

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2967-I

Appeal MA13-6

South Simcoe Police Services Board

October 23, 2013

Summary: The appellant sought information about a specific internal investigation. The police did not locate responsive records. This order requires the police to conduct another search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17(1), 17(2).

OVERVIEW:

[1] The South Simcoe Police Service Board (the SSPS or the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following:

... the total sum of the cost of the internal investigation ... ordered by [named Police Chief] and conducted by Senior Staff, which (former) [named Police Chief] refers to on pages #84 and #85 of his Ontario Civilian Police Commission (OCPC) disciplinary hearing transcript [given date]. Please provide the names of the Senior Staff that conducted the internal investigation and the number of man hours that were required to conduct this investigation ...

Please break down the cost and or man hours in the respective years that they were applicable too. (Per year basis).

[2] The police issued a decision to the requester advising that no records responsive to the request exist.

[3] The requester (now the appellant) appealed the decision to this office. The appellant attached a copy of an excerpt of the OCPC transcript referred to in his request.

[4] During the course of mediation, the appellant advised the mediator that he is relying on the OCPC transcript mentioned in his request as evidence that responsive records exist. The mediator relayed the appellant's position to the police.

[5] After conducting another search, the police issued a decision letter to the appellant advising that "no records exist as the South Simcoe Police Service does not have a copy of the OCPC transcript in reference nor will we be obtaining one".

[6] Subsequently, the appellant requested that the mediator forward to the police a copy of the partial transcript that the appellant included with his appeal. The mediator provided the partial transcript to the police. The police maintained their position that no responsive records exist.

[7] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were received and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In this order, I order the police to conduct another search for responsive records.

DISCUSSION:

Did the institution conduct a reasonable search for records?

[9] 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 17.¹ 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.

[10] 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

¹ Orders P-85, P-221 and PO-1954-I.

to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[11] 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.⁴

[12] 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.⁵

[13] 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.⁶

[14] In the Notice of Inquiry, I asked the police to provide a written summary of all steps taken in response to the request. In particular, they were asked:

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.
2. If the institution did not contact the requester to clarify the request, did it:
 - (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

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469, PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

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.

[15] The police state that they completed both a thorough and comprehensive search for any records responsive to the request. They state that this search was completed at the time of the request and again during the mediation stage of this appeal by the Deputy Chief, who the police describe as experienced and responsible for any records relating to this request. The police further state that they followed the proper "Chain of Command" in their search. The police state that:

The [appellant] was advised in the decision letter that the South Simcoe Police Service does not have a copy of the transcript referred to and is not obtaining one. In the file provided to the mediator during the mediation process, memorandums and notes were included from the appropriate parties where search was conducted. The memorandums and notes clearly state that no records exist with the South Simcoe Police Service. A secondary search of the record and a revised decision letter was issued at the request of the mediator to which our decision was upheld that no records exist. A copy of the [appellant's] transcripts was provided by the IPC to the South Simcoe Police Service after this decision was issued. The South Simcoe Police Service refused ownership as the mediator was creating a record to now be held in the South Simcoe Police Service's possession. The transcript is available from the Ontario Civilian Police Commission for a large fee. The South Simcoe Police Service has no interest in owning this document as it has no relevance to the South Simcoe Police Service as an institution.

[16] The appellant states that the police have not provided a response to the information sought in his request; nor have they provided any details of the searches undertaken for this information.

Analysis/Findings

[17] The appellant's request sought information about three items, as follows:

- the cost of a specific internal investigation broken down by cost per year;

- the number of man hours that were required to conduct this investigation broken down by year; and
- the names of the Senior Staff that conducted this internal investigation.

[18] In response, the police issued a decision letter, dated December 19, 2012, which read:

Following a thorough search by Deputy Chief [name] for [quotes request]. You are hereby notified that the search concluded that no records exist.

[19] Subsequently, during the mediation stage of this appeal, the police issued a second decision letter. In this decision letter, the police make reference to the transcript referred to in the appellant's request. The second decision letter, which is dated March 1, 2013, contained the same wording as the first decision letter, and added the following:

We uphold our decision that no records exist as the South Simcoe Police Service does not have a copy of the transcript in reference nor will we be obtaining one.

[20] On March 7, 2013, the mediator sent the police pages 1 (the cover page), 84 and 85 of the transcript referred to in the request, which contained highlighted passages referring to the investigation at issue in the request. On March 13, 2013, the police returned these three pages to the mediator, stating:

...As stated in our final decision letter, we uphold our decision that no records exist as the South Simcoe Police Service does not have a copy of the transcript in reference nor will we be obtaining one. This letter was sent to your office dated March 1, 2013. Your letter dated March 7, 2013 has been received after the fact that we have decided to uphold our original decision. The South Simcoe Police Service is of the opinion that we refuse to have custody of the records you have provided us. [Emphasis in original]

[21] I find that the appellant referred to pages 84 and 85 of a transcript in his request in order to clearly identify the investigation that is the subject matter of the request. The appellant provided these pages to this office, and the mediator provided these pages to the police, in order to assist the police in identifying the specific investigation referred to in his request. Instead of making use of the information in the pages of transcript provided to them to assist in locating the responsive information, the police returned the pages of the transcript indicating that they refuse to have custody of these pages.

[22] Section 17(1)(b) of the *Act* requires a requester in seeking access to records from an institution to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

[23] The appellant highlighted the names of the tribunal in question and the parties to that proceeding on the cover page and one paragraph on each of pages 84 and 85. I find that the police have acted unreasonably in not reviewing the highlighted pages of the transcript provided to them in order to assist them in locating the responsive information. I also find that they acted unreasonably in not seeking this and other information from the appellant at the request stage to assist them in identifying and locating responsive records.

[24] The police's decision letters only provide specific details about whether they have possession of the full transcript. Nowhere in any of their decision letters or in their representations do the police provide details of any searches they undertook for the exact information sought by the appellant.

[25] The Notice of Inquiry asks the police to respond to specific questions about the search or searches undertaken. Instead of responding to these questions, the police's representations focus on how the appellant can obtain a full copy of the transcript referred to in his request. However, the appellant never sought access to a complete copy of this transcript, nor did he ask the police to purchase this transcript.

[26] In their representations, the police state that:

...In the file provided to the mediator during the mediation process, memorandums and notes were included from the appropriate parties where search was conducted. The memorandums and notes clearly state that no records exist with the South Simcoe Police Service...

[27] I have reviewed these memorandum and notes. In an email to the police's Freedom of Information unit on December 13, 2012, the Deputy Chief advises that:

I do not have a copy of pages 84 and 85 of the OCPC hearing transcript that [the appellant] is referring to. I am unaware of an internal investigation conducted by senior staff. If it is possible for [the appellant] to provide a copy of these pages I will look into his request. [Emphasis added by me]

[28] Instead of searching for the responsive records or asking the appellant for the pages of the transcript sought by the Deputy Chief in his email to assist in any search, the police wrote a note to file immediately thereafter indicating that no responsive records exist. They then issued the first decision letter indicating that no records exist.

[29] In this appeal, if the police required more information to identify the responsive records, they ought to have asked the appellant if he could provide them with the two pages of the transcript referred to in his request, or asked him to provide any other relevant information required by them to respond to the request. If a request does not sufficiently describe the record sought, section 17(2) of the *Act* requires an institution to inform the requester of the defect and offer the requester assistance in reformulating the request. I find that the police have not made a reasonable effort to identify and locate all of the responsive records within their custody or control. I find that the police have not conducted a reasonable search for responsive records and I will order them to conduct another search.

ORDER:

1. I order the police to conduct a further search for records responsive to the request of the appellant seeking:

- the cost of the specific internal investigation referred to in the appellant's request broken down by cost per year;
- the number of man hours that were required to conduct this investigation broken down by year; and
- the names of the Senior Staff that conducted this internal investigation.

In order to assist the police in this search, along with this order I will provide them with a copy of the highlighted cover page and pages 84 and 85 of the transcript referred to in the appellant's request.

2. I order the police to provide me with an affidavit sworn by the individual(s) who conduct(s) the search(es), by **November 21, 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;
- (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;

(g) if as a result of the further searches it appears that responsive records exist that are not in the possession of the SSPS, details of whether the police have a right to possession of these records.

3. 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*.

4. 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* without recourse to a time extension under section 20 of the *Act*.

5. 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 _____
Diane Smith
Adjudicator

October 23, 2013