “any and all” records involving the three individuals. He takes the position that he is not expanding his requests, but merely indicating where possible responsive records would be located, and that the subject matter of the records would involve the identified proceedings.

In my view, the original requests were clearly for “any and all” records involving the three identified individuals, and did not include all records relating to the particular proceedings. Accordingly, I will review the issue of the reasonableness of the Police’s searches for records in each of these three appeals, taking into account the information provided by the appellant.

Appeal MA-040312-1

This appeal arose from the appellant’s request for access to records related to the appellant’s arrest that involved a particular [named] police officer. In support of his position that additional responsive records exist, the appellant refers to a copy of an e-mail exchange, which he attaches to his representations. In that e-mail exchange between members of the Police, both e-mail messages identify that they were copied to the officer named in the request. The appellant takes the position that these records should also exist within the record-holdings of that named officer.

In addition, the appellant refers to a reference in one of the e-mail messages that he says “directs” the recipient to contact the named officer at an identified telephone number.

Finally, the appellant refers to the various activities which involved him and the Police during the time covered by the request, and takes the position that the named officer was one of those involved in the planning of and in providing advice on those activities, and that additional responsive records should exist with the named officer.

The Police were provided with a copy of the appellant’s representations.

The Police take the position that the original search for responsive records was reasonable and thorough. They state:

A search was undertaken for any responsive records which may exist with, or in the offices of, [the named officer]. [The named officer] advised that he has no notes, records or files related to this matter.

An additional search was conducted of the records originally located in response to a substantial number of previous requests by the same appellant regarding these matters. It should be noted that these earlier requests encompassed a large volume of records, which included the complete investigation file covering all aspects of the investigation.

In his sur-reply representations, the appellant maintains that additional responsive records exist, based on the material he provided earlier. He states:

It is the position of the appellant that [the e-mail exchange referred to earlier] indicates that several original documents exist within the Toronto Police Service that are responsive documents to the segregated requests [resulting in these appeals]. A reasonable search will uncover these documents if they still exist. The [Police] did not confirm or deny that these records had been destroyed by the Officer or officers involved.

Appeal MA-040313-1

This appeal arose from the appellant's request for access to records related to the appellant's arrest that involved a named member of the Police's Legal Services Branch. In support of his position that additional responsive records exist, the appellant refers to a copy of an e-mail exchange, which he attaches to his representations. In that e-mail exchange, the named member of legal services is the author of one of the e-mail messages, and the recipient of the other. The appellant takes the position that these records should exist in the record-holdings of this individual.

In addition, the appellant identifies that the named member of legal services refers to information and facts he had received earlier, and that is clear from the e-mails that information had been provided to this individual on an earlier occasion.

Finally, the appellant refers to the various activities that involved the Police and himself during the time, and takes the position that the named member of legal services was one of those involved in providing advice on those activities, and that additional responsive records involving the named individual should exist.

The Police were provided with a copy of the appellant's representations.

The Police take the position that the original search for responsive records was reasonable. They state:

During the original search for records, [the individual named in the request] was contacted. [He] advised that he has no notes, records or files related to this matter. It should be noted that [the individual named in the request] is not required to maintain a memorandum book.

... a previous search for responsive records, including the complete investigative file, had been conducted, with the issues disposed of in [an earlier appeal].

In his sur-reply representations, the appellant maintains that additional responsive records exist, based on the material he provided earlier. He states:

[The named member of legal services] generated an e-mail, copies of which were sent to [three identified individuals].

The appellant submits that he has no reasonable grounds to respond to the claim that outside of a memorandum book which was not required, the other records of [the named individual] were maintained by other Officers who had care and control of [the named individual's] work, including those officers or civilian personnel in charge of the cache and data base used in inter-office memos of the [Police], and that [the named individual] did not maintain his own files

Appeal MA-040314-1

This appeal arose from the appellant's request for access to records related to the appellant's arrest that involved another named police officer. In support of his position that additional responsive records exist, the appellant again refers to a copy of an e-mail exchange, which he attaches to his representations. In that e-mail exchange between members of the Police, the named officer is identified as one who was supplied with identified information. The appellant takes the position that these records ought to exist with the named officer.

The appellant also takes the position that the named officer's files would contain notes representing certain facts involving the appellant, and lists the facts that should be contained in the named officer's notes.

Finally, the appellant refers to the various activities that involved the Police and himself during the time, and takes the position that the named officer was one of those included in the planning of those activities, and that additional responsive records should exist with the named officer.

The Police were provided with a copy of the appellant's representations.

The Police take the position that the original search for responsive records was reasonable and thorough. They state:

During the original search for records, [the officer named in the request] was contacted. [He] advised that he has no file or records on this matter. A check of

the memorandum book notes of [the named individual] for the respective period was conducted and no memorandum book notes were located related to this matter.

... a previous search for responsive records, including the complete investigative file, had been conducted, with the issues disposed of in [an earlier appeal].

In his sur-reply representations, the appellant maintains that additional responsive records exist. He states:

Relying on the copy of the e-mail ... it is incontrovertible that [the named individual] is in possession of records of "facts" related to the case, and documented them as he received them from [another officer]. A memorandum book, if it exists and has not been destroyed, would record these communications.

The appellant acknowledges that the named officer and his commanding officers searched for records and examined the named officer's existing memorandum books; however, the appellant states:

Nevertheless it is clear from the records ... that [the named officer] was, in November of 2000, in possession of "facts" he referred and transmitted to [another individual]...

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. The *Act* does not require the Police to prove with absolute certainty that records or further records do not exist. In order to properly discharge its 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.

MA-040312-1

In this appeal the appellant believes additional records should exist in the files of the named officer. He references the material which supports his view that the named officer was involved in the proceedings involving him, and supports his position that additional responsive records exist. In the circumstances, however, I am satisfied that the Police's search for records responsive to the request resulting in Appeal MA-040312-1 was reasonable.

To begin with, as identified above, two pages of records, consisting of e-mail messages, were located and identified as responsive to the request. They are dealt with above.

Furthermore, the appellant states that a reference in the e-mail message “directs” the recipient to contact the named officer. I have reviewed that e-mail message, and note that it refers to the contacting of the named officer as simply an option.

As set out in their representations, the Police conducted various searches for the records, including directly contacting the officer named in the request. The Police identify that they did not locate any additional records.

I accept the evidence provided by the Police concerning their search for responsive records. Although the appellant questions some of the information, and also identifies the reasons why, in his view, additional records may exist, I am not convinced that this information is sufficient to support a finding that the Police’s search for the records was not reasonable. In the circumstances of this appeal, I find that the Police’s search for records was reasonable.

MA-040313-1

In this appeal the appellant refers to the referenced e-mail messages in support of his view that the named individual was involved in the proceedings involving him, and that additional responsive records exist. After reviewing the representations of the parties, I am satisfied that the Police’s search for records responsive to the request resulting in Appeal MA-040313-1 was reasonable.

As a preliminary point and as identified above, two pages of records, consisting of e-mail messages, were located and identified as responsive to the request. They are dealt with above.

The appellant states that the e-mail messages, which are either authored by the named individual or addressed to him, refer to other information of which the named individual was advised. However, there is no reference to whether this information was transferred orally or in writing.

The Police identify in their representations that they conducted various searches for the records, including directly contacting the named member of legal services, and identify that they did not locate any records other than the two pages of records, consisting of e-mail messages, that were located and identified as responsive to the request.

I accept the evidence provided by the Police concerning their search for responsive records. Upon my review of the records, as well as the appellant’s representations, I find that the Police’s search for records in Appeal MA-040313-1 was reasonable.

MA-040314-1

In this appeal the appellant is clearly interested in obtaining additional records he believes should exist in the files of the named officer. He refers to the e-mail messages in support of his view that the named officer was involved in the proceedings involving him, and in support of his position that additional responsive records exist, particularly information identifying the “facts” the named officer would have known. However, in the circumstances, I am satisfied that the

Police's search for records responsive to the request resulting in Appeal MA-040314-1 was reasonable.

To begin with, as identified above, two pages of records, consisting of e-mail messages, were located and identified as responsive to the request. They are dealt with above.

I accept that the e-mail message referred to by the appellant references certain "facts" which were passed on by the officer named in the request. However, again there is no reference to whether this information was transferred orally or in writing. The appellant maintains that the named individual would have recorded them in his memorandum book. The Police identify the various searches they conducted, and specifically identify that they reviewed the named individual's memorandum book notes for the respective period, and that no memorandum book notes relating to this matter were located. The Police also identify that the named officer was asked about this matter, and confirmed that he has no file or records on this matter.

In the circumstances of this appeal, I accept the evidence provided by the Police concerning their search for responsive records, and I find that the Police's search for records in Appeal MA-040314-1 was reasonable.

Conclusions

I find that the Police have adequately discharged their responsibilities under section 17 of the *Act* to conduct reasonable searches for all responsive records.

ORDER:

I uphold the decisions of the Police and dismiss the appeals.

Original Signed By: _____

June 14, 2005

Frank DeVries
Adjudicator