Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-2841-I

Appeal MA11-23-2

Toronto Police Services Board

January 31, 2013

Summary: The appellant requested access to records that postdated a previous request, but addressed similar subject matter. The Toronto Police Services Board located only one record that was responsive to the appellant's updated request and relied on section 9(1)(d) (relations with other governments), in conjunction with section 38(a), as well as 38(b) (personal privacy) to deny access to the portion they withheld. The appellant took issue with the reasonableness of the police's search for responsive records, the manner in which the police processed the request and the application of the exemptions. This interim order finds that the police did not conduct a reasonable search for responsive records and requires them to conduct a further search. The other issues will be addressed after the police provide the results of their search and a federal government agency is notified of the appellant's request for access to the record that the police identified as responsive to the request.

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

OVERVIEW:

[1] The Toronto Police Services Board (the police) received the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> I am requesting access to and copies of all personal records through [*MFIPPA*] as an UPDATE from my request received [identified request] of copies of all written and electronic records, including all log books, flipbooks, notebooks, files, telephone messages, inter and intra office emails and Outlook Express records, or any similar proprietary internal or external communication system used by [the police] in whatever format, of Officer #[specified badge number] or "[named individual]". This will include all internal or external records, of any and all sorts and formats of communication between "[named individual]" and Officers of the Hamilton Wentworth Police Service, Correctional Service of Canada and the National Parole Board, and all revised and altered "police occurrence" reports relative to me alleged to have been authored by "[named individual]". My request will also include all personal references and documentation in Internal Investigation File [specified number].

[2] After extending the time to respond to the request, which then resulted in a deemed refusal appeal,[1] the police issued a decision letter. The police advised that their search yielded only one responsive record, consisting of a series of emails. The police granted partial access to this record relying on sections 38(a) (discretion to refuse requester's own information), in conjunction with 9(1)(d) (relations with other governments) and 38(b) (personal privacy) to deny access to the portion they withheld. The appellant sought access to the withheld portions of the record identified as a responsive record by the police and takes issue with the manner in which they processed the request. In addition, the appellant takes issue with the reasonableness of the police's search for responsive records, asserting that other responsive records ought to exist.

[3] In the course of mediation, the appellant provided the mediator with a letter outlining where he believed additional responsive records would be located within police document storage areas. As set out in the Mediator's Report:

> The mediator then advised the Police of the appellant's position.
>
> As a result of the concerns raised by the appellant, the Police conducted an additional search. The Police advised that they located additional documents that may be responsive to the request. The Police, however, advised that they would need several weeks to review those records to determine if any of those records were responsive to the request.
>
> As of August 17, 2011 the Police had not provided a supplementary decision related to the new documents located.

[1] This was assigned file number MA11-23. When that file was closed the within appeal file (MA11-23-2) was opened.

> As a result, the appellant advised he could not wait any longer for the Police to issue a supplementary decision and instructed the mediator to forward the appeal to the next stage of the appeals process. It is the appellant's position that many additional responsive records must exist and he asked that the appeal move to the adjudication stage of appeal to determine if the Police had conducted a reasonable search.

[4] Also during mediation, the appellant requested that a finding be made concerning alleged police misconduct. As set out in the Mediator's Report:

> It is the appellant's position that [the police] are deliberately delaying his appeal. He also believes that there was a conscious effort by the police to mislead the mediator during the mediation process.

[5] At the appellant's request, the mediator added to the appeal the issue of whether the appellant can invoke the application of the offence provisions contained in sections 48(1)(d) and (e) of the *Act*.[2]

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and the individual named in the request (who I described as an affected party). In response, the police provided a letter advising that the affected party would not be providing representations and that an "additional clarification" letter had been sent to the appellant. A copy of the "additional clarification" letter accompanied the police's correspondence. These letters, which are addressed in more detail below, were all that the police provided in response to the Notice of Inquiry.

[8] I then sought representations from the appellant on the facts and issues set out in the Notice of Inquiry, as well as the "additional clarification" letter that he received from the police. Along with his representations, the appellant was asked to provide copies of his prior correspondence on this appeal that he asserts would support his position. The appellant provided extensive representations in response and continued to do so while the appeal was in the adjudication stage of the process.

[9] In the order that follows, I conclude that the police have not conducted a reasonable search for records responsive to the appellant's request and I order them to

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[2] Sections 48(1)(d) and (e) provide that no person shall,

> (d) wilfully obstruct the Commissioner in the performance of his or her functions under this *Act*;
>
> (e) wilfully make a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this *Act*.

conduct focussed searches and to provide this office with a reasonable amount of detail regarding the results of those searches. After I have received the results of the searches, and notified a federal agency about the appellant's request for access to the email the police identified as responsive to the request, I will then address the application of the exemptions to the email, as well as the issue of whether the appellant can invoke the application of the offence provisions contained in sections 48(1)(d) and (e) of the *Act*.

DISCUSSION:

[10] At mediation, the appellant contended that additional records existed and were likely located in an identified internal investigation file, in the police archives and on the affected party's personal computer.

[11] The Notice of Inquiry sent to the police and the affected party set out the tests pertaining to the issue of the reasonableness of the search for responsive records and provided that:

> The institution is required to provide a written summary of all steps taken in response to the request. In particular:
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> 1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
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> 2. If the institution did not contact the requester to clarify the request, did it:
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> (a) choose to respond literally to the request?
>
> (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
>
> 3. Please provide details of any searches carried out including: by whom were they conducted, what places were

> searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
>
> 4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
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> **This information is to be provided in affidavit form.** The affidavit should be signed by the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations. [Emphasis in original]

The police's representations

[12] As discussed above, in response to the Notice of Inquiry the police provided a letter responding to the Notice of Inquiry which referred to an "additional clarification" letter that the police sent to the appellant.

[13] The responding letter provided that:

> After consultation, it has been determined that [the affected party] will not be making written representations. If an affidavit is required, we will be pleased to obtain one from [the affected party] and forward it accordingly.

[14] The "additional clarification" letter appeared to respond to matters raised by the appellant at mediation. It referenced a police occurrence report number and stated that:

> The issue of initials […] and number located on the Record of Arrest (ROA) are the initials of [named detective and badge number] who also worked on the above police occurrence. This area in the ROA may vary in its appearance as it is signed off (name and badge added) only when an arrested party is informed that they have reasonable use of a telephone. It can be done either in pen or typed in by an officer who provided the information or is preparing the report. This may explain the "altered" documents you received from the various agencies you requested information from. As a document makes its way through the system, various signatures can be added along the way.

> In response to the query about emails sent to an officer's personal external email box, these emails are protected through the use of the section 14 exemptions. Any emails/Victim Impact Statements from victims would also be protected by the section 14 exemptions.
>
> Further to the specific query regarding any records held by the City Solicitor, the IPC and the Court of Appeal, please note these records would be in the custody/control of those agencies and requests must be submitted directly to them.
>
> Lastly, any notes taken during the trial/sentencing/Court of Appeal hearings by the involved officer cannot be produced as they are not in the custody/control of [the police]. Any notes taken of importance are later transcribed into an officer's memorandum book notes. We have not received any indication from [the affected party] that this is the case, in this instance.

[15] The letter did not provide any further details relating to the search that was discussed at mediation.

The appellant's representations

[16] In contrast to the police, the appellant filed voluminous representations in support of his position.

[17] Amongst other things, the appellant relies on a letter that he sent to the police arising from their extension of time to respond to the request. After commenting on the scope of the request, he wrote:

> The records requested are to a large degree assembled in the "completed cases" file in [the police] lockup. The supplementary electronic records I have requested are downloadable by the Section analyst from a search of [the police] intranet and internet files and cache associated with the officer. I may caution that I am aware that the identified Officer is and has been using his private, home based e-mail of [identified email address] to conduct official police business associated with the allegations he has made leading to the charges against me in [specified date]. Thus a search of his home computer will also be required to fully meet the object of the request.

[18] The appellant submits that this letter provided precise and exact locations where the paper records were stored and:

- that electronic records were generated in three areas: on the server of [the police] for [the affected party]; on the CPIC and Occurrence records entered electronically by [the affected party]; and at [identified email address] where the officer was conducting official police business

- that the Official File concerning [the affected party] contained a clear reference number accessible to the police in their own records using their own locators

[19] He further states that after receiving a subsequent letter from the police seeking clarification of his request under section 17(1)(b) of the *Act*, he responded in a letter to the police that:

- as a result of ATIP [Access to Information and Privacy] requests and updates fulfilled by Correctional Service of Canada, and as a result of ATIP requests fulfilled by the National Parole Board of Canada, I have obtained as part of the records of those Institutions generated during [specified year] and [specified year] responsive copies of records received by their Officers from [identified badge number] of [the police], provided to those institutions, both by email and by fax, indicating an ongoing intervention and communication in official matters by Officer [identified badge number] as they concern me personally

- new records were generated by the officer during two trials

- new copies of [police] records were generated by the Officer and forwarded by means of the Information Unit, by fax, to Correctional Service of Canada, in [specified year]. These records, received by the Correctional Service of Canada, (and obtained under an ATIP request of that institution) were new versions and significantly altered occurrence reports bearing the officer's name, and not previously part of the records at issue in my first ATIP request of [specified year]

- the use by the affected party of his personal ISP email address to conduct official police business

- that he had "been informed by another Police Service and other Institutional Officers that the Toronto Officer in question was also generating records concerning me and which were forwarded to the RCMP, relative to alterations in CPIC records based on reports, including occurrence reports generated by this Officer of [the police]"

- there exist "extensive records generated by this Officer in his communications with the Attorney General of Ontario in [specified date] and on other dates"

- there exist records generated by the subject officer with the Solicitor's Office of the City of Toronto

- he was "advised by an Officer of [an identified police service] that records were requested of the subject officer in December [specified year] and December [specified year]

Analysis and Finding

[20] While the appellant's representations go on at some length regarding the reasonableness of the police's search for responsive records and discuss why in the appellant's view, the claimed exemptions do not apply, in light of the failure of the police to provide sufficient information and materials dealing with the reasonableness of its search, and my determinations in this interim order, it is not necessary to set them out in detail.

[21] 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.[3] 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.

[22] 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.[4] I conclude that the police have not conducted a reasonable search for records responsive to the appellant's request for the following reasons.

[23] Firstly, in my view, the police have not provided me with sufficient evidence to establish that they have conducted a reasonable search for responsive records. In the Notice of Inquiry I initially issued to the police and the affected party to commence my inquiry, I requested the police to provide me with a "written summary of all steps taken in response to the request." In particular, I asked the police to provide this information "in affidavit form" from the "person or persons who conducted the actual search[es]." No affidavits were provided.

[24] The appellant has referred to specific record-holdings where he asserts that responsive records would be found, including the personal email of the affected party.

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.

In their "additional clarification" letter, the police take the position that emails sent to an officer's personal external email box would be subject to exemption under section 14(1) of the *Act*. This reverses the process. If such records exist, and they are responsive to the request, the police should have reported this result and then issued a decision letter. In addition, although the police referred to locating two boxes of records during mediation, no further details about them were provided. This leaves some doubt as to what further records were located and whether they are also responsive to the request.

[25] In my view, the police have not provided adequate detail about the searches undertaken for responsive records, including what was actually searched, where the searches took place, when each search was completed, who was consulted during the course of each search and the results of each search.

[26] Accordingly, for the reasons set out above, I conclude that the police have not conducted a reasonable search for records responsive to the appellant's request and I will order them to conduct focussed searches and to provide a reasonable amount of detail to this office regarding the results of those searches.

[27] After I have received the results of the searches, I will then address the application of the exemptions to the record that the police did identify as responsive to the request[5] as well as the issue of whether the appellant can invoke the application of the offence provisions contained in sections 48(1)(d) and (e) of the *Act*.

INTERIM ORDER:

1. I order the police to conduct further searches for records responsive to the request. I order the police to provide me with an affidavit sworn by the individual(s) who conducts the search(es), including the affected party, **by March 5, 2013** deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:

> (a) information about the individual(s) swearing the affidavit describing his or her qualifications, positions and responsibilities;
>
> (b) a statement describing their 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;

[5] In this regard I have decided to provide the appropriate federal government agency with notice of the appellant's request for access to the withheld portions of the responsive email.

(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.

2. The affidavit(s) 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(s) 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*.

3. If, as a result of the further searches, records responsive to the request are identified, I order the police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.

4. I remain seized of this appeal with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original signed by: January 31, 2013
Steven Faughnan
Adjudicator