

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

FINAL ORDER MO-2826-F

Appeal MA11-192

Ottawa Police Services Board

January 10, 2013

Summary: The appellant sought access to records relating to complaints initiated by him. The police located responsive records and disclosed the majority of them to the appellant. In Interim Order MO-2797-I, the police were ordered to conduct a further search of the Chief's and Professional Standards Branch files for responsive records. This order upholds the police's new search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17(1).

Orders and Investigation Reports Considered: Orders MO-2797-I, MO-2410-F.

OVERVIEW:

[1] The Ottawa Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records relating to the requester's request for police protection and his complaints about the Canadian Security Intelligence Service (CSIS) and the Ottawa Police officers.

[2] The police located 115 pages of responsive records and granted the appellant access to most of them. The police claimed that disclosure of some of the withheld information would constitute an unjustified invasion of personal privacy under section

38(b) of the *Act* and that other records or portions of the record are exempt under section 38(a), in conjunction with the law enforcement provision at section 8(1)(l).

[3] The appellant appealed the police's decision to this office. During mediation, the appellant questioned the reasonableness of the police's search. In response, the police provided a written response to the appellant's questions and conducted a further search for responsive records.

[4] At the end of mediation, the appellant advised that he was not satisfied with the results of the police's further search. The appellant also confirmed that he did not want to pursue access to the personal information of other identifiable individuals contained in the records. However, the appellant indicated that he wished to pursue access to the information in pages 4, 17, 30, 31, 47, 77 and 89, in their entirety.

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. After inviting representations from the parties, Adjudicator Jennifer James issued Interim Order MO-2797-I, which included the following order provisions:

3. I order the police to conduct a search for responsive records in the Chief's and Professional Standards Section files.
4. I order the police to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days 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) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
 - (d) the results of the search.

5. The affidavit referred to above should be sent 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.
6. If, as a result of the further search, the police identifies 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.

[6] Although seized of this matter, as Adjudicator James was not able to complete this inquiry through to final order, the file was re-assigned to me.

[7] In accordance with Interim Order MO-2797-I, the police granted the appellant with access to page 89 of the records. Also in accordance with this order, the police provided this office with affidavits from the Executive Assistant to the Chief of Police (the assistant) and the Acting Program Coordinator, Professional Standards (the coordinator), detailing the searches they each conducted for responsive records in the Chief's and Professional Standards Section files respectively. As a result of these further searches, the police provided the appellant with access to one additional record, which was a copy of a letter the appellant had previously received from a named staff sergeant.

[8] I provided the appellant with a copy of the police's affidavits and sought representations from him as to his position on whether the police had conducted a reasonable search for records in accordance with the order provisions of Interim Order MO-2797-I. In response, the appellant maintained that the police had not conducted a reasonable search for these records. He also sought a reconsideration of Adjudicator James' findings in Interim Order MO-2797-I.

[9] In this order, I uphold the police's search made as a result of the order provisions in Interim Order MO-2707-I. I also do not reconsider this order.

ISSUES:

- A. Should Interim Order MO-2797-I be reconsidered?
- B. Was the search conducted as a result of Interim Order MO-2797-I reasonable?

DISCUSSION:

A. Should Interim Order MO-2797-I be reconsidered?

[10] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[11] On December 13, 2012, the appellant called the Adjudication Review Officer and told her that he would like a reconsideration of the Interim Order MO-2797-I. He was advised that the time period for filing a reconsideration request had passed as the police had already complied with the interim order,¹ but that he could still send in a request with an explanation as to why his request was being made late. The appellant was referred to section 18 of the *Code of Procedure*, in particular section 18.04 which reads:

A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

- (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or
- (b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

[12] The appellant was also referred to Order MO-2410-F, where Adjudicator Colin Bhattacharjee determined that because the appellant in that appeal had failed to

¹ See section 18.04(a) of the IPC's *Code of Procedure*.

comply with the timeframe set out in section 18.04, his reconsideration request could be dismissed on that basis alone.

[13] In this appeal, the appellant has not complied with the timeframe set out in section 18.04 of the *Code of Procedure*. Interim Order MO-2797-I is dated October 16, 2012, and requires the police to provide an affidavit to the IPC detailing the new searches they were ordered to conduct within 30 days of October 16, 2012. Therefore, the appellant's reconsideration request should have been received by this office on or before November 15, 2012, which it was not. The first indication that the appellant was dissatisfied with the terms of Interim Order MO-2797-I was in his phone call to the Adjudication Review Officer on December 13, 2012.

[14] The appellant's explanation for his failure to comply with section 18.04 of the *Code of Procedure* was contained in his representations dated December 16, 2012, which were received on December 19, 2012. The appellant's explanation reads as follows:

My confusion about the protocol about the IPC requirements may have generated unneeded paperwork. My apologies. In addition to this representation requested in your letter of December 4/12,² I sent an appeal sent to you via registered mail on November 28, 2012 as recommended by [the Adjudication Review Officer] of your staff. In addition, there was confusion about the details of the Order MO-2797-I and about the wording of the letter I received [from the Freedom of Information Coordinator] of the Ottawa Police Service (OPS). Another member of your staff informed me that any requested 'reconsideration' of an order must be filed in a very narrow window. I had problems finding the criteria applicable to a reconsideration on your website. All told, there are too many vehicles to convey what is a simple message; namely, that the order to perform another search by the former Adjudicator, Ms. Jennifer James, is gratefully received but its phraseology may have just missed the target, the target being the files of a special unit within the Ottawa Police and of distinct police officers. I don't know if this requires a 'reconsideration' or not.

[15] In this appeal, the police were clearly required by Interim Order MO-2797-I to conduct searches of the Chief's and Professional Standards Section files and to provide detailed affidavits describing these searches within 30 days of the date of this interim order. Although the appellant strongly disagreed with the terms of the interim order, he did nothing after receiving this order and allowed the police to undertake these

² My letter to the appellant is dated December 4, 2012. This letter enclosed the police's affidavits and requested the appellant's representations on the police's search conducted in accordance with the order provisions in Interim Order MO-2797-I.

searches and prepare the affidavits, without indicating to either the police or this office within the 30 days that he was planning to ask for this order to be reconsidered.

[16] The appellant's first communication to this office after the date of the interim order was on November 28, 2012 by telephone, in which he stated he was not sure that the police had performed the searches required by the interim order as he had at that point only received the decision letter disclosing page 89 of the records and one other document. He made no mention of seeking a reconsideration of the interim order in this letter.

[17] It was not until December 13, 2012, that the appellant advised this office by telephone that he wanted a reconsideration of Interim Order MO-2797-I. This reconsideration request was received on December 19, 2012, over two months past the date of the interim order.

[18] I find that the appellant has not provided a reasonable explanation for his failure to file a reconsideration request in a timely manner. On that basis alone I am able to dismiss his reconsideration request.³ However, I also find that there are other reasons to dismiss this reconsideration request.

[19] In Order MO-2410-F, Adjudicator Bhattacharjee decided to also consider whether the appellant's request met the grounds for reconsideration set out in section 18.01 of the *Code of Procedure*. He stated that:

The appellant's reconsideration request does not make any reference to the grounds for reconsideration set out in section 18.01 of the *Code*. In my view, he is simply attempting to present new arguments as to why certain information that I found exempt under section 8(1)(e) of the *Act* should be disclosed to him. I find that his reasons for seeking a reconsideration of Interim Order MO-2347-I do not fit within the grounds set out in section 18.01, and his reconsideration request must, therefore, be dismissed on that basis [emphasis added].

[20] As stated above, section 18.01 of the *Code of Procedure* allows the IPC to reconsider an order where it is established that there is a fundamental defect in the adjudication process, some other jurisdictional defect in the decision, or a clerical error, accidental error or omission or other similar error in the decision. In this appeal, the appellant did not set out in his reconsideration request the basis for his request under section 18.01 of the *Code of Procedure*. As was the case in Order MO-2410-F, I cannot ascertain from the appellant's December 16, 2012 representations the grounds for his reconsideration request. After carefully considering the appellant's December 16, 2012 representations, I find that he is both reiterating the representations he provided to

³ Order MO-2410-F.

Adjudicator James on March 19, 2012 and also presenting new evidence, both of which do not form the basis for a reconsideration request.⁴

[21] Accordingly, I am not reconsidering Interim Order MO-2797-I. I will now consider whether the police conducted a reasonable search in accordance with order provision 3 of Interim Order MO-2797-I.

B. Was the search conducted as a result of Interim Order MO-2797-I reasonable?

[22] As stated above, the appellant maintains that the police have not conducted a reasonable search for records in the Chief's and Professional Standards Section files.

[23] 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.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[24] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁷

[25] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁸

[26] 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.⁹

[27] In response to Interim Order MO-2797-I, the police provided two affidavits, one from the Executive Assistant to the Chief of Police (the assistant) and the Acting Program Coordinator, Professional Standards (the coordinator).

[28] The assistant states in her affidavit that she searched the Chief's files for responsive records. She also states that all mail received by the Chief's office is tracked and that she searched through all of this mail; as a result she found two files, which

⁴ See section 18.02 of the IPC *Code of Procedure*.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469, PO-2592.

⁸ Order MO-2185.

⁹ Order MO-2246.

had already been disclosed to the appellant.¹⁰ I also provided the appellant with a copy of these files, which were attached to the assistant's affidavit.

[29] The affidavit from the police's coordinator states that she has full access to all information and complaints laid. She conducted a name search on IAPro (Internal Affairs and Professional Standards Software), which provided her with all reports and emails under the appellant's name. Her search resulted in three complaints filed by the appellant. I provided the appellant with a copy of the results of her search which were attached to the coordinator's affidavit.

[30] The appellant submits that the order should not have restricted a new search to only two locations, the Chief's office and the Professional Standards Section. The appellant points out that his request seeks access to all records related him, not only those in these two locations.

[31] In restricting the new search to two locations, at paragraphs 23 and 24 of Interim Order MO-2797-I, Adjudicator James stated that:

Throughout his representations, the appellant raises concerns about two individuals in the police's Freedom of Information Office who were responsible for processing his access request. He questions the veracity of the information they reported in the police's decision letter and exchanged during mediation. He also questions whether they have the qualifications to conduct the types of searches required given the amount and type of electronic records located on the police's servers. I have considered the appellant's evidence along with the police's decision letter and information exchanged during mediation and am satisfied that the police's search for responsive records were conducted by individuals knowledgeable in the police's records holdings. However, the fact that the police's search did not locate the copies of the Office of the Independent Police Review Director's letters to the Chief or the letter that the appellant received from the police's Professional Standards Section suggest that a further search of these record holdings should be ordered.

With respect to the remainder of the police's search, I am satisfied that the police's freedom of information office expended a reasonable effort to locate responsive records. In making my decision, I took into account that the police's freedom of information office provided the appellant with lengthy explanations in response to his questions, in addition to conducting another search for responsive records. However, the appellant was and continues to be dissatisfied with the police's search as it has failed to locate records which would corroborate CSIS' [Canadian Security

¹⁰ These two files can be found at pages 94 to 115 of the records.

Intelligence Service] and the police's collaboration relating to him [emphasis added].

[32] It is clear to me that Adjudicator James was aware that the appellant's request sought access to all records about the appellant. She determined that the police had conducted a reasonable search for all records related to the appellant, except for those in the two locations that she ordered the police to search.¹¹

[33] Concerning the search for responsive records in the Chief's and Professional Standards Section files, the appellant did not provide specific representations on the police's search of these two locations. He did provide general representations, which state:

...I didn't receive screen prints from any system, no logs of action, and, aside from RMS [records management system] and CPIC [Canadian Police Information Centre], no references to systems either, no Word documents (yet we know it's their primary document-creating software), no reports, nothing from the Mental Health Unit, even though they were mentioned exhaustively, no files and nothing in reference to these [named] people...

[34] I note that Adjudicator James in Interim Order MO-2797-I did not order the police to search for information in specific systems or in the Mental Health Unit or to search for records of specific individuals, other than the Chief.

[35] In ordering further searches in Interim Order MO-2797-I, Adjudicator James states that:

...the fact that the police's search did not locate the copies of the Office of the Independent Police Review Director's (OIRPD) letters to the Chief or the letter that the appellant received from the police's Professional Standards Section suggest that a further search of these record holdings should be ordered.

[36] Concerning the Chief's records, the assistant states in her affidavit that she searched the files of the Chief and also searched all mail received by the Chief. The coordinator is responsible for maintaining the complaints from the Chief's office and also complaints forwarded to the Professional Standards Section by the OIRPD. She also conducted a search for responsive records.

[37] The searches that were undertaken as a result of the order provisions of Interim Order MO-2797-I located correspondence between the OIRPD, the Chief, and the appellant concerning the appellant's complaints. The appellant has not indicated in his

¹¹ In Interim Order MO-2797-I.

representations which responsive records he believes still have not been located in either the Chief's office or the Professional Standards Section, the two locations Adjudicator James ordered to be searched in Interim Order MO-2797-I.

[38] I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist in the two locations that Adjudicator James ordered to be searched in Interim Order MO-2797-I. I find that the police have made a reasonable effort to identify and locate responsive records within their custody or control in these two locations. Accordingly, I uphold the police's search for responsive records made in accordance with Interim Order MO-2797-I and I dismiss this appeal.

ORDER:

I uphold the police's search and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ January 10, 2013