



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2372-I**

## **Appeal MA07-310**

### **Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all notes, reports or other documents pertaining to a marihuana grow operation at a particular property.

The Police located responsive records and issued a decision letter denying access to these records in their entirety. The records identified at this stage consisted of extracts from the notebooks of a number of police officers. The Police claimed that the responsive portions of these records were exempt pursuant to sections 8(1)(l) (law enforcement) and 14(1) (personal privacy) of the *Act*. Other portions were identified as non-responsive. The requester, now the appellant, appealed the Police's decision to this office.

During the mediation stage of the appeal, the appellant stated that he believed that additional records responsive to his request should exist. To support his position, the appellant provided a copy of a record that he received in response to another freedom of information request that was made to the City of Toronto (the City). This record was a document entitled "Toronto Drug Squad Marihuana Cultivation Reporting Form".

The Police then agreed to conduct additional searches during mediation. As a result, they located some additional police officers' notes, and denied access based on the same exemptions identified in their initial decision letter, namely, sections 8(1)(l) and 14(1), and also claimed that some portions of the newly discovered records were non-responsive. As well, they identified the one page document that had been provided to the Mediator by the appellant, entitled "Toronto Drug Squad Marihuana Cultivation Reporting Form" (the Reporting Form) as responsive, granted partial access. The severed portions of this record were denied pursuant to section 14(1).

The appellant decided to appeal the Police's decision to withhold these additional records and the portions of the Reporting Form. The appellant still believes that additional records responsive to his request should exist and accordingly, the reasonableness of the Police's search for records continues to be an issue in this appeal.

Also during mediation, the Police clarified that they are relying on section 8(1)(l) to withhold only the police codes that appear within the records at issue in this appeal. In turn, the appellant advised that he is not pursuing access to any police codes. Accordingly, section 8(1)(l) is no longer at issue in this appeal. The appellant also confirmed that he is not pursuing access to any portions of the records that have been identified as non-responsive by the Police.

Further mediation was not possible and this file was moved to the adjudication stage of the appeal process.

The issues in this Appeal MA07-310 are whether the Police have properly denied access to the records at issues in that appeal, and whether they have conducted a reasonable search. I have decided to issue this interim order on the issue of whether the Police have conducted a reasonable search for responsive records. I will issue a further order relating to the denial of access under section 14(1) in due course.

The description of the exchange of representations process that follows relates only to the appellant's claim that the Police have not conducted a reasonable search for responsive records.

I began my inquiry on this issue by issuing a Notice of Inquiry to the Police inviting them to submit representations on the issue of reasonable search. I received representations from the Police. I then issued a Notice of Inquiry inviting the appellant to submit representations in response and I provided the appellant with the non-confidential portions of the Police representations. I received representations from the appellant. I decided that the appellant's representations raised issues to which the Police should be provided an opportunity to respond. Therefore, I wrote to the Police enclosing a complete copy of the appellant's representations, and invited the Police to submit representations in reply. The Police responded with reply representations.

In their reply representations, in addition to responding to the appellant's arguments on the reasonable search issues, the Police advised that further searches for records were conducted and an additional responsive record was discovered. Consequently, the Police issued a revised decision letter identifying the additional responsive record (the I/CAD Report relating to 911 calls) and withholding access to that record pursuant to section 14(1). The appellant appealed that decision, and appeal MA07-310-2 was opened. The appellant's appeal of the Police decision to withhold the I/CAD Report will be dealt with in Appeal MA07-310-2 and, therefore, that record is not at issue in this appeal.

After reviewing the Police's reply representations, I decided that the appellant should be invited to submit sur-reply representations. As a result, the non-confidential portions of the Police reply representations were shared with the appellant, and I invited him to submit sur-reply representations, which he subsequently provided.

## **DISCUSSION:**

As noted above, the appellant claims that additional responsive records must exist. 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.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that 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 the records do not exist. However, 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 [Order P-624]. A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Police claim that they have conducted a reasonable search for responsive records. In their initial representations, they state:

Through the mediation stage of this appeal, this institution complied with every request for information by the IPC, while asserting that these records would not be considered for release to the appellant. All memorandum book notes have been provided by the TPS Drug Squad confirming the absence of involvement of the appellant. The TPS having made no arrests in this case have neither records of arrest in their possession nor any additional records than those already provided to the IPC.

...

Every reasonable effort to locate responsive records was conducted. Consultation with the TPS Drug Squad have indicated that there are no further criminal investigations or arrests, therefore no more documents to be forwarded. All records have been provided to the IPC, no further locations can be searched as no further criminal investigations or arrests have been realized.

The Police conclude by claiming that their search for responsive records has been “exhaustive” and that there are no other locations to be searched.

The appellant disputes that the Police’s search for responsive records has been sufficient. He states:

In its decisions, the Police never referred to any records in particular, therefore we do not know exactly what is in their possession. However, we have a hard time believing that the Police can receive a 911 call, show up at the unit, and find a criminal operation with 118 marihuana plants, and not have any officers’ notes or reports of the call or the event. We believe that there must be responsive records...

The Police had not even located the record entitled Toronto Drug Squad – Marijuana Cultivation Reporting Form, yet this record was provided to us by the City of Toronto. We submitted a request for access to the City at the same time as the request we submitted to the Police, and the City provided access to the Reporting Form in response to that request. Contrary to the statement of the Police in the fifth paragraph on page three of its representations, as just stated above, it was not the Police’s suggestion that prompted us to make our request for access to the City. We gave [the mediator] a copy in support of our appeal. It is our understanding based on our conversations with the [mediator] that the Police had not even forwarded that record to the IPC. Had this record not been provided

to us by the City, we would not have known of its existence and it would have been withheld from us by the Police because of their inadequate search.

In addition to the Reporting Form mentioned above, the City also disclosed to us some email communications. One of these internal emails dated December 15, 2005, a copy of which is attached for your reference, states "We received notification from the Police..." Where is this notification?

As well, an Investigation Card from the City, Urban Development Services, a copy of which is also attached for your reference, refers to the Toronto Police as the "source of complaint". Where is the Police record reporting the marijuana operation to the City?

Lastly, the Toronto Drug Squad Marijuana Cultivation Reporting Form refers to Detective Mark Clendinning as the reporting and assessing officer. Prior to completing the Reporting Form, we believe that there must have been notes written by this officer in relation to this unit.

The Police submit in reply that all reasonable efforts to locate responsive records were conducted, and because there have been no further investigations or arrests, there are no more documents in their possession. With respect to the appellant's comments regarding the Police communications with the City about the marijuana grow operation, the Police state:

The normal process is the Toronto Police Service Drug Squad notifies the City of Toronto via email. Once again the writer contacted the Drug Squad Unit to confirm this process. The Analyst was informed that the TPS Drug Squad Crime Analyst holds carriage of this responsibility. The further search and subsequent receipt of the records assisted us in ensuring all available records were called in. Every reasonable effort has been made to obtain all responsive records; these are in the possession of the IPC.

It should be noted that during the time of this investigation, the Crime Analyst has since retired. Any records of electronic correspondence with the City's Municipal Licensing & Standards would no longer be maintained by the service. The relationship with that organization is they are informed of the location where marijuana is cultivated for their follow-up, while our institution handles law enforcement.

In sur-reply representations, the appellant states that although he is prepared to accept the position of the Police that there are no more officers' notes that may be responsive to the request and that there may be no records relating to the laying of criminal charges, he believes that there must exist a Police report or other document confirming closure of the investigations. The appellant states:

Isn't there an occurrence/file/case number somewhere in the Police's database or some kind of information or report entered in relation to the address? If not, how did the Police's FOI Office even track down this event upon receiving our request for access?

While the Police maintain that all responsive records were provided to the IPC, the Police have not provided any explanation as to why there would not be a report or another type of corporate document beyond the officers' notes, to address our belief that more records exist.

### **Analysis and Findings**

The Police conducted further searches during mediation and at the inquiry stage of this appeal, each of which produced additional responsive records. Having reviewed the evidence before me concerning the searches that have been done, and the arguments submitted, I conclude that there remains a substantial possibility that additional responsive records exist.

To begin with, I am not persuaded by the Police's representations. Despite asking for detailed information about the searches conducted, the representations are general and lacking in particularity. For example, I have not been provided with sufficient information regarding the employees who conducted the searches for records, the dates the searches were conducted, the files and locations that were searched, or who was contacted in the course of the search. I also note that the Police admit that there were email communications with the City regarding the incident, but I have not been provided with any details of the searches that were conducted for these emails, which the Police suggest no longer exist. Without a search, however, I am not satisfied that they no longer exist. Moreover, it appears that if the appellant had not identified the Reporting Form, the records relating to the 911 call, and the email communications between the Police and the City in his representations, the Police may not have agreed to conduct the additional searches that they did conduct in the course of this appeal.

On the other hand, the appellant's representations provide a reasonable basis for concluding that additional records are likely to exist. For example, the Police representations clarify that no charges were laid as a result of this incident, but I note that there is nothing in the responsive records to explain why no charges were laid and what investigations may have been conducted that led to that decision. It only seems reasonable that records would exist relating to the decision not to lay charges. As well, it seems likely that an occurrence report or some other formal documentation of the investigation is likely to exist, and no credible explanation has been provided for the absence of such a record.

In addition, the appellant provided this office with a number of records in support of his position in this appeal, which were obtained by the appellant from the City. In a document entitled "Health Hazard Complaint/Request/Inquiry for Service Inspection Report", there is a reference to a Police report as being attached. However, other than the Reporting Form, the Police have not provided this office with any reports or other records relating to communications with the City.

There is also information in the records that have been provided to this office that suggests that additional records may exist that have not been provided by the Police to this office. I am unable to set out the details of the information in the records without disclosing their contents and, given that no findings have yet been made about access to these records, I will not do so. However, having read pages 3, 10, 33, 34 and 35 of the records, I believe that these pages contain evidence that supports a finding that additional responsive records do exist that have not been found or identified by the Police as responsive.

For all of these reasons, I find that the Police have not conducted a reasonable search for records responsive to the appellant's request and I will order the Police to conduct further searches for records.

**ORDER:**

1. I order the Police to conduct a further search for records responsive to this request, including a search for records in electronic form, and to provide the appellant with a decision letter in accordance with the provisions of sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the *Act*. I further order the Police to provide me with a copy of this decision letter to the appellant.
2. Within the time frame identified in Order Provision 1, I also order the Police to provide me with affidavit evidence sworn by the individuals who conducted the searches, detailing the searches that have been conducted during this inquiry and the searches that have been conducted as a result of this order. The Affidavit evidence should include the following information:
  - a) The names of employees who conducted the searches, the qualifications, positions and responsibilities of these employees, information about the types of files and locations of files that were searched, who was contacted in the course of the search, and finally, what were the results of the searches.
  - b) If, as a result of the searches, it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about the records retention policies and practices in relation to those records.
3. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original Signed by: \_\_\_\_\_  
John Higgins  
Senior Adjudicator

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November 28, 2008