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

ORDER MO-2585

Appeal MA10-112-2

Toronto Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 information related to Toronto Police Services procedures. The request specifically stated:

> I am requesting a copy of any Toronto Police Services procedures that relate to sections 41(1.1) to 41(1.4) of the *Police Services Act*. In particular, who is a designate of the Chief of Police as per section 41(1.1). Please provide any guidelines used in assessing "high risk" individuals.

The Police responded to the request by stating that no records exist responsive to the request. The decision stated in part:

> The [Police Services Board] does not have any written governance in relation to sections 41(1.1) to 41(1.4) and therefore, access to the records cannot be provided as no such record does exist.
>
> In regard to guidelines in assessing "high risk" individuals, you may wish to contact [the Ministry of the Attorney General at an identified address].

The appellant appealed the decision.

During mediation, the appellant took the position that responsive records ought to exist. In support of his position, the appellant provided a copy of a by-law for a different police service in Ontario, which deals with the police response to high-risk individuals. He argued that the existence of that by-law supports his position that similar policies and written procedures should exist for the Police. The Police identified that additional records relating to "high risk" individuals may exist, but that these were not responsive to the request. As a result, the issue of the scope of the request was raised in this appeal.

Mediation did not resolve the issues, and this appeal was transferred to the inquiry stage of the process.

I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the Police initially. The Police provided representations in response. I then sent the Notice of Inquiry, along with a copy of the representations of the Police, to the appellant, who also provided representations in response.

DISCUSSION:

SCOPE OF THE REQUEST

The scope of a request is often an important issue in reasonable search appeals, as the scope determines the parameters of the search and, accordingly, the types of searches that ought to be conducted.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Police state that the request was clear and self-explanatory, and that it was therefore not necessary to contact the appellant to clarify or narrow the request.

The request can be separated into two parts.

Part one of the request

The first part of the request reads:

> I am requesting a copy of any Toronto Police Services procedures that relate to sections 41(1.1) to 41(1.4) of the *Police Services Act*. In particular, who is a designate of the Chief of Police as per section 41(1.1).

In response to this part of the request, the Police stated:

> The [Police Services Board] does not have any written governance in relation to sections 41(1.1) to 41(1.4) and therefore, access to the records cannot be provided as no such record does exist.

During the processing of this appeal, the parties identified and explained their positions regarding the existence of responsive records, and these are addressed below. There does not appear to be any issue regarding the scope of the first part of the request.

Part two of the request

The second part of the request reads:

> Please provide any guidelines used in assessing "high risk" individuals.

In response to this part of the request, the Police stated:

> In regard to guidelines in assessing "high risk" individuals, you may wish to contact [the Ministry of the Attorney General at an identified address].

As identified above, the appellant provided a copy of a by-law of another police board in Ontario, which specifically deals with police responses to high risk individuals. The appellant's position was that the Police ought to have a similar by-law dealing with these issues.

In response, the Police provided this office with materials identifying that some information about high risk individuals is available on the Police's website, and referred to specific information contained therein. At that time, the Police were of the view that, although this information dealt with high risk individuals, it did not respond to the appellant's request for "guidelines used in assessing 'high risk' individuals."

In its representations, the Police state that the appellant was advised that minutes of a public meeting of the Police Board, addressing certain records relating to "high risk" individuals, are available on the Police's website. In addition, the Police state that "further information regarding high risk individuals could be located on [the Police's] website, as well as [a Police] organizational chart."

The Police also refer to the following information, which it provided in mediation:

> In regards to the Toronto Police Service adapting any procedure that would be similar to the [identified bylaw], (reference/copy provided by the appellant), I would invite you to review [two identified excerpts from two public meetings of the Toronto Police Services Board held on two specific dates] found at [the Toronto Police website address]. Also note, further information … can be found at [another identified police website].

Finally, the Police state the following regarding the issue of the scope of the request:

> If the mediation process had continued, [the Police] would have revised the decision letter citing section 15 [information published or available] of the *Act*.

In response, the appellant states:

> Apparently there appears to be some confusion as to what documents I am requesting. …

The appellant proceeds to review the history of some of his dealings with the Police. He identifies how section 41 of the *Police Services Act* was referred to by the Police in an earlier proceeding, and why he is personally interested in accessing any information relating to "high risk" assessments. He then reviews the information in the publically available websites referred to by the Police, and asks questions as to how this information could have been connected to him and the interactions he has had with the Police in the past.

The appellant then proceeds to identify the specific information he is seeking. This is clearly and carefully laid out in his representations in a series of requests for information and questions regarding how this information relates to him and his situation. For example, he states that, if he was assessed as a "high risk" individual, who from the Police designated him as such? What process did the identified detective use in assessing the appellant's conduct? What expertise or training does the identified detective have in making such assessments? The appellant then restates his request in a number of ways, including reformulating the request for general records, and asking for the records relied on by any members of the Police who dealt with him, including references to specific individuals and circumstances.

Finding

I have carefully considered the scope of the second part of the request, which was for "any guidelines used in assessing 'high risk' individuals."

There are unique circumstances in this appeal that affect my finding on the scope of the request.

To begin with, it is clear that the appellant and the Police, including the Freedom of Information Coordinator responding to this request, are familiar with each other, and have had dealings in the past. It is also clear from the appellant's representations that he made the request for this information because of the dealings he has had with the Police, and the reason he wants the information is to review the actions of the Police as they relate to him (particularly his concerns that he may have been assessed as a "high risk" individual by the Police, and his questions about how such an assessment was made). However, the appellant chose to make the request resulting in this appeal in more general terms, asking simply for "any guidelines used in assessing 'high risk' individuals."

The Police chose to respond to the second part of the request in a very literal manner, interpreting the request to be specifically for *guidelines* used in *assessing* high risk individuals, and referring the appellant to the Ministry of the Attorney General which sets standards for certain assessments of individuals as part of its mandate.

I find that, in responding to the second part of the request in the manner in which they did, the Police interpreted this part of the request in a very narrow manner. This is contrary to the approach to requests established in previous orders, which state that institutions "should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*." A finding that an institution has interpreted a request too narrowly sometimes results in an order that the institution continue the appeal based on a broader interpretation of the request (see, for

example, Orders M-1139 and MO-2135-I). However, there are a number of factors which mitigate against such a finding in this appeal.

In the first place, although the Police interpreted the request in a narrow manner, they outlined for the appellant the limits of their search for records. Previous orders, beginning with Order 38, have established that if an institution chooses to narrow a records search unilaterally, it must outline the limits of the search to the appellant. One of the reasons why it is important for an institution to identify for a requester that it unilaterally narrowed a search for records is to allow a requester to know the limits of the search that was conducted. A requester can then identify the parameters of the search, and can also take issue with the scope of the search. In my view, by referring the appellant to the Ministry of the Attorney General, the Police made it clear that they were limiting their search to include only certain specific types of records (namely – specific guidelines for making risk assessments). As a result, the appellant was aware of the Police decision to narrow the scope of the search, and was able to take issue with those narrow parameters.

In the second place, when the Police were advised that the appellant was interested in records beyond the specific guidelines used in a technical assessment of "high risk" individuals, the Police provided additional information, and referred to information on its website regarding high risk individuals. The Police have also identified that, if mediation had continued, its response to a more broadly interpreted request would have been different. Whether this response would have satisfied the appellant, given his reasons for requesting the records, is unclear at this point; however, the Police have indicated that they were open to responding to a more broadly interpreted request in a different manner. Unfortunately, this could not be resolved between the parties.

Thirdly, in the appellant's representations he sets out a number of specific requests for specific records. Although he states that he wants these records in the context of this appeal, based on his representations it is clear that he is interested in using this request to obtain access to other, additional information beyond that identified in the original request. For example, even a broad reading of the appellant's request would not include "a copy of any report pertaining to the appellant," which is a document that the appellant now states he is seeking as part of the present appeal.

In light of the above circumstances, I find there would be no purpose served in continuing with this appeal based on a revised interpretation of the second part of the initial request. In my view, the appropriate action is that the appellant submit a new request for the specific information he seeks.

As a final matter on this point, I note that in the appellant's representations, where he now specifies the information he seeks, he has framed a number of his requests in the form of questions rather than in the form of requests for records. Previous orders have addressed the issues that arise in these situations (see, for example, Orders PO-1655 and MO-2285).

I will now review the issue of whether the Police conducted a reasonable search for records responsive to part one of the request.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Background

As identified above, part one of the request reads:

> I am requesting a copy of any Toronto Police Services procedures that relate to sections 41(1.1) to 41(1.4) of the *Police Services Act*. In particular, who is a designate of the Chief of Police as per section 41(1.1).

In response to this part of the request, the Police stated:

> The [Police Services Board] does not have any written governance in relation to sections 41(1.1) to 41(1.4) and therefore, access to the records cannot be provided as no such record does exist.

The appellant maintained that responsive records ought to exist, and referred to other police services that do have certain policies.

The Police provided representations in support of their position that responsive records do not exist. They refer to material provided earlier in this appeal in which they stated:

> … in regards to section 41(1.1) and section 41(1.4) of the *Police Services Act*, the Toronto Police Service does not have any written governance on these sections as the Board writes policies that direct the Chief of Police.

In their representations on the nature of the searches conducted, the Police state:

> The Corporate Planning Unit was consulted on the appellant's request, as the mandate of this unit is to prepare, publish and maintain Service governance and to review the contents and provide information relating to Service policies and procedures. It was their opinion that Toronto Police Service does not have any written governance of these sections as the Toronto Police Service Board writes policies that direct the Chief of Police. Service Procedures and the Standards of Conduct are the Chief's governance of his/her members. As such, the Chief would not write a procedure of section[s] in the Standards of Conduct to direct him/herself.

In response to these representations, the appellant refers to the Police's position that no responsive records exist with a variety of questions regarding how decisions relating to him were or could have been made in the absence of any such written policies or procedures. He also asks a number of questions about how sections 41(1.1) to 41(1.4) of the *Police Services Act* are interpreted and applied by the Police, and requests additional documentation about particular records relating to him.

Findings

As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the Police's search for responsive records was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, I may order that further searches be conducted.

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]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with

respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

In this appeal, the Police have responded to the request for policies and procedures that relate to sections 41(1.1) to 41(1.4) of the *Police Services Act* by stating that no responsive records exist. In making this decision, they have referred to the searches for responsive records that were conducted, and identified that the Corporate Planning Unit was consulted. They have also provided an explanation regarding why no responsive records exist. The appellant's reference to by-laws of other police services, which he believes support his position, were provided to the Police, and the Police have responded by identifying that, although they have records relating to "high risk" individuals, records responsive to the first part of the request do not exist.

In the circumstances, based on the information provided by the Police regarding the searches conducted and the explanations provided, and because the appellant has not provided me with sufficient evidence to support a finding that additional searches ought to be conducted, I am satisfied that the Police's search for records responsive to the request was reasonable.

ORDER:

I uphold the Police's search for responsive records, and dismiss the appeal.

December 22, 2010

Frank DeVries
Adjudicator