



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2196-I

Appeal MA-050328-2

Hamilton Police Services Board



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This Interim Order follows from my previously issued Interim Orders MO-2084-I and MO-2122-I in this same appeal, which were released on August 31, 2006 and November 17, 2006 respectively.

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.

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 Co-ordinator (the Co-ordinator) 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 all three of them. In that Order, 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 Co-ordinator for the Police. I subsequently received a copy of a further decision letter and attached records which the Police had sent to the appellant.

After reviewing the material provided by the Police, I issued Interim Order MO-2122-I in which I addressed 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.

In response to Interim Order MO-2122-I, the Police provided another affidavit sworn by the Co-ordinator. In addition, I subsequently received a copy of a further decision letter which the Police had sent to the appellant.

This Order constitutes my ruling on the adequacy of the searches conducted by the Police for responsive records following the issuance of Interim Order MO-2122-I.

DISCUSSION:

REASONABLE SEARCH AND INTERIM ORDER MO-2122-I

As identified in previous orders, 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].

Interim Order MO-2122-I addressed three specific categories of records responsive to the request which were remaining at issue, and made various findings regarding each of those categories. I will summarize those findings and the requirements arising from them, and review the Police's response to them to determine whether the Police have conducted reasonable searches for responsive records.

1) Emails and correspondence between the appellant and the Police

In Interim Order MO-2122-I I found that, in response to Interim Order MO-2084-I, the Police had clearly conducted further searches for emails and correspondence passing between the appellant and the Police, identified additional records responsive to the request, and provided a decision letter to the appellant, stating that access to the records was granted in full. I also stated that it was 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, I found that it was not possible for me to make that determination. I stated:

... 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. ...

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.

In response to Interim Order MO-2122-I, the Police provided a further affidavit in support of their position that the searches conducted for responsive records was reasonable. In that affidavit, the Coordinator for the Police reviews the searches that were conducted by the Police and the specific records which were located in response to those searches. The Co-ordinator also affirms that she had "exhausted all other areas within the service to search", and states that there are "no further locations to be searched." With respect to the requirement in Interim Order MO-2122-I that the Police provide me with additional details about the nature and extent of the further searches they conducted for email correspondence, and the concern that a named detective's "superiors" were not specifically identified, the affidavit identifies the referenced "superiors" by name. In addition, the affidavit provides additional evidence that these superiors were also involved in the searches, and notes the results of the searches.

Based on the previous evidence provided to me and referred to in the previous Interim Orders, and on the further affidavit evidence provided to me (in particular, the specific information about the names of the “superiors” who were involved in the searches for responsive records and the results of those searches), I am satisfied that the searches conducted by the Police for emails and correspondence between the appellant and the Police were reasonable.

2) Professional Standards Branch

In Interim Order MO-2084-I, I had determined 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”. Although in response to that order the Police provided additional material relating to the searches for records with the Professional Standards Branch, I stated as follows in Interim Order MO-2122-I:

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.

In response to Interim Order MO-2122-I, the Police provided a further affidavit, sworn by the Co-ordinator. The Police have also provided me with a copy of a decision letter sent to the appellant dated December 6, 2006, regarding access to responsive records held by the Professional Standards Branch of the Police. In this decision letter the Police state:

I am responding to Order MO-2122-I for information pursuant to the [Act].

This letter is in compliance with the Information and Privacy Commission's above order and relates to access to responsive records held by our Professional Standards Branch. ...

The decision goes on to indicate that access to the responsive records is not granted on the basis that the records fall outside the operation of the Act as a result of the exclusion in section 52(3).

The decision of the Police that section 52(3) applies to the responsive records referred to in the Police's decision was appealed by the appellant, and that file was eventually resolved by a finding by an Intake Officer with this office, which concluded that the responsive records were excluded from the scope of the Act by the application of section 52(3).

Based on the evidence provided by the Police, including the affidavit, and on the recently-issued decision letter which referred to the responsive records located in the Professional Standards Branch file, I am satisfied that the Police's search for records located in the Professional Standards Branch was reasonable.

3) Records from other bodies

With respect to records which may have been received from other bodies, Interim Order MO-2122-I stated:

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.

The response by the Police to this aspect of Interim Order MO-2122-I is brief. The affidavit provided by the Police refers to my finding above, restates the reasonable search requirements, and then states that, at the time of the swearing of the affidavit and to the best of the affiant's knowledge, "no further *releasable* records exist".

An issue that has been raised a number of times in this appeal is whether certain records are responsive to the request. This first arose in the course of the oral representations made by the parties. It was also discussed in Interim Orders MO-2084-I and MO-2122-I. In those orders, I confirmed that the appellant's request for records was broadly worded, and that the scope of the Police's search for records should include all responsive records (other than those specifically removed from the scope of the request in mediation). Responsive records would include not only records which the Police ultimately choose to provide to the appellant, but also records which the Police choose to deny access to.

Furthermore, I clearly stated that records which the Police believed should not be disclosed would nonetheless be responsive to the request, and that searches for those records ought to be conducted.

As identified, the affidavit provided by the Police in response to Interim Order MO-2122-I and in relation to the adequacy of the search conducted by the Police states that "no further *releasable* records exist". Although this statement may be accurate, it does not address the requirement on the Police to conduct an adequate search for the responsive records, and to provide evidence regarding the nature of the searches conducted.

It may well be that certain records responsive to the appellant's request would not be released to the appellant for any number of reasons, including:

- because a discretionary or a mandatory exemption under the *Act* applies,
- because the records fall outside the scope of the *Act* and are not covered by it, or
- because other bodies have a greater interest in those records and ought to make the determination regarding access, or for other reasons.

However, this does not negate the obligation on the Police to conduct an adequate search for those records.

The obligations on an institution to search for records and provide them to this office, even though the records may be exempt or even fall outside the scope of the *Act*, was reviewed in Order P-623. In that order, the Ministry of Health took the position that it was not required to provide certain records to this office, as it had determined that those records fell outside the scope of the *Freedom of Information and Protection of Privacy Act* on the basis of section 65(6) of that Act (the equivalent of section 52(3) of the *Act*). Adjudicator Holly Big Canoe determined that this office has the mandate and responsibility to review records to determine whether or not the *Act* applies to them. She stated:

The first issue which arises, then, is whether the words "This *Act* does not apply" in section 65(2) of the *Act* mean that the whole *Act* does not apply to these records, including the appeal process and section 52(4) of the *Act*.

Section 1(a)(iii) of the *Act* provides that one of the purposes of the *Act* is to provide a right of access to information in accordance with the principle that "decisions on the disclosure of government information should be reviewed independently of government". In keeping with this principle, the Legislature created an independent, expert review authority (the Commissioner) to determine issues relating to access to information.

The appeal provisions of the *Act* provide that any decision of the head of an institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the *Act*, which states:

After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the *Act*, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.

While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation of the *Act*, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).

In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).

Order P-623 was upheld by both the Ontario Division Court and the Ontario Court of Appeal (*Minister of Health*) v. *Big Canoe* [1995] O.J. No. 1277 (C.A), affirming (June 29, 1994), Toronto Doc. 111/94 (Div. Ct.).

Accordingly, the position of the Police that they conducted a search for all *releasable* records does not satisfy the requirements to respond to access requests in accordance with the requirements of the *Act*. In this case, it does not satisfy the obligation of the Police to provide

this office with sufficient evidence to support a finding that a reasonable search for responsive records has been conducted.

As a result, I will order the Police to search for responsive documents which may have been received from or provided to other bodies (excluding OCCPS), and to provide me with additional details about the nature and extent of the further searches it conducts. In addition, if such records are located, the Police are to provide a decision letter to the appellant respecting access to those records.

ORDER:

1. 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.
2. If responsive records are located as a result of the search(es) referred to in Provision 1, I order the Police to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

3. The affidavit referred to in Provision 1 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.
4. 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

_____ May 28, 2007