Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2831-I

Appeal MA11-521-2

Toronto Police Services Board

January 18, 2013

Summary: The appellant submitted an access request to the Toronto Police Services Board for records related to the decision-making process for inclusion of individuals in the Toronto Police Wall of Honour. The police issued a decision letter identifying 136 pages of responsive records and denied access to them in their entirety, based on section 11(g) (pending policy decision) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the decision and challenged the adequacy of the police's search for records. On a number of occasions, this office sought representations and copies of all of the records at issue from the police. However, the police provided only unsevered and unmarked copies of pages 1-55 to this office and did not provide representations in support of the positions taken. In this order, the adjudicator finds that the police have not conducted a reasonable search and orders further searches. The adjudicator also orders the police to produce the records at issue in this appeal to this office.

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

OVERVIEW:

[1] The appellant, represented by a law firm, filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Toronto Police Services Board (the police) for access to:

> [a]ll correspondence, communications, deleted emails, emails, meeting minutes, records, memorandums, notes and material…relating to or involving [two named individuals] and/or the Toronto Police Wall of Honour between May 28, 2007 – October 30, 2011.

[2] The requester then named 10 individuals who may be in "possession or control" of responsive records, noting that the list should not be considered an exhaustive one. The request also referred to responsive records related to nine committee meetings regarding the appellant's father (identified by name in the initial part of the request) and the "Toronto Police Wall of Honour."[1] The request also sought correspondence between the Toronto Police Association and the Chief, which was referred to in an email to the appellant dated October 8, 2010.

[3] In response, the police issued a decision letter advising that it had located responsive records related to the "Memorial Wall Committee." The police denied access in full based on consultation with members of the Memorial Wall Committee, who advised that the "matters related to your request are ongoing." The police claim that disclosure could reasonably be expected to result in the premature disclosure of a pending policy decision for the purpose of section 11(g) of the *Act*.

[4] The appellant appealed the decision of the police to this office, which appointed a mediator to explore the possibility of resolution. During mediation, the appellant advised that she believed that additional records beyond those identified by the police should exist. As a result, the adequacy of search was added as an issue to this appeal. The discretionary exemption in section 38(a) of the *Act* was also added, given that at least some of the records in the 10-page representative sample provided to this office with an index[2] appear to contain the personal information of the appellant.

[5] It was not possible to resolve this appeal through mediation. The police did not provide copies of the full 136 pages of records at issue and did not wish to discuss the exemption claim with the mediator. In email correspondence sent to the police just prior to the conclusion of mediation, the mediator expressed the view that, in light of past orders of this office, section 11(g) did not apply. She also wrote:

> The emails refer to many meetings of a "working group" but your index does not include any notes, agendas, minutes of these meetings. … The emails also refer to "selection criteria and process" and "revisions to procedure" which the working group was working on, [but] which have not been referenced in the index.
> …

[1] The meeting dates were listed as March 22 and August 31, 2010, January 4 & 24, February 2, March 4 & 28, April 27, and May 26, 2011.

[2] The index of records prepared by the police at the time of the initial decision lists 136 pages of "correspondence," but this index was not provided to the appellant.

> We require all records to which access has been denied. You have provided us with a sample of 10 pages of correspondence; apparently there is another 126 pages of correspondence. We will also need all the records relating to notes, agendas, minutes of the working group's meetings if you intend to apply an exemption to them [emphasis in original].

[6] The police did not respond to this email in spite of attempts to follow up by the mediator.

[7] Accordingly, the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal started her inquiry by seeking the representations of the police, initially, through a Notice of Inquiry setting out the facts and issues sent on April 12, 2012. In the cover letter accompanying the Notice of Inquiry, Adjudicator Jennifer James added the following:

> To date, this office has not received a complete copy of the records at issue. Please ensure that a complete copy of the records is provided along with your representations.

[8] The due date for receipt of representations from the police was May 3, 2012. The police requested a two-week extension for the submission of representations to May 17, which was granted. On May 24, 2012, when the representations had still not been received, the adjudicator wrote to the police outlining concerns about the circumstances and requesting contact with this office upon receipt of the letter. The police responded with an explanation about workload issues and requested a further extension for submission of representations until June 4. On June 5, the police emailed senior adjudication staff to provide an update about the preparation of the representations and alluded to experiencing difficulty coordinating discussions with "stakeholders."[3] In this same email, the police indicated that they would "be forwarding a complete copy of the records at issue first thing in the morning as requested in the NOI [Notice of Inquiry]."

[9] However, the police ultimately did not respond to this Notice of Inquiry, either by providing representations or copies of all of the records at issue. Instead, the police issued a revised decision letter to the appellant on the same day (June 5, 2012) and granted partial access to records, still only consisting of pages 1-55. The police also added two mandatory exemptions to withhold information: the personal privacy exemption in section 14(1), together with the presumption in section 14(3)(b) and the exemption for relations with other governments in section 9(1)(d). Notably, the police did not cite sections 38(a) or 38(b) in this decision letter. The police also alluded to the

[3] i.e. Memorial Wall Committee members.

fact that consultations with some of the Memorial Wall Committee stakeholders were challenging due to the non-application of the *Act* to the various associations they represent.

[10] On June 7, 2012, with its copy of the revised decision letter, this office also received clean copies of pages 1-55. Copies of the records as severed and provided to the appellant with the revised decision letter were not provided at that time. Consequently, Adjudicator James sought clarification from the police as to whether the 55 pages represented the sum total of the records identified as responsive (rather than the 136 pages earlier indicated), as well as with respect to the severances made with disclosure to the appellant. The police did not respond to these telephone inquiries seeking clarification.

[11] Given the non-response by the police to these inquiries and due to questions raised by the appellant following receipt of the disclosed records, Adjudicator James sent a revised Notice of Inquiry to the police on June 13, 2012, inviting representations respecting the revised decision. The new exemptions claimed by the police were added as issues to this Notice of Inquiry for response. The due date set for receipt of the police's representations was July 5. The police did not submit representations in response to the Notice of Inquiry, nor did they respond to the telephone messages left by this office on July 10, 2012.

[12] On July 12, 2012, Adjudicator James sent correspondence to the police FOI coordinator and analyst responsible for this appeal, outlining the unsatisfactory progress of the appeal and advising that due to concerns about delay, she was moving the appeal to the next stage to invite the appellant's representations through a Notice of Inquiry. The appellant's Notice of Inquiry was sent on the same day. The appellant submitted representations on August 1, 2012, which included copies of the severed records disclosed by the police. Shortly thereafter, the adjudicator moved this appeal to the orders stage for the writing of an Interim Order.

[13] Following communication from the appellant about concerns related to the retention of records, Adjudicator James wrote to the police on October 2, 2012, advising that the appellant had been asked to contact the police directly for information about retention policies and schedules. The adjudicator also stated:

> For the purposes of this appeal, please maintain your files and a copy of responsive records, until further notice.

[14] As Adjudicator James is not available to complete this part of the inquiry, the appeal was recently re-assigned to me to do so.

[15] In this Interim Order, I order the police to produce copies of all records identified as responsive to the request to this office. I also find that the searches conducted to

date are not reasonable, and I order the police to carry out further searches in accordance with this order. I make no findings at this time with respect to the exemptions relied on by the police to withhold information.

RECORDS:

[16] The index of records the police provided to this office lists records numbered (pages) 1 to 136, while the records received in June 2012 are numbered only (pages) 1 to 55.

ISSUES:

A. Should the police be ordered to produce copies of the records?

B. Did the police conduct a reasonable search for records?

DISCUSSION:

A. Should the police be ordered to produce the records?

[17] This office has sought to proceed with this appeal by obtaining copies of the records at issue, but to no avail. On several occasions, the police have been asked to clarify or explain in writing, or to provide, the following to this office:

- confirmation of the records considered by the police to be responsive to the request;
- an explanation of the discrepancy between the records described in the initial index of records (136 pages of correspondence) and (55 pages of) records provided to this office;
- copies of the records provided to the appellant with the June 5, 2012 revised decision letter; and
- an explanation and/or a revised index of records, indicating which exemptions apply to each record or portion thereof.

[18] To date, the police have provided none of the requested documentation or clarification.

[19] The following summary of the situation from the appellant's viewpoint is expressed in the written representations she provided to this office:

> The [appellant] is understandably incredulous with the results of Toronto Police's response to the FOI request. The Toronto Police have failed to provide an index of responsive records and as a result, it is impossible for

> the [appellant] to know which records are being withheld, which records are being redacted pursuant to a particular exemption and which records the Toronto Police are claiming do not exist. The problem is compounded by the fact that the alleged responsive records have not yet been provided to the IPC.

[20] It is clear that the review and adjudication of an appeal of an institution's access decision will be compromised if the very records at issue have not been provided to this office for the purpose of determining the issues.

[21] Section 10 of the IPC's *Code of Procedure* provides that where an institution fails to provide the records at issue within the time specified by this office, the IPC may issue an order requiring the institution to produce the records. Section 10 also provides that the IPC may issue an order requiring the institution to provide a detailed index describing the records, indicating which exemptions are being claimed, numbering pages, and providing highlighted copies. Most often, the step of ordering an institution to produce records is taken by this office earlier in the processing of an appeal because *no* documentation has been provided by an institution at the time of appeal. However, this appeal reached the adjudication stage without this office possessing a complete copy of the records because the police had not been forthcoming in providing them. Only through the appellant sending the severed copies provided with the June 5, 2012 revised decision letter was there any indication of the police's revised position on disclosure of the first 55 pages.

[22] Without copies of pages 56-136, properly marked copies of pages 1-55, or representations from the police, there is currently no basis upon which I can determine whether the denial of access by the police was in accordance with the provisions of the *Act*. In the circumstances, therefore, I will order the police to produce all records listed in the December 2011 index of records. Further, this production order contemplates inclusion of any new records identified as responsive, pursuant to the searches ordered in the following part of this order.

B. Did the police conduct a reasonable search for records?

[23] In reviewing the claim by an appellant 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 that are responsive to the request, as required by section 17 of the *Act*.[4] 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.

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

[24] The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, 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.[5]

[25] Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, she must still provide a reasonable basis for concluding that such records exist. In circumstances where an appellant provides sufficient detail about the records that she is seeking, it is my responsibility to ensure that the institution has conducted a reasonable search to identify those responsive records or to establish that they may not exist.

[26] As previously indicated, the police did not submit representations, or provide any explanation, to substantiate the steps taken to identify records reasonably related to this request.

[27] The appellant, however, began providing detailed arguments about records she believes should exist during the mediation stage. Specifically, the appellant expressed her view that the working group meetings referred to in the emails she received as a consequence of the revised decision of June 2012 should have resulted in the creation of minutes, agendas and other responsive records. The appellant also believes that these emails suggest that other "selection criteria and process" and "revisions to procedure" documents should exist.

[28] In the written representations provided in response to the Notice of Inquiry, the appellant maintains that the suggestion by the police that additional responsive records may exist, but are not in their possession is not tenable. Moreover, the appellant submits that:

> What is apparent is that there are records which have not been produced, either in full, or in redacted form, that are responsive to the request. Without an index, it is impossible for the [appellant] to determine whether these records are being withheld on the basis of an exemption or whether the documents have been excluded from production as a result of an inadequate search.

[29] The appellant contends that the "detailed, pointed and specific" request should have permitted the police to identify more responsive records than those initially identified. The appellant sets out the wording of the request; namely, the preamble outlining the types of records sought and the subject matter, followed by the list of 10 identified individuals, nine Memorial Wall Committee meeting dates, and a specific letter between a representative of the Toronto Police Association and the (chief of the)

[5] Order P-624.

Toronto Police, which was identified in an email sent to the appellant by the Association representative.

[30] The appellant's representations set out in detail nine examples of records that she asserts ought reasonably to exist, but which have not been identified or produced. The appellant itemizes records based on references in the email correspondence disclosed with the June 5, 2012 revised decision to:

- "first version content document for the procedure {February 4, 2011 email};"
- "draft procedure [circulated to] the working group" by the Chief's staff {February 4, 2011 email};
- "draft criteria" or "suggested criteria {March 7 & 11, 2011 emails};"
- "the criteria will be inserted in the procedure and some other modifications will be made to clean up the language {March 11, 2011 email};"
- "revised version of the Memorial Wall procedure draft {March 29, 2011 email};"
- "… the wording of the first sentence of the submission criteria section [is] a bit confusing{March 30, 2011 email};"
- "the draft procedure was circulated… and several minor changes were suggested… this coming week the draft will go to our planning group for formatting {April 1, 2011 email};"
- "working group is meeting April 27 to review the latest draft and incorporate any feedback from the various Board's [sic] of directors {April 16, 2011 email}; and
- "basic agreement on the selection criteria and process but some further revisions to the procedure were recommended {May 27, 2011 email}."

[31] Stating that none of the "drafts, policies, procedures, guidelines, revisions or records" have been produced as part of the police's response, the appellant submits that the records must exist because they are mentioned in the police's own correspondence. According to the appellant, this suggests that the police have conducted a "woefully inadequate" search or are "intentionally excluding relevant material." Further, the appellant adds that the police have not tendered any evidence regarding the adequacy of their search or the efforts made to identify and located responsive records, as required.[6] The appellant submits that in this context, the police ought to be ordered to conduct "a further search, including but not limited to a search of the Toronto Police computer servers."

[32] I accept the appellant's position.

[33] To begin, I am satisfied that the appellant has provided the requisite detail to establish that certain records responsive to this request ought to exist, but have not been identified by the police through the searches conducted to this point.

[6] In support of this position, the appellant relies on Order PO-2559.

[34] Further, the police have failed to demonstrate that a reasonable search for responsive records was done due to their decision not to provide representations. Twice, this office sought representations from the police on the issues. These Notices of Inquiry included specific questions and requests for documentation. The police asked for, and received, an extension to the deadline for the submission of representations with respect to the first Notice of Inquiry, but ultimately provided no representations in response to either Notice. The lack of a meaningful response by the police to these pointed inquiries is not only unfortunate; it means that there is simply no evidence before me at all regarding the searches the police carried out to identify records that would be responsive to the appellant's request. Accordingly, I find that the searches conducted by the police were not adequate.

[35] In light of my finding that the police's search for records responsive to the appellant's request in this appeal cannot be upheld, I will order the police to conduct further searches. Specifically, I am requiring the police to conduct searches of its record-holdings for all records related to the appellant, her father and the Toronto Police Wall of Honour for the time period May 28, 2007 to October 30, 2011. I note that the police were reminded by this office to maintain their files and any responsive records until further notice.

[36] Additionally, the types of records specifically identified in the request are not to be taken as an exclusive or exhaustive list, and should be viewed in conjunction with the list of named individuals, the specified meetings, and the identified correspondence. For greater certainty, "all records" may include "correspondence, communications, deleted emails, emails, meeting minutes, records, memorandums, notes and material" relating to the subject matter, the named individuals, and the identified meetings (as specified in the request), but may also include processes, procedures, selection criteria, or meeting agendas.

ORDER:

1. I order the police to produce to this office all of the records that have been identified as responsive to the appellant's request. For greater certainty, this should include the full 136 pages identified to date and any responsive records which are newly identified consequent to the search provisions of this Interim Order, below. Prior to providing copies of the records identified as responsive to this office, the police must:

    a) revise the existing Index of Records to specify the exemption claims in relation to each of the records, adding any newly identified records and providing the same specification of exemptions; and

b) clearly identify all withheld records, or portions of records, by highlighting and labeling the relevant exemption claims or non-responsive portions.

2. I order the police to conduct further searches for responsive records, whether in printed form, on videotape, by electronic means or otherwise, within their record holdings. With regard to this provision, I order the police to provide me with affidavits sworn by the individuals who conduct the searches. 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, position 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.

3. If further responsive records are located as a result of the searches referred to in Provision 2, I order the police to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request. **The police must provide a copy of any new decision letter to me.**

4. The affidavit(s) referred to in Provision 2 should be sent to my attention, and may be shared with the appellant, unless there is an overriding confidentiality concern.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original signed by: January 18, 2013
Daphne Loukidelis
Adjudicator