



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2122-I

Appeal MA-050328-2

Hamilton Police Services Board



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This Interim Order follows from my previously issued Interim Order MO-2084-I in this same appeal, which was released on August 31, 2006.

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 appellant 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 appellant, certain 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, advised that no records exist for notes or information compiled by a named individual, and advised that any information relating to records concerning the complaint made by the appellant to the Ontario Civilian Commission on Police Services (OCCPS) would have to be accessed from that agency directly.

The appellant appealed the Police's decision, and one of the reasons for the appeal was the appellant's position that additional records responsive to his request should exist.

During mediation, the Police issued two revised decision letters to the appellant, and a number of issues were resolved, as described in Interim Order MO-2084-I. However, the appellant was not satisfied with the response of the Police concerning the existence of certain additional records, and believed additional records should exist in relation to his request. The Police advised that there were no additional records, and the sole remaining issue in this appeal was whether additional records responsive to the appellant's request exist.

As I identified in Interim Order MO-2084-I, in appeals involving a claim that additional records exist, 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 transferred to the inquiry stage of the process, 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 detectives involved in the investigation that was the subject of the request.

The Police and the appellant provided representations in the oral inquiry, as set out in Interim Order MO-2084-I. Based on the representations of the parties, I issued Interim Order MO-2084-I, in which I addressed the issues in this appeal. In that Interim Order, I found that three categories of records were responsive to the appellant's request, and ordered the Police to conduct further searches for those three categories of records.

INTERIM ORDER MO-2084-I

Emails and correspondence between the appellant and the Police

With respect to the issue of the search for emails and correspondence between the appellant and the Police, examples of which were included in the appellant's materials provided at the oral inquiry, the Police stated that they did not consider them to be responsive to the request and did not search for them. In Interim Order MO-2084-I, I found that 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. Although I acknowledged that some records were in a different category than the type of information contained in the Police's investigative file, I stated as follows regarding whether records such as these would be responsive to the request:

... the request ... 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.

I accordingly found that records of this nature ought to have been included in the searches conducted by the Police, and ordered the Police to conduct further searches for them.

Professional Standards Branch

Concerning records which may exist in the Professional Standards Branch, I found as follows:

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.

I accordingly ordered the Police to conduct further searches for records responsive to the request residing with the Professional Standards Branch of the Police.

Records from other bodies

With respect to responsive records which may have been received from other bodies, the Police stated that they would not release such records to the appellant. I held that:

It appears ... 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.

I then stated that, based on the representations received from the Police, it was unclear to me whether or not the Police considered records received from other bodies as responsive to the request. I accordingly ordered the Police to conduct further searches for any responsive documents which may have been received from or provided to other bodies (excluding OCCPS).

Order provisions in Interim Order MO-2084-I

Order provisions 1 and 2 of Interim Order MO-2084-I read as follows:

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.

In Interim Order MO-2084-I, I also stated that I remained seized of this appeal in order to deal with any other outstanding issues regarding the search for records by the Police.

Following the issuance of Interim Order MO-2084-I, I received an affidavit sworn by the Freedom of Information Coordinator for the Police. I subsequently received a copy of a decision letter and attached records which the Police had sent to the appellant.

After reviewing the material provided by the Police, I have decided it is not necessary to hear from the appellant at this time, and I have decided to issue this further Interim Order, addressing a number of issues respecting the adequacy of the searches conducted by the Police in response to the Order Provisions in Interim Order MO-2084-I.

DISCUSSION:

Emails and correspondence between the appellant and the Police

In the affidavit provided by the Police, the affiant reviews in detail the searches conducted for records prior to the oral inquiry. The affiant then confirms that, in Interim Order MO-2084-I, the Police were ordered to conduct further searches for records responsive to the original request. The affiant also comments on the earlier searches conducted for records, and refers to the Police's records retention schedule in reference to the fact that the appellant had retained a number of emails which the Police had not retained. The affiant responded that there is no retention schedule which dictates that the Police must retain emails. She then states as follows with respect to the existence of emails responsive to the request:

Our internal computer system has retention of one year, so if not printed by the recipient it would automatically purge off the system.

After identifying why these emails would not have been retained, the affiant states:

Some of those emails had been forwarded to [the third detective's] superiors for their information and to advise them of the complainant's dissatisfaction with our service.

I have located these emails during this final search for documents. They have been collected and will be forwarded to the appellant with a decision letter [as required by Interim Order MO-2084-I].

The Police subsequently sent me a copy of the decision letter sent to the appellant, which states:

As per [Interim Order MO-2084-I], please find enclosed further documents that were located during this ordered search.

The Police also provided me with the attached records, which consist of twenty pages of correspondence and emails, most of which passed between the appellant and the Police. At least some of them appear to have been located in the Police's Professional Standards Bureau, and one was sent to the appellant from the Chief of Police.

Findings

As identified in Interim Order MO-2084-I, where a requester claims that 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 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that 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.

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 that it has made a reasonable effort to identify and locate responsive records [P-624].

In this appeal, and in response to Interim Order MO-2084-I, the Police have clearly conducted further searches for emails and correspondence passing between the appellant and the Police, have identified additional records responsive to the request, and have provided a decision letter to the appellant, stating that access to the records is granted in full.

In the circumstances of this appeal, it is possible that the further searches conducted by the Police for emails and other correspondence were reasonable; however, due to the lack of specificity in the affidavit regarding the nature of those further searches conducted by the Police, it is not possible for me to make that determination.

Although the affidavit provides significant details regarding the earlier searches conducted by the Police, Interim Order MO-2084-I required the Police to conduct further searches. The detailed information required to be included in the affidavit which I ordered the Police to provide to me under Order Provision 1 related to the nature of the further searches to be conducted. On my review of the affidavit and the records provided to the appellant, it appears that this further search for records identified additional responsive records in files maintained by the detective's "superiors"; however, these individuals are not specifically identified, nor is the location of these files specified. It is unclear whether these records were located in one or many offices, nor does the affidavit provide information regarding how many or which "superiors" were contacted. Specifically, I find that the affidavit fails to address questions such as the date(s) the person conducted the search and the names and positions of any individuals who were consulted, information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search, as well as other information relevant to the searches conducted.

In the absence of specific, detailed information regarding the nature of the further searches conducted for responsive records, and given the circumstances of this appeal, I will order the Police to provide me with additional details about the nature and extent of the further searches they conducted for email correspondence as a result of Interim Order MO-2084-I.

Professional Standards Branch

In the affidavit provided by the Police, the affiant suggests that some or all of the records located as a result of the further searches conducted, and now provided to the appellant, were located in the Professional Standards Branch investigative files. The affidavit then states:

The remainder of the Professional Standards Branch files is non responsive to this original request but responsive to the appellant's complaint about the [Police] and the Investigating Officers, therefore he would not be entitled to access these records

Finding

As identified above, in Interim Order MO-2084-I, I found that any and all records relating to the complaints made to the Professional Standards Branch should have been considered responsive to the appellant's broad request for 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".

The information provided by the Police in the affidavit does not describe the nature of the searches conducted for responsive records located in the Professional Standards Branch (although the searches appear to have located some such records). Furthermore, the Police indicate that, although additional records relating to the appellant's complaint apparently exist, the appellant would not be entitled to access these records (without providing the appellant with an access decision describing the records nor the basis for this denial of access).

In the absence of specific, detailed information regarding the nature of the searches conducted for responsive records in the Professional Standards Branch, and given the circumstances of this appeal, I will order the Police to provide me with additional details about the nature and extent of the further searches it conducted in the Professional Standards Branch as a result of Interim Order MO-2084-I.

In addition, the Police have identified that additional records relating to the appellant exist in that branch, although they state that these records are "not responsive". However, based on my decision in Interim Order MO-2084-I, and the broad nature of the appellant's request, in my view these records would be responsive to the appellant's request. I will accordingly order the Police to issue an access decision to the appellant with respect to those records.

Records from other bodies

Regarding records received from other bodies, the affidavit provided by the Police states:

Any documents that may be in our possession from other bodies can only be obtained from those bodies as we do not release documents prepared and

produced by outside bodies. I believe this was addressed with the appellant in his original decision letter.

The affidavit is correct in identifying that this issue was addressed in the original decision letter to the appellant. However, it was also specifically addressed by me in Interim Order MO-2084-I, where I stated:

It appears ... 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.

In Order Provision 1, I specifically ordered the Police to conduct further searches for any responsive documents which may have been received from or provided to other bodies (excluding OCCPS).

Finding

The Police have not provided specific, detailed information regarding the nature of the searches conducted for responsive documents which may have been received from or provided to other bodies (excluding OCCPS), nor have they identified any additional responsive records. In light of the information provided by the Police in their affidavit, and given the circumstances of this appeal, I will order the Police to conduct further searches for records responsive to this aspect of the appeal. To be clear, I will order the Police to search for responsive documents which may have been received from or provided to other bodies (excluding OCCPS), to provide me with additional details about the nature and extent of the further searches it conducts for such records, to identify to me the results of those searches, and to provide a decision letter to the appellant respecting access to any responsive records which exist or which may be located as a result of those further searches.

ORDER:

E-mail correspondence

1. I order the Police to provide additional details about the nature and extent of the further searches it conducted for e-mail correspondence as a result of Interim Order MO-2084-I. I order the Police to provide me with an affidavit sworn by the individual who conducted the search(es) within 21 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; and
 - (e) the results of the search.

Professional Standards Branch Records

2. I order the Police to provide additional details about the nature and extent of the further searches it conducted for responsive records with the Professional Standards Branch as a result of Interim Order MO-2084-I. I order the Police to provide me with an affidavit sworn by the individual who conducted the search(es) within 21 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; and

- (e) the results of the search.
3. I order the Police to provide a decision letter to the appellant regarding access to responsive records with the Professional Standards Branch in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

Responsive documents which may have been received from or provided to other bodies (excluding OCCPS)

4. I order the Police to conduct further searches for 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 21 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.
5. I order the Police to provide a decision letter to the appellant regarding access to responsive records which may have been received from or provided to other bodies (excluding OCCPS) in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

General

6. The affidavits referred to in Provision 1, 2 and 4 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400,

Toronto, Ontario, M4W 1A8. The affidavits 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.

7. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original signed by: _____
Frank DeVries
Adjudicator

November 17, 2006