



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

FINAL ORDER MO-2650-F

Appeal MA07-144-2

Hamilton Police Services Board



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NATURE OF THE APPEAL:

This final order addresses the sole issue remaining from Interim Order MO-2434-I, released by Adjudicator Jennifer James on June 29, 2009, and Interim Order MO-2574-I, which I issued on November 30, 2010.

Nature and background of the appeal

A detailed background of this appeal was provided by Adjudicator James in Interim Order MO-2434-I. Briefly summarized, the appellant made a series of complaints to the Hamilton Police Service between 1995 and 2004 relating to certain identified allegations, and to concerns about how the Police conducted their investigations.

On August 4, 2005, the appellant submitted a request to the Hamilton Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information about the Police investigations relating to the appellant. In response to that request, the Police granted the appellant partial access to responsive records. The appellant then appealed the Police's decision on the basis that additional responsive records ought to exist, and appeal MA-050328-2 was opened. In that appeal, issues regarding whether the Police conducted a reasonable search for records were addressed by me in Interim Orders MO-2084-I, MO-2122-I, MO-2196-I and Final Order MO-2203-F.

The appellant then submitted a second request to the Police, dated April 5, 2007, for related information, and this current appeal deals with the appellant's second request.

The current appeal

The second request resulting in the current appeal was for access to records relating to the requester's complaints and the Police's initial and subsequent investigations. The request was for access to all relevant records for the period of October 2, 1995 to April 5, 2007.

In response, the Police issued a decision letter granting the appellant partial access to certain responsive records, and denying access to other records or portions of records on the basis of a number of exemptions. The appellant appealed the decision on a number of grounds, including his concern that additional responsive records existed.

Many of the issues in this appeal were addressed by Adjudicator James in Interim Order MO-2434-I, and subsequently by me in Interim Order MO-2574-I. In Interim Order MO-2574-I, I made a number of findings regarding access to certain records, correction of information, the adequacy of the searches conducted, as well as other issues. Interim Order MO-2574-I resolved a number of issues, but also resulted in my order that the Police provide additional information and conduct further searches for particular records, including those relating to an additional investigation conducted in June and July of 2006. The relevant portion of that order reads:

3. *Other records created between August 4, 2005 and April 5, 2007*

The affidavit and other material provided by the Police which describe the additional searches conducted for responsive records is somewhat confusing. It identifies in detail the earlier searches conducted for records responsive to the first request (prior to August 4, 2005). However, with respect to records created between August 4, 2005 and April 5, 2007, the Police representations on the nature and extent of the searches conducted are not very detailed.

Furthermore, as identified above, following Interim Order MO-2434-I, the Police provided additional material to the appellant. This material included seven newly-released pages which relate to a further Police investigation, conducted by a different officer, in June and July of 2006. While these records were disclosed to the appellant, it appears that they were identified as responsive records for the first time when they were included in the package of material provided to the appellant in July of 2009.

In my view, this raises a question regarding the reasonableness of the searches conducted by the Police for investigative records responsive to the request created between August 4, 2005 and April 5, 2007. On my review of the affidavit provided by the Police, I am not satisfied that it identifies with sufficient detail the nature of the searches conducted for responsive investigative records created during this time; nor does it explain how the seven pages of newly-identified records were located and identified as responsive. Furthermore, the appellant questions why these additional records do not include any notes or notebook entries relating to this further investigation, undertaken in June and July of 2006.

In the circumstances, I am not satisfied that I have been provided with sufficient evidence to satisfy me that the searches for investigative records created between August 4, 2005 and April 5, 2007 were reasonable. Accordingly, I will order the Police to conduct a further search for responsive investigative records created between August 4, 2005 and April 5, 2007 (the period of time between the first and second request), and to provide me with detailed, specific information regarding the nature of the search conducted and the results of the search. In addition, I will also order the Police to provide me with specific information relating to:

- where and how the seven (7) additional pages relating to the 2006 investigation, disclosed in July of 2009, were located;
- what searches led to the identification of the seven (7) additional pages relating to the 2006 investigation;
- whether searches were conducted for notebook entries and notes regarding the 2006 investigation referred to in the seven (7) additional pages;

- whether any other searches were conducted to determine if other investigations were conducted between August 4, 2005 and April 5, 2007; and
- what the results of any such searches were.

Actions after Interim Order MO-2574-I was issued

Following the issuance of Interim Order MO-2574-I, the sole issue remaining was whether the searches conducted for investigative records responsive to the request that were created between August 4, 2005 and April 5, 2007, were reasonable.

In response to Interim Order MO-2574-I, I received representations from the Police regarding the nature of the searches conducted for the responsive records. In addition, the Police indicate that a named detective who conducted the 2006 investigation was subsequently asked to search for notebook notes that would correspond with the seven additional records referred to in Interim Order MO-2574-I. As a result of these additional searches, the detective located six notebook entries relating to the actions taken in 2006. The portions of those notebook entries responsive to the request were then provided to the appellant.

After receiving the representations of the Police, I invited the appellant to provide representations to me on the issue of whether these subsequent searches for responsive records were reasonable. I also provided the appellant with a summary of the representations of the Police, and referred to the fact that additional responsive records (the six notebook entries) had now been located and provided to him. The appellant provided representations in response.

DISCUSSION:

PRELIMINARY MATTERS

As a preliminary matter, I note that many of the appellant's representations (including additional material provided by him in the course of this appeal) identify concerns he has regarding both the manner in which the Police conducted their investigations, as well as the negative impact their actions have had on him. In addition, the appellant identifies concerns that certain additional records or documents "ought to have been created." For example, he questions why some handwritten notes he received are sparse and not more detailed, as well as why certain actions were not taken by the Police when certain information came to light.

As identified above, the sole issue in this appeal is whether the search for responsive records conducted by the Police was reasonable. Issues concerning the nature or adequacy of the investigations conducted by the Police, or the amount of detail contained in certain records, are not issues before me in this appeal. In addition, as I pointed out in Interim Order MO-2574-I, these same issues were raised by the appellant earlier, and I concur with the manner in which Adjudicator James addressed them in Interim Order MO-2434-I, when she stated:

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.

In addition, the appellant also provides representations in support of his position that additional records from 1996 and 1998 ought to exist. As stated in both Interim Order MO-2434-I and Interim Order MO-2734-I, any issues regarding the reasonableness of the searches for records relating to the period of time covered by the first request (that is - prior to August 4, 2005) have been addressed in previous orders issued in relation to appeal MA-050328-2, and are not at issue in this appeal.

REASONABLE SEARCH

In appeals involving a claim that additional 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, for example, 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 statements with respect to the requirements of reasonable search appeals:

... the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] 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 statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that 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.

Representations

In response to Interim Order MO-2574-I, I received representations from the Police. In those representations, the Freedom of Information Coordinator for the Police identifies the nature and extent of the searches conducted for the responsive records and provides some additional information about them. The Coordinator states that, when she took carriage of this matter, certain actions on the earlier file had already taken place. She also identifies that, in conducting earlier searches, she referred to the records already in her possession and contacted all of the officers named in those records to ensure their record-holdings were searched.

The Coordinator then states that certain documentation not covered by the scope of the *Act*, (as referred to by Adjudicator James in Interim Order MO-2434-I) which the Coordinator only became aware of later, referred to a named detective who was involved in this matter in 2006. As this was the first time the named detective was identified as being involved in this matter, he had not been asked earlier to conduct searches for responsive records. The Coordinator also identifies that the named detective provided seven additional pages relating to the 2006 investigation (referred to in Interim Order MO-2574-I), and these records were included in the responsive records in this appeal and disclosed to the appellant.

Finally, the Coordinator identifies that the named detective was subsequently asked to conduct additional searches for notebook notes that would correspond with the seven additional pages of records and, as indicated above, the named detective located six responsive notebook entries relating to his 2006 investigation. These have also been provided to the appellant.

The appellant's representations address a number of issues. Aside from those referred to in the preliminary issue set out above, the appellant provides a number of specific representations in support of his position that additional searches ought to be conducted. These specific arguments are addressed in greater detail below.

Analysis and Findings

I have considered the representations presented by both the Police and the appellant, and have also reviewed the earlier material resulting in the interim orders issued in this appeal.

To begin, I acknowledge that the appellant is very upset with what he considers to be deficiencies in the Police investigations (both the manner in which they were conducted and the results of those investigations), as well as the manner in which this request and appeal file was processed by the Police. I accept that the actions of the Police in processing the appellant's request and the appeal file have, at times, been disorganized and somewhat scattered. I also note that the appellant's communications have, at times, been complex and intemperate. In addition, I note that this appeal file has resulted in the disclosure of many pages of records and the production of hundreds of pages of correspondence and documents. In my view, all of these factors clearly contributed to the problems that arose in dealing with this request and appeal.

Notwithstanding these issues, in order to resolve the remaining issue in this appeal, I must determine whether the searches that have now been conducted by the Police for records responsive to the request were reasonable. For the reasons that follow, I am satisfied that they were.

As indicated above, the Freedom of Information Coordinator for the Police identifies the nature of the searches conducted for the responsive records and provides some additional information about the searches. She begins by stating that when she took carriage of this matter, certain actions on the earlier file (MA-050328-2) had already taken place. She also identifies that in conducting the earlier searches, she referred to the records already in her possession and contacted all of the officers named in those records to ensure their files were searched (as identified in previous affidavits).

The Coordinator then refers to certain documentation not covered by the scope of the *Act* relating to an investigation by the Professional Standards Branch (see Interim Order MO-2434-I). The Coordinator indicates that, although she was aware that these records existed, she only reviewed this material later in the process and, at that time, became aware that other responsive records (which were not Professional Standards Branch records) may exist. The subsequent searches resulted in the identification of the seven additional responsive pages, which were then disclosed to the appellant. Because the Coordinator was unaware of the existence of these records prior to this time, the appropriate individuals, including a named detective, had not been asked to conduct searches for responsive records earlier.

Finally, the Coordinator identifies that, as a result of my Interim Order MO-2574-I, the named detective was subsequently asked to conduct additional searches for notebook notes that would correspond with the seven additional pages of records. As indicated above, the named detective located six responsive notebook entries relating to his 2006 investigation, and these have also been provided to the appellant.

Based on the information provided by the Police with respect to the actions taken by them to identify responsive records and the evidence regarding the searches conducted for responsive records, I am satisfied that the searches that have now been conducted for responsive records were reasonable. The appellant raises a number of concerns regarding the searches, which I will address below.

First, the appellant refers to the information contained in the seven pages from the 2006 investigation provided to him. He notes that these pages refer to voicemail messages left for an individual, as well as a conversation held between the named detective and an identified individual. In addition, these pages refer to a conversation the detective had with the Coordinator in 2006. The appellant questions why no notes of these actions or conversations are included in the notebook entries.

The appellant also refers to the information contained in the notebook entries which have been provided to him. He questions why certain information is included in these notes (for example, references to the weather conditions and the names of certain police inspectors). He also raises concerns about the scarcity of the information contained in these notebook entries.

I have carefully reviewed the seven additional pages and the six notebook entries. Some of these notes are very brief and contain a minimal amount of detail. However, these notes are clearly the notebook entries of the detective who was involved in the investigation in 2006, and the entries were made between May 9, 2006 and July 31, 2006. In addition, these notes clearly relate to the requested information, and reflect the information contained in the seven pages of additional material provided to the appellant. Although I accept the appellant's position that these notebook entries are, on some occasions, very brief and contain a minimal amount of detail, I am satisfied that they are the responsive records for the relevant dates. It is clear that the detective searched his notes and located the responsive notebook entries. In the circumstances and based on the information provided by the Police, I am satisfied that the searches conducted for the notebook entries are reasonable.

The appellant also raises questions about whether searches were conducted for the records of other police officers referred to in the notes. In particular, the appellant states that the notes refer to certain inspectors by name, and asks why these inspectors were not asked to search for responsive records. In addition, one of the notebook entries refers to the preparation of a draft letter by the named detective for the signature of another identified police officer. The appellant questions why this individual was not asked to conduct searches for responsive records.

In light of the appellant's specific questions, I have reviewed the records at issue, as well as the other records which have been provided to the appellant in the context of this appeal.

To begin, I note that this matter is complicated by the fact that certain records (the Professional Standards Branch records) are not covered by the scope of the *Act*, and are not at issue in this appeal.

With respect to the inspectors named in the notebook entries, I note that these individuals' names are set out in the first few lines of the notebook entries (along with the date and weather conditions). Absent additional information linking these inspectors to the specifics of an investigation, the notation that they were the inspectors on duty on that day does not mean that they were necessarily involved in any meaningful way in the investigation conducted by the detective. With one exception, I find that there is insufficient evidence to suggest that these individuals were involved in the investigation.

The exception is a named inspector who is referred to in one line of the additional seven pages of records provided to the appellant. This reference indicates that this inspector was involved in some way in the investigation; however, on my review of the records and correspondence at issue, I note that this inspector is also referred to on a number of occasions in various records created in 2005 and 2006. These records, containing references to him, were included in the records initially provided to the appellant. As noted above, the Coordinator has identified that, in conducting the earlier searches, she contacted all of the officers named in those records to ensure their files were searched. Accordingly, I am satisfied that this named inspector's records were covered by the searches conducted by the Coordinator. The fact that this individual is briefly referred to in the newly-located material is not sufficient to satisfy me that the earlier searches were not reasonable.

With respect to the appellant's questions regarding the police officer for whom a draft letter was prepared, I note that the appellant had received a letter from this officer in August of 2006, and that this letter was provided to him as part of the package of numerous pages of material he had received earlier in the processing of this file. Although it is not clear to me whether or not this officer was asked to conduct searches, previous orders have confirmed that a reasonable search does not require that every individual named in any record be contacted and required to conduct searches (see, for example, MO-2143-F). Whether a search is reasonable depends on a number of factors. In the circumstances, I have not been provided with sufficient evidence to satisfy me that, as a result of the information contained in the notebook entries, the searches conducted by the Police for responsive records were not reasonable.

Lastly, the appellant questions the Coordinator's statement that she was unaware of the involvement of the named detective until she received documentation later in the process. In support of his position, he notes that she is referred to by name as an individual who was contacted in the course of conducting the 2006 investigation. The appellant states that, as a result, the Coordinator ought to have known about the named detective's involvement in these matters.

Based on the material contained in the records and referred to by the appellant, I accept the appellant's position that there appears to be a discrepancy in the information provided by the Coordinator regarding when she became aware of the named detective's involvement in the 2006 investigation. It appears that the Coordinator was contacted in 2006 and, at a minimum, asked to supply the detective with a telephone number. I also note, however, that many pages of documentation relating to appellant's access to information requests have been provided to the appellant earlier in this appeal, and that the Coordinator has been involved in many of the issues and in responding to many of the questions raised by the appellant over the course of the last number of years. In my view, the apparent discrepancy in the statements made by the Coordinator is not sufficient to give rise to a reasonable apprehension that other responsive records exist, nor does it provide sufficient evidence to affect my finding that the searches conducted by the Police were reasonable.

In summary, I find that I have not been provided with sufficient evidence to satisfy me that the searches which have now been conducted for responsive records were not reasonable, and I dismiss this appeal.

ORDER:

I find that the searches conducted for responsive records were reasonable and I dismiss this appeal.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ August 26, 2011