



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2434-I

Appeal MA07-144-2

Hamilton Police Services Board



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BACKGROUND OF THE APPEAL:

In 1995, an individual made a complaint to the Hamilton Police Services Board (the Police) relating to alleged abuse he and his brother received while in foster care and/or while a ward of a specified Children's Aid Society. The Police conducted an investigation and decided not to lay any charges. The Police advised the complainant that no charges were laid as the primary suspects had died. In 1995, 1996 and 1998 the complainant advised the Police that the Children's Aid Society should be held criminally responsible for the abuse he suffered, but again the Police did not lay charges. In 2004, the complainant advised the Police that he had new evidence. The new evidence and the 1995-1998 investigations were reviewed by a detective. At the time, the complainant provided the detective with information he obtained from his Children's Aid case file. The Police subsequently advised the complainant that their 1995-1998 investigations and the 2004 review found no evidence to support criminal charges. At the time, the Police also advised the complainant that no further police investigation would occur unless new evidence was presented.

On August 4, 2005, the complainant submitted a request to the Police under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for "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 Police granted him partial access to responsive records and he appealed the Police's decision to deny access to other information to this office. Appeal files MA-050328-1, MA-050328-2 and MA-050328-3 were opened and Interim Orders MO-2084-I, MO-2122-I, MO-2196-I and Final Order MO-2203-F disposed of the reasonable search issues in those appeals.

This appeal deals with the complainant's second expanded request for related information.

NATURE OF THE APPEAL:

The Police received a seven-page request under the Act for access to records relating to the requester's complaint and the Police's initial and subsequent investigations. The date of the second request was April 5, 2007. The request sought access to all records for the period of October 2, 1995 to April 5, 2007 relating to:

- any investigations concerning the requester, named individuals, and the Children's Aid Society; and
- the requester and various organizations such as the Professional Standards Branch, the Ontario Civilian Commission on Police Services (OCCPS) and the Police's Freedom of Information office.

The requester also asked the Police to make specified corrections to their records. The remaining portions of the request relate to questions the requester has about the Police's conduct relating to the investigation of his complaints.

Enclosed with the request was a cheque, which the Police returned. The Police advised the requester that their policy is that fees prescribed under the Act are to be paid by cash or money

order. The requester filed an appeal with this office, disputing the authority of the Police to demand payment by cash or money order as a condition for processing his access request and appeal file MA07-144 was opened. The issue was addressed in Order MO-2201, in which Assistant Commissioner Brian Beamish found that the Police were in a deemed refusal position. As a result, the Police were ordered to issue a final decision letter to the requester upon their receipt of the appellant's personal cheque.

The appellant resubmitted the cheque to the Police and the Police issued a decision letter granting the appellant partial access to the responsive records – an occurrence report, police officer's handwritten notes and an e-mail chain. The Police indicated that a copy of the severed records would be provided to the appellant upon payment of \$32.80.

The Police denied the appellant access to the remaining portions of the records under section 38(a) in conjunction with the discretionary law enforcement provisions found at sections 8(2)(a), 8(1)(e) and 8(1)(l) of the *Act*. The Police also claimed that disclosure of the remaining records would constitute an unjustified invasion of privacy under section 38(b) and that the factors favouring non-disclosure at sections 14(2)(e), 14(2)(f) and 14(2)(i) of the *Act* also applied.

With respect to records contained in any Professional Standards Branch files, the Police took the position that these records are excluded from the scope of the *Act* under section 52(3)3 of the *Act*.

With respect to records relating to OCCPS, the Police referred the requester to OCCPS directly, noting that it does not release documents of other agencies to requesters.

With respect to the correction request, the Police advised that the portion of the appellant's request which specifies the information to be corrected would be adopted as the requester's statement of disagreement, and would be attached to the occurrence report in accordance with section 36(2)(c).

The requester (now the appellant) appealed the Police's decision and this office opened Appeal file MA07-144-2.

At the outset of mediation, the mediator assisted the parties in finding a resolution concerning the fee of \$32.80 and the manner by which the records would be made available to the appellant. As a result of discussions with the mediator, the appellant agreed to pay the \$32.80 fee and the Police agreed to send the records to the appellant by registered mail.

After the appellant obtained the records, he confirmed that he continued to seek access to the responsive withheld information. The appellant also obtained consent from one of the affected persons in this appeal. The affected person consented to the disclosure of his personal information to the appellant and the mediator forwarded the consent form to the Police. To date, the Police have not issued a revised decision regarding the portions of records that contain this individual's information.

With respect to the Police's position that he should contact OCCPS directly, the appellant advised the mediator that he thought that the records relating to OCCPS should be processed by the Police as part of his request. The appellant also confirmed that he continued to seek access to records in the Police's Professional Standards Branch (PSB) files.

The appellant also advised the mediator that he believed there should be additional records responsive to his request relating to the processing of his freedom of information requests, including all correspondence with the Freedom of Information Co-ordinator. He also believes there should be additional notes from the detective assigned to conduct the 2004 review and investigation.

With respect to his correction request, the appellant advised the mediator that he was not satisfied with only attaching a statement of disagreement to his file, as there are allegedly inaccuracies in the records that he wishes to have formally corrected.

At the end of mediation, the following issues were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*:

- Are the Police required to process the portion of the request that relates to OCCPS records?
- Does section 52(3) exclude the Professional Standards Branch records from the application of the *Act*?
- Does the discretionary exemption at section 38(a) in conjunction with law enforcement exemptions found at sections 8(1)(e), 8(1)(l) and 8(2)(a) of the *Act* apply to the records at issue?
- Does the discretionary exemption at section 38(b) in conjunction with the factors favouring non-disclosure of personal information at sections 14(2)(e), 14(2)(f) and 14(2)(i) of the *Act* apply to the records at issue?
- Did the institution exercise its discretion under sections 38(a) and 38(b) of the *Act*? If so, should this office uphold the exercise of discretion?
- Did the Police conduct a reasonable search for records?
- Should the Police correct the appellant's personal information under section 36(2)?

The mediator also identified some deficiencies in the records provided to this office and the Police agreed to send another copy of the records. With the revised copy of the records, the Police provided a revised Index of Records. This Index of Records identified additional discretionary and mandatory exemptions. In particular, the revised Index of Records identifies that section 38(a) and/or 8(1)(c), 8(1)(g) and 8(2)(c) apply to the occurrence report. The revised

Index of Records also identifies that the presumptions at sections 14(3)(a) and 14(3)(b) apply to the occurrence report.

The revised Index of Records the Police sent to this office marks the first time they identified the discretionary exemptions at sections 8(1)(c), 8(1)(g) and 8(2)(c). The Confirmation of Appeal this office sent to the Police indicated that they had a specified time in which to raise any new discretionary exemptions. As the Police failed to raise these discretionary exemptions within the specified time period, the late raising of these exemptions have been added as an issue to this appeal.

Though the revised Index of Records also mark the first time Police raise the presumptions at sections 14(3)(a) and 14(3)(b), there is no issue about them being added to the appeal as they are presumptions that apply in conjunction with the mandatory exemption in section 14(1).

I commenced my inquiry by sending a Notice of Inquiry to the Police, initially. The Police were invited to provide representations on all of the issues identified in the mediator's report, but for the issues relating to whether the Professional Standards Branch records were excluded under section 52(3)3 and whether additional notes from the detective who conducted the 2004 review and investigation should exist. I did not seek the Police's representations regarding these two issues as it appeared that this office had already addressed the issues in earlier decisions.

The Police provided brief representations in response. The Police's representations, in part, state:

After a review of this Inquiry, and through consultation with involved Hamilton Police Service investigators, it has been determined that the appropriate representations have already been submitted under MA-050328-2, and still stand. There is nothing further we could add or argue that is not already captured in our previous representations.

Unfortunately, this was not the satisfaction of the Appellant, so a further request was submitted and processed. We feel that the Appellant has received disclosure of all relevant records *to which he is entitled* without breaching the right to privacy of the other affected parties named in [the specified occurrence], including two deceased individuals, in accordance to section 38 of the Act.

I subsequently wrote to the appellant and sought his representations as to why I should commence an inquiry into issues that appear to have already been decided by this office. In particular, the appellant was asked to explain why I should commence an inquiry as to whether additional notes from the detective exist and whether Professional Standard Branch records are subject to the *Act*, since it appeared that these issues were addressed in a letter decision, dated April 17, 2007 and Interim Order MO-2084-I.

The appellant provided representations in response. Most of the appellant's evidence focuses on questions he has about the Police's investigation into his initial and subsequent complaints.

Understandably, the appellant has had a difficult time accepting the Police's conclusion that there was not sufficient evidence to lay charges. The appellant's complaint involves serious allegations of abuse. To the appellant's disappointment, his complaint did not result in charges being laid.

However, this office does not have the jurisdiction to review the Police's conduct regarding their handling of the appellant's initial and subsequent complaints. This office also does not have the jurisdiction to review any subsequent investigations the Police undertook to investigate any complaints the appellant made about individual police officers.

Given the Police's response to the Notice of Inquiry and the appellant's response to my letter, I have decided that an Interim Order is required before I seek the appellant's representations on the application of the exemptions to the records identified as responsive to the request. In my view, it is important to first address the preliminary issues respecting the adequacy of the Police's decision regarding the OCCPS records and whether the Professional Standards Branch records fall within the scope of the *Act*. This order will also address whether the Police's search for responsive records was reasonable.

PRELIMINARY ISSUES:

Are the Police required to process the portion of the request that relates to OCCPS records?

The Police have not claimed that they do not have in their custody or under their control OCCPS records responsive to the request. Rather, the Police's decision letter directs the appellant to contact OCCPS directly, as follows:

With respect to your request for documents from OCCPS, I must refer you to them for that information as this Service does not release documents of other Agencies.

Section 18 of *Act* sets out a procedure that must be followed by institutions upon receipt of a request for records that may be of interest to another institution. The relevant portion of section 18 of the *Act* reads:

Transfer of request

18(3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Greater interest

18(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

The Notice of Inquiry sent to the Police invited their representations as to whether their decision letter was adequate taking into consideration sections 18(3) and 18(4). The Police's representations did not address this issue.

As the appellant has taken issue with the Police's decision not to issue an access decision regarding his request for OCCPS records, I must decide whether the Police met their obligations under section 19 of the *Act*. Section 19 of the *Act* states:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

I have carefully reviewed the entire file, and am satisfied that the Police did not transfer the portion of the request relating to OCCPS records to another institution having a greater interest, as they may have chosen to do under section 18. There is also no evidence that the Police provided the appellant with written notice of whether or not access to any responsive OCCPS records or portions of records will be given. Accordingly, I find that the Police failed to meet their obligations under section 19.

Section 22(4) of the *Act* states:

A head who fails to give the notice required under section 19 or subsection 21 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Accordingly, I also find that the Police are in a deemed refusal position pursuant to section 22(4) of the *Act*. As a result of my findings, I will order the Police to issue a decision letter to the appellant regarding access to the OCCPS records requested within 30 days of the issuance of this order.

Does section 52(3)3 exclude the Professional Standards Branch records from the Act?

The Police's decision letter states:

Records located in the Professional Standards Branch file pertain to a complaint against this Service and its officers, therefore they are covered under Section [52(3)3] and relate to employment. As such, they are exempt and outside the formal Freedom of Information process.

Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(3) applies, the records are excluded from the scope of the *Act*.

For section 52(3)3 to apply, the Police must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

During the Intake stage of the appeal process, in Appeal file MA-050328-3, this office concluded that the records relating to the appellant located in the Professional Standards Branch were excluded from the scope of the *Act* pursuant to section 52(3)3 of the *Act*. This office also found that none of the exceptions set out in section 52(4) of the *Act* applied. The decision was communicated to the appellant by letter dated April 17, 2007.

I provided the appellant with a copy of the April 17, 2007 letter and advised him that I was inclined to dismiss this issue without an inquiry, having regard to this office's prior decision which was communicated to him. However, before I made my decision I invited representations from the appellant on this issue.

The appellant provided representations in response. The appellant's representations state:

In spite of the fact that your office has already issued a decision regarding the records held by the Professional Standards Branch. I would ask you to not dismiss this issue but in fact I would ask you to order the [Police] to give me those records.

The appellant did not provide evidence suggesting that the records were not collected, prepared, maintained or used by the Police, or that the collection, preparation, maintenance or usage was not in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the Police has an interest. Rather, the appellant argues that the records should be provided to him because they contain information regarding complaints he made about police officers and that he has many questions and concerns relating to these officers' conduct. The appellant made these same arguments to Analyst Althea Knibbs during the Intake stage of this appeal, who stated the following in her April 17, 2007 decision to

the appellant:

In our telephone conversations, you described information that has caused you to be deeply concerned about the Police's conduct, both with regards to the investigation into your abuse as well as concerns about how other incidents, unrelated to you, were addressed by the Police. In our conversations I explained that the IPC jurisdiction did not extend to the review of the Police's conduct, however I encouraged you to pursue your concerns through the appropriate channels available outside of the IPC.

After considering the appellant's representations and the circumstances of this appeal, I have decided to dismiss this aspect of the appeal. In making my decision, I took into account that this office already provided the appellant with a decision on this issue in its April 17, 2007 letter to the appellant. In my view, the appellant has failed to provide any new evidence demonstrating that the three-part test in section 52(3)3 has not been met. The appellant's representations also do not provide any evidence demonstrating that any of the exceptions provided by section 52(4) of the *Act* apply in the circumstances of this appeal.

As stated in the April 17, 2007 decision, the responsive Professional Standards Branch records are not subject to the *Act* and thus fall outside this office's jurisdiction. As a result, this office does not have the jurisdiction to order the Police to disclose these records to the appellant. Accordingly, if the appellant wishes to obtain access to them, he will have to pursue access outside the *Act*.

Was the Police's search for responsive records reasonable?

During the mediation stage of this appeal, the appellant indicated his belief that additional records responsive to his request should exist. In particular, he submits that additional records relating to the processing of his freedom of information request (including all correspondence with the Freedom of Information Co-ordinator) and notes from the detective conducting the 2004 review and investigation should 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.

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 [Order P-624].

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 Notice of Inquiry sent to the Police asked them to provide an affidavit containing a written summary of all steps taken in response to the appellant's request for records relating to the processing of his access requests.

The Police did not provide an affidavit in response to the Notice of Inquiry. Rather, the Police's representations state that "appropriate representations have already been submitted under MA-050328-2, and still stand. There is nothing further we could add or argue that is not already captured in our previous representations."

The evidence and findings in the appellant's first request (Appeal MA-050328-2)

Appeal MA-050328-2 dealt with the appellant's three-page request for "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 subject-matter of that request relates to the same complaints and subsequent investigation the appellant had initiated with the Police in 1995.

The Police provided the appellant partial access to an occurrence file relating to his complaint and the Police's subsequent investigation. During the mediation stage of that appeal, the appellant advised that he believed that additional records should exist in relation to the Police's investigation of his complaint. The appellant submitted that additional records, such as notes, reports, correspondence, e-mails, faxes, telephone memos, interviews and communications between the Children's Aid Society and three police officer's should exist. One of the police officer's identified is the detective who conducted the 2004 review and investigation. During mediation of that appeal, the Police conducted a further search for records and located additional notes prepared by this detective. The Police issued a revised decision to the appellant granting him partial access to the detective's notes.

At the end of mediation, some of the issues relating to the Police's search were resolved. However, the appellant continued to believe that additional records, including notes prepared by the detective should exist. Accordingly, the issue of whether additional records responsive to the appellant's request was transferred to the adjudication stage of the appeal process and was disposed of in Orders MO-2084-I, MO-2122-I, MO-2196-I and MO-2203-F by Adjudicator Frank DeVries.

Adjudicator DeVries conducted an oral inquiry by teleconference, initially. Prior to the inquiry, the appellant provided 52-pages of written materials to this office. At the inquiry, the parties, including the detective, provided oral representations and the appellant was given an opportunity to make oral reply representations. During the inquiry, the appellant identified concerns he had regarding the way the Police conducted their investigations into his complaints. In particular, the appellant submitted that other records or documents "ought to have been created". Following the

inquiry, Adjudicator DeVries issued Order MO-2084-I, in which he stated:

... 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.

After reviewing the representations of the parties, Adjudicator DeVries found that the Police's search "should have been cast wider" and ordered the Police to conduct further searches for the following categories of records:

1. E-mails and correspondence between the appellant and the Police
2. Professional Standards Branch
3. Records from other bodies (excluding OCCPS records)

Adjudicator DeVries did not order the Police to expand its search for records, such as the detective's notes, contained in their investigative files. In making his decision, Adjudicator DeVries stated the following about the evidence of the detective:

[H]e 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.

The Police were also ordered to provide an affidavit outlining the steps they took to search for further records. Adjudicator DeVries remained seized of Appeal MA-050328-2 in order to deal with outstanding issues regarding the search for records the Police were ordered to conduct.

After reviewing the affidavit material provided by the Police, Adjudicator DeVries found that the Police failed to provide "specific, detailed information regarding the nature of the further searches conducted for responsive records." He determined that it was not necessary to seek the appellant's representations at that time, and issued Interim Order MO-2122-I, and ordered the Police to conduct further searches for three specified categories of records.

Following the issuance of Interim Order MO-2122-I, Adjudicator DeVries received an affidavit sworn by the Freedom of Information Coordinator for the Police. Also provided to this office was a copy of the Police's revised decision letter which advised the appellant that records responsive to his request for Professional Standards Branch records were not subject to the *Act*

under section 52(3)3. The appellant appealed that decision and Appeal file MA-050328-3 was opened.

After reviewing the material provided by the Police, Adjudicator DeVries found that the Police's searches for e-mails and correspondence between the appellant and the Police were reasonable. Adjudicator DeVries also found that the Police's searches for records in the Professional Standards Branch were reasonable. However, Adjudicator DeVries was not satisfied with the evidence provided regarding the Police's search for records which may have been received from other bodies (excluding OCCPS records). In this regard, Adjudicator DeVries found that the Police's evidence that they conducted a search for all "releasable" records did not satisfy their requirements to respond to access requests under the *Act*. In other words, Adjudicator DeVries found that the Police had an obligation to search for responsive records, even though the records may be exempt or even fall outside the scope of the *Act*.

Accordingly, in Interim Order MO-2196-I, Adjudicator DeVries ordered the Police "to conduct further searches for responsive documents which may have been received from or provided to other bodies (excluding OCCPS)".

Again, the Police was ordered to provide this office with an affidavit and the appellant with a decision letter regarding access to any responsive records located.

Following the issuance of Interim Order MO-2196-I, the Police provided a further affidavit in support of their position that the searches for responsive records which may have been received from or provided to other bodies (excluding OCCPS) were reasonable. After considering the material provided by the Police, Adjudicator DeVries dismissed the appeal and stated the following in Final Order MO-2203-F:

Based on the nature of the searches conducted for responsive records, the previous evidence provided to me and referred to in the previous Interim Orders, and the specific sworn evidence which states that the searches included searches for responsive records received from an outside body or provided to an outside body, I am satisfied that the searches conducted by the Police for responsive documents which may have been received from or provided to other bodies were reasonable.

The issuance of MO-2203-F disposed of all outstanding issues relating to the Adjudicator DeVries' initial finding that the Police had failed to conduct a reasonable search for the three specified categories of records responsive to the request, namely e-mail correspondence, Professional Standards Branch and records from other bodies (excluding OCCPS).

The appellant's evidence in the present appeal

As previously mentioned, the appellant's submission that the Police has failed to conduct a reasonable search for records has two-prongs:

- that additional investigative records prepared by the detective for the period of October 2, 1995 to April 5, 2007 should exist; and
- that additional records relating to the processing of the appellant's freedom of information request for the period of October 2, 1995 to April 5, 2007 should also exist.

As mentioned above, the appellant was asked to provide representations explaining why I should commence an inquiry into whether the Police conducted a reasonable search for additional notes from a named detective having regard to Adjudicator's DeVries findings in Interim Order MO-2084-I.

In support of his position that the Police failed to conduct a reasonable search, the appellant argues that the sheer number of investigations and reviews the Police indicate were completed in response to his complaint suggest that additional records should exist. In this regard, the appellant states that "...with all of these REVIEWS that were supposed to have been conducted, I find it strange that I have received no notes or paperwork regarding ANY of those so-call reviews". The appellant goes on to suggest that the Police has been less than forthcoming in identifying records that would demonstrate that they mishandled the investigation. In support of this position, the appellant refers to a document in which a Children's Aid worker states that their information appears to support the veracity of the appellant's allegations. The appellant questions how the Police arrived at the conclusion that "documents received from the [Children's Aid Society] contradicted claims made by [the appellant] rather than support them".

Findings and Decision

1. Records prepared by the detective

The issue I am to determine is whether the Police's search for responsive investigative records created by the detective was reasonable. The appellant's submission raises two issues. First, whether the Police's search for notes prepared by the detective for the period of time captured by the first request was reasonable (October 2, 1995 to August 4, 2005). Second, whether the Police's search for any notes prepared by the detective after the date of the first request, August 4, 2005, was reasonable.

As previously mentioned, 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.

In my view, the evidence the appellant has provided fails to demonstrate a reasonable basis for concluding that additional records exist. The appellant's position is that the Police mishandled their investigation and, as a result, failed to create crucial documentation or identify documents which may reveal a cover-up. In support of this position, the appellant provided copies of newspaper articles and other documents which question the Police's conduct into their investigation of unrelated matters. In this regard, the appellant provided a copy of his e-mail to

the Police which sought answers about the wrongful arrest of an individual, which was reported in the Hamilton Spectator. The appellant also provided me with a copy of his e-mail to the Police questioning their conduct in the investigation into the attempted murder of an eight month old, which was also reported in the Hamilton Spectator.

In my view, the issue relating to the Police's search for notes prepared by the detective for the period of time captured by the first request has already been addressed by Adjudicator DeVries in Interim Order MO-2084-I. In that order, Adjudicator DeVries found that the Police's search for investigative records, such as notes prepared by detectives and police officers, was reasonable.

With respect to the issue of whether the Police's search for responsive records created by the detective after the date of the first request was reasonable, I find the appellant has failed to provide a reasonable basis for concluding that such records exist. In making my decision, I note that there is no evidence before me suggesting that the detective in question created additional investigative records than those identified in Interim Order MO-2084-I. For instance, there is no evidence that the Police undertook further investigations regarding the appellant's allegations. As stated above, 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.

In summary, I find that Interim Order MO-2084-I already addresses the issue of whether the Police conducted a reasonable search for notes prepared by the detective for the period of time between October 2, 1995 to August 4, 2005. I also find that the appellant has failed to establish a reasonable basis for concluding that the detective created any further notes responsive to the request after August 4, 2005. Accordingly, I dismiss this portion of the appeal.

2. *Records relating to the processing of the appellant's freedom of information request*

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 [Order P-624].

As mentioned above, the Notice of Inquiry sent to the Police asked for an affidavit containing a written summary of all steps they took in response to the appellant's request for records relating to the processing of his access requests. The Police did not provide an affidavit. The Police's position is that their representations submitted in Appeal MA-050328-2 should be adopted for the purposes of this appeal. However, the issue of whether the Police conducted a reasonable search for records relating to the processing of the appellant's access request was not at issue in Appeal MA-050328-2. In fact, it could not have been an issue as any records relating to the processing of the appellant's freedom of information request could only have been created after the Police's receipt of the first request – August 4, 2005. As a result, the Police's representations in Appeal MA-050328-2 do not address this issue.

The only evidence before me in support of the Police's position, is the copy of records the Police provided to this office. Based on my review of the severed and unsevered records, it appears that the Police located responsive records relating to the processing of the appellant's access request. In particular, correspondence between the appellant and the Police's Freedom of Information Office was located and provided to the appellant. However, I note that no internal correspondence relating to the appellant's access request was included in either the severed or unsevered records provided to this office. Having regard to the above, I am not satisfied that the Police provided sufficient evidence demonstrating that their search for responsive records relating to the appellant's access request was reasonable. Accordingly, I will order the Police to conduct a further search for records relating to the processing of the appellant's access requests for the period of August 4, 2005 to April 5, 2007, the period of time between the first and second request.

SUMMARY OF FINDINGS

I found that the Police are in a deemed refusal position pursuant to section 22(4) with respect to the portion of the appellant's request for OCCPS records. As a result, I will order the Police to issue a final decision letter to the appellant regarding access to the OCCPS records.

I dismissed the portion of the appellant's appeal which sought access to Professional Standards Branch records.

With respect to the reasonable search issue, I dismissed the portion of the appellant's appeal seeking additional notes prepared by the detective. However, I found that the Police's search for records relating to the processing of the appellant's freedom of information access request was not reasonable. Accordingly, I will order the Police to search for these records and to provide an affidavit to this office. The Police will also be ordered to issue a decision letter to the appellant, if additional records are located. If the Police's further search does not locate additional records relating to the processing of the appellant's access request, the Police must notify the appellant in writing.

Upon my receipt of the Police's affidavit, I will send a Notice of Inquiry to the appellant. The Notice of Inquiry will seek the appellant's representations regarding the Police's further search and the application of exemptions at section 38(a) in conjunction with sections 8(2)(a), 8(1)(e) and 8(1)(l) and section 38(b) in conjunction with sections 14(2)(e), 14(2)(f) and 14(2)(i). The appellant will also be given an opportunity to provide representations regarding the late raising and application of the discretionary exemptions at sections 8(1)(c), 8(1)(g) and 8(2)(c) and whether the Police properly exercised their discretion.

ORDER:

1. I order the Police to issue a final decision letter to the appellant regarding the appellant's request for responsive OCCPS records, in accordance with the provisions of the *Act*, without recourse to a time extension, considering the date of this order as the date of the request and without recourse to a time extension.

2. I dismiss the portion of the appellant's appeal seeking access to the Professional Standards Branch records.
3. I order the Police to conduct a further search for records responsive to the portion of the appellant's request for records relating to the processing of his freedom of information request, for the period of August 4, 2005 to April 5, 2007. I order the Police to provide me with an affidavit sworn or affirmed 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.
 - (g) 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.
4. 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. If the Police's further search does not locate additional records relating to the processing of the appellant's access request, the Police is to notify the appellant in writing within 30 days of the date of this Interim Order.

5. In order to verify compliance with provision 1 and 3 of this order, I order the Police to provide me with a copy of any decision letter sent to the appellant. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Toronto, Ontario M4W 1A8.
6. I remain seized of this appeal in order to deal with any other outstanding issues.

Original Signed by: _____

Jennifer James
Adjudicator

_____ June 29, 2009