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

INTERIM ORDER MO-2084-I

Appeal MA-050328-2

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a three-page request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in which the requester sought all information relating to a complaint and subsequent investigation he had initiated with the Police in 1995. The request was for access to records relating to the investigations regarding the requester, named individuals, and an identified organization. Portions of the request read as follows:

> I want any and every piece of information regarding me and the investigation of [identified individuals] going back to the 1995/1996 investigation and also including the 1998 investigation and the … investigation … in 2004. …
>
> What I want from the [Police] is every scrap of information regarding me, [identified individuals], the [identified organization] … and all information regarding their investigations of my case and any other contacts and information gotten during the period from 1995 to the present.

The Police issued an initial decision letter in which they granted partial access to certain responsive records including a copy of an identified occurrence which included records dated in 1995, 1996, 1998 and 2004, portions of the notes of two detectives, and internal email correspondence between identified police officers. The Police indicated that portions of the records had been severed on the basis of certain identified exemptions.

In addition, the Police advised that no records exist for notes or information compiled by a named individual (A), and also that if the requester was seeking information regarding charges being laid, he would need to discuss this with the investigating officers.

Finally, the Police advised that any information relating to records concerning the Ontario Civilian Commission on Police Services (OCCPS) would have to be accessed from that agency directly, as there was no reference to OCCPS in the identified occurrence report.

The requester (now the appellant) appealed the Police's decision.

One of the issues raised in the appeal was the appellant's position that additional records should exist pertaining to the investigation of his complaint by the Police. The appellant indicated that there should be additional records such as notes, reports, correspondence, emails, faxes, telephone memos, interviews and communications with the identified organization. In particular, the appellant indicated that there should be additional documents held by three specifically named detectives.

During the course of the mediation of this appeal, the Police issued two revised decision letters to the appellant.

In the first revised decision sent on January 27, 2006, additional information contained in the existing identified records was provided to the appellant. Furthermore, the Police identified that a records search was conducted for the notes or information compiled by the named individual (A), and that no records existed.

In the second revised decision (dated March 20, 2006), the former Freedom of Information Coordinator for the Police stated:

> I have conducted an additional search for officers' notes, specifically from [the three named detectives]. I have been advised by both [two of the named detectives] that all information has been released previously, there is nothing further. The only additional information located is [the third detective's] notes. A decision has been made to grant you partial access to these notes.

Attached to the decision were portions of 22 pages of records, and the decision identified the exemptions which applied to the portions of the records which were not disclosed to the appellant.

During the mediation process, many of the outstanding issues were resolved, including issues relating to the responsiveness of records, the correction of records, and the application of the identified exemptions. Furthermore, the following issues relating to the search for records were resolved:

- with respect to any information concerning the appellant's complaint with OCCPS, the appellant agreed to submit a separate request to the Police and/or the Ministry of Community Safety and Correctional Services. Accordingly, records relating to the appellant's complaint with OCCPS, including the Police's response to this complaint, were removed from the scope of this appeal.

- concerning the information relating to the named individual (A), the appellant advised that he would be satisfied if the Police would confirm in writing that this individual did not have any additional records relating to the investigation. The Police provided the appellant with the requested written statement, and the appellant confirmed that the existence of additional records relating to this individual is no longer an issue in this appeal.

However, the appellant identified that he was not satisfied with the response of the Police concerning the existence of additional records, as he believed additional records should exist in relation to his request. In particular, the appellant advised the mediator that he believed there should be additional records relating to his request such as: notes; reports; correspondence; e-mails; faxes; telephone memos; interviews; and communications with the identified organization. The appellant also advised that he believed there should be additional records relating to this investigation by all of the officers involved including, but not limited to, the three named detectives.

The Police advised that there were no additional records, and the sole remaining issue in this appeal is whether additional records responsive to the appellant's request exist. In appeals involving a claim that an additional record exists, the issue to be decided is whether the Police have conducted a reasonable search for records responsive to the appellant's request as required by the *Act*.

The file was referred to me, and I sent a Notice of Inquiry to the appellant and the Police setting out the facts and the issue in this appeal, and scheduling an oral inquiry to address the remaining issue. Prior to the inquiry, the appellant forwarded to this office 52 pages of materials which he indicated he intended to rely on at the inquiry. The appellant also provided a copy of that material to the Police.

On June 26, 2006 I conducted an oral inquiry by teleconference. The appellant represented himself, but also had two individuals present in support. Participating for the Police were their Freedom of Information Coordinator (the Coordinator) and one of the named detectives (the third detective).

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that additional records exist, as is the case in this appeal, 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*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision 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/she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has conducted 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

Appellant's written materials

As indicated above, prior to the oral inquiry the appellant forwarded 52 pages of documentation which he advised he would rely upon at the oral inquiry. The documentation provided by the appellant includes a cover page, recent correspondence between the appellant and the Police, a number of email messages between the appellant and the Police, documentation relating to the request which resulted in this appeal, and a cover page addressed to OCCPS, with a number of attachments. There are also a number of duplicate copies of the documents contained in the 52 pages.

Appellant's oral representations

The appellant began by referring to the 52 pages of material he had provided. He states that these documents, particularly the email messages, stand "as evidence itself" that additional records exist, as records such as these emails would form part of "all and any communications that were requested". He also identifies that a number of the emails were sent from the Police to him, and that they date back to 2004.

The appellant specifically states that responsive records would include records relating to "any member of the Police force … from 2004 on right on up to the present". He refers to the emails and correspondence to and from other identified individuals, and does not accept the position of the Police that there are no other records.

With respect to any responsive information which may exist relating to events occurring between 1995 and 2004, the appellant identifies his concerns regarding the initial investigation. He states that the officers conducting the initial investigation did not interview the appropriate individuals, and did not conduct a thorough investigation. He states that his position is that more records exist, and that more should have been created.

The appellant then reviews in detail a number of the records which were provided to him. He identifies that he has been provided with "quite a bit" of notes from the original investigation into his original complaint, but that he believes that there ought to be more material from the third detective, who dealt with his subsequent complaints about the initial investigations. He refers to some of the 52 pages he provided, including emails and letters, and states that there should be additional responsive records regarding what this third detective's conclusions were.

The appellant also spent some time identifying concerns he had regarding the accuracy of some of the information in some of the documents. In addition, he states that the 52 pages of material he provided are "just a small portion" of the records that he has in his possession, and he offers

to attend at this office to "open his computer" to allow this office to view the "wealth of additional information" stored on his personal computer.

The Oral Representations of the Police

The Coordinator for the Police provided representations regarding the nature and extent of the searches conducted for records in response to the appellant's request. The Coordinator identifies that, in response to the request, the former Coordinator sent email messages to individual A and the three detectives involved in this matter, requesting any notes or information they had relating to the request. Two of the detectives provided their notes from their investigations. The third detective was not available at the time of the request, and his notes were not provided at the time of the initial decision, but were provided to the appellant subsequently (attached to the decision letter dated March 20, 2006).

In the course of processing this appeal, after it became clear that the appellant was raising the issue of the reasonableness of the search, the Coordinator states that the two detectives involved in the initial investigation were again asked to conduct a search for responsive records, and that no further records were located.

At the time the oral inquiry was scheduled, the Coordinator identifies that she again sent email messages to the officers involved in this matter, advising them of the teleconference and asking them to check for notes or further information. The Coordinator advises that she received responses from the first two detectives, the third detective, and an identified inspector who was involved in reviewing a specific internal complaint, and that all of them advised that they had no additional responsive records.

In addition, the Coordinator identified that she contacted the Professional Standards Branch of the Police and spoke with an identified individual who confirmed for the Coordinator that all of information in the Professional Standards Branch file had been released to the appellant at the time he made a complaint to that branch. The Coordinator confirmed that this complaint was made in 2004, and also advised that the Professional Standards Branch investigation is distinct from the OCCPS investigation.

With respect to the 52 pages of material provided by the appellant in this inquiry, the Coordinator identifies that these documents are emails exchanged between the appellant and individual officers (including the third detective). Accordingly, the Police submit that the appellant would already have copies of this correspondence, and they would, therefore, not be considered responsive to the appellant's request. She also notes that these pages of documents did not date back to the investigations in 1995 and 1998, but were more recent. Later in the representations, the Coordinator identifies that, in her review of the 52 pages, a number of them contain what she would characterize as a considerable amount of "rambling" or "name calling" by the appellant.

The Coordinator also identifies the individuals employed by the Police who would have reviewed the complaints made by the appellant regarding the investigations, and the results of

those reviews. She also states that the Police do not release records received from other agencies and bodies, as they belong to those other bodies.

As identified above, the "third detective" was also involved in this oral inquiry on behalf of the Police, and he provided representations on the nature of searches he conducted for responsive records. This detective confirmed that, in response to the request, he reviewed his notebook for the period of time from the initial contact he had with the appellant up to the date of the request, and that he copied all of the relevant responsive notes. He also located a copy of an occurrence report dated March, 2004 as well as a memo which he had submitted to the Professional Standards Branch regarding certain facts. He confirmed that these documents - the responsive portions of his notes, the occurrence report, and the identified memo - which were provided to the appellant, constituted his entire file.

Appellant's reply representations

The appellant maintains his position that additional records exist. He states that the Police appear to have confirmed that other records exist but that these records were not considered responsive to this request. In particular, the appellant states that the Police seem to have taken the position that, because certain records had been provided to him or by him, the Police did not consider them responsive, and he states that just because he may have a copy of a record does not make it non-responsive. The appellant also questions why the Police did not include as responsive records the emails exchanged between the appellant and members of the Police. The appellant also states that communications of "any kind" must be identified as responsive, notwithstanding that the Police may consider them to be "ramblings".

Finally, one of the individuals present in support of the appellant identified an issue regarding the possible destruction of records, and I briefly address this issue below.

Analysis and findings

As a preliminary matter, although the appellant identifies concerns he has regarding the way in which the Police conducted their investigations, and believes other records or documents "ought to have been created", as I confirmed during the oral inquiry, the sole issue in this appeal is whether the search for responsive records conducted by the Police was reasonable. Issues concerning the nature of the investigations conducted by the Police or the accuracy of information contained in particular documents, which the appellant has referred to on a number of occasions, are not issues before me in this appeal.

With respect to the issue that is before me, I have carefully reviewed the parties' representations. As I have indicated previously, the *Act* does not require the Police to prove with absolute certainty that records do not exist. The Police must, however, provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate records responsive to the appellant's request. 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 note from the representations of the parties that this request and appeal arise from a complaint the appellant initially made to the Police in 1995 regarding incidents which occurred a number of years earlier. The appellant also contacted the Police in 1998, and again in 2004 regarding his dissatisfaction with the way in which the Police had conducted the initial investigation. Subsequently, these complaints made their way to the Police's internal complaints bureau, as well as OCCPS, referred to above.

I also note that the material provided by the appellant and relied on by him includes documents which were created after the date of the request (August 4, 2005), and are clearly not responsive to the request for information made on that date. In addition, as identified above, during the mediation stage of this appeal, with respect to any information concerning the appellant's complaint with OCCPS, the appellant agreed to submit a separate request to the Police and/or the Ministry of Community Safety and Correctional Services. Information relating to the appellant's complaint with OCCPS, including the Police's response to this complaint, is not an issue in this appeal. Accordingly, the documentation provided by the appellant that contains these two categories of information is of no assistance in my determination of whether the Police conducted a reasonable search for responsive records.

However, the other documentation provided by the appellant is relevant to the issue in this appeal. The appellant provides copies of email exchanges he had with the Police which pre-date the date of the request. Copies of these email exchanges were not identified as responsive to the request and were not disclosed to him in response to this request. The appellant relies on this material to support his position that additional responsive records exist.

In their response to the appellant's position, the Police indicate that records such as those contained in the 52 pages of material were either provided to the Police by the appellant, or provided by the Police to the appellant, and that they were, accordingly, not considered to be responsive to the request. At another point in their representations they indicate that these records were not part of the investigative record nor maintained as such, and that therefore they were not considered to be responsive.

Responsiveness of records/reasonableness of search for records

In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

Furthermore, in Order 38, former Commissioner Sidney B. Linden considered an institution's obligations with respect to broadly worded requests. He stated:

> In my view, an institution that receives a broadly worded request has three choices in making its response. It can choose to respond literally to the request, which may involve an institution wide search for the records requested. It may request further information from the requester so that it may narrow its area of search. Finally, it may narrow a records search unilaterally, *but if it does so, it must outline the limits of the search to the appellant*. [emphasis added]

I adopt the approach taken in the orders referred to above regarding the scope of the request and the responsiveness of records.

Documents such as those contained in the 52 pages of materials

The Police provided various explanations as to why records such as the emails provided by the appellant were not considered to be responsive to the request. These include references to the fact that records such as these were already in the hands of the appellant, would not be included in the investigative file, or were ramblings and insults. What is clear, however, is that the Police did not consider them to be responsive to the request and did not search for them (although some of the emails are referred to in the notes provided by the third detective). In my view, the Police ought not to have unilaterally limited the scope of the request to certain types of records without, at the very least, outlining the limits of their search to the appellant.

The request resulting in this appeal was somewhat lengthy, and included a request to have certain information corrected, questions regarding the investigative processes used by the Police, and comments which may be considered to be insulting. However, the request also clearly states that the appellant sought access to "every scrap of information regarding me … and all information regarding [the Police] investigations of my case and *any other contacts* and information gotten during the period from 1995 to the present" (emphasis added). Records of the sort provided by the appellant which predate the date of the request and do not relate to the OCCPS complaint would, in my view, clearly "relate to the request", and are accordingly responsive to it.

Although I have found above that the emails referred to by the appellant are records responsive to the request, I understand why the Police took the position they did regarding some of these records. A number of them include what I would characterize as taunts and personal insults made by the appellant against individual police officers, including the officers receiving the emails. I understand why some of these records would have been regarded by the Police in a different category than the information contained in their investigative file, and that they may have been dealt with in a different manner. However, the fact remains that records such as these are responsive to the appellant's broad request for records, and ought to have been included in the searches conducted by the Police.

Professional Standards Branch

In the course of providing their representations, the Police referred to an investigation conducted in 2004 by the Professional Standards Branch. The Coordinator specifically referred to this investigation and indicated that the Police did not include records residing with this branch of the Police as part of the request, apparently on the basis that the appellant would have previously received these records. When asked whether the Professional Standards Branch process was distinct from the OCCPS process, the Coordinator indicated that it was. In my view, records relating to this process should have been considered responsive to the appellant's broad request to the Police as set out above.

Records from other bodies

As set out above, the Police state that they would not release to the appellant records received from other bodies. It appears from the material provided that the Police may not have considered records in their possession, but received from other bodies, to be responsive to the request. In their initial decision letter the Police identify that some records may be in the possession of OCCPS, and these records are not at issue in this appeal; however, other bodies and agencies are referred to in the representations of the parties, and there is no reference to responsive records relating to these other bodies in the decision letters.

Although bodies other than the institution receiving a request may have a greater interest in responsive records than the institution which receives a request, responsive records relating to these other bodies are still considered to be responsive records in the hands of the institution. Depending on the nature of these records, the institution may choose to transfer the request under section 18 of the *Act*, notify the other body as an affected party under section 21, or deny access to these records under an identified exemption. However, an institution cannot consider these records as non-responsive to the request.

Based on the representations received from the Police, it is unclear to me whether or not the Police considered records received from other bodies as responsive to the request, and I will require the Police to address this question in the order provisions set out below.

Two additional matters

There are two additional matters which I wish to address arising from the representations of the parties.

First, in his oral representations the appellant refers to "numerous" additional pages of material which he has in his possession and which he claims are similar to the material provided by him in this appeal. He maintains that this information is also responsive to the request, and offers to "open his computer" to this office to review this documentation.

I am not aware of the specifics of the information referred to by the appellant, and whether some or all of it is or is not relevant to the request. However, the Notice of Inquiry sent to the parties clearly identified that the parties were to provide any documentation they intended to rely on prior to the inquiry. The Notice of Inquiry stated:

> Please note that if you intend to rely on written documentation at the oral inquiry, you should provide this documentation to the Adjudicator with a copy to the other party no later than one week prior to the date of the inquiry.

The Notice of Inquiry also stated:

> Therefore, the appellant will be asked to inform the Adjudicator of any details he is aware of concerning records which have not been located, or any other information to indicate that the search carried out by the Police was not reasonable.

The appellant provided the material he considered relevant to this inquiry in the course of providing his representations. This material was sufficient to satisfy me that the Police ought to conduct further searches for records, and I am ordering them to do so. However, in regards to the appellant's reference to the "pages" of other material in his possession, the appellant chose not to provide that information in the course of this inquiry. Accordingly, it is not evidence before me, and is not referred to in this order.

Secondly, in the latter part of the oral hearing, the discussion focussed on the possible requirements of records retention schedules in the event that records which may have existed in the past have been destroyed or otherwise dealt with by the Police. Although the appellant indicates his dissatisfaction with the manner in which the Police conducted their initial and subsequent investigations, and states that additional records should have been created, the issue of the possible destruction of records has only been raised in the context of how the Police may have dealt with certain emails. I have found above that the Police did not consider the emails to be responsive to the request and did not search for them. In light of my decision that the search by the Police was not sufficiently broad, and should have been cast wider, and my requiring the Police to conduct further searches, there is no need to review the issue of whether records were or were not destroyed in this interim order.

ORDER:

1. I order the Police to conduct further searches for records responsive to the request. The scope of this request is to include, but not be limited to, email correspondence, documents residing with the Professional Standards Branch of the Police, and any responsive documents which may have been received from or provided to other bodies (excluding OCCPS). I order the Police to provide me with an affidavit sworn by the individual who conducts the search(es) within 30 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

    (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

(b) a statement describing the employee's knowledge and understanding of the subject matter of the request;

(c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

(d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;

(e) the results of the search;

(f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The affidavit referred to above should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

2. If, as a result of the further searches, the Police identify any additional records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

3. I remain seized of this appeal in order to deal with any other outstanding issues regarding the search for records arising from this appeal.

Original signed by: August 31, 2006
Frank DeVries
Adjudicator