

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2938-I

Appeal MA11-521-2

Toronto Police Services Board

August 30, 2013

Summary: This is the third interim order addressing the issues raised by a request to the Toronto Police Services (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* regarding the decision-making process for determining eligibility criteria for the Toronto Police Wall of Honour. Two previous interim orders addressed the exemptions claimed to deny access, the production of records and the adequacy of the police's search for responsive records. In Interim Order MO-2831-I, I ordered the police to conduct further searches and to produce the records at issue to this office, along with a revised index of records. In Interim Order MO-2877-I, I ordered disclosure of the records withheld under sections 9(1)(d) and 14(1), with limited exceptions. I also concluded that the searches conducted in response to Interim Order MO-2831-I were not reasonable, and I ordered additional searches. After certain matters respecting compliance with Interim Order MO-2877-I were addressed, the police disclosed records and provided additional affidavit evidence regarding the searches ordered. I find that the police have not yet provided sufficient evidence to support a finding that a reasonable search for draft versions of the Memorial Wall Procedure or criteria has been conducted, and I order further searches be undertaken.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17(1) and 43(3).

Orders and Investigation Reports Considered: Orders MO-2831-I, MO-2877-I, and MO-2196-I.

OVERVIEW:

[1] This third interim order follows Interim Orders MO-2831-I and MO-2877-I, issued earlier this year respecting Appeal MA11-521-2. The appeal's history was outlined in Interim Order MO-2877-I, as follows:

This order is the second interim order released to address the issues raised by an appeal of a decision by the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request under appeal relates to records about the Toronto Police Wall of Honour and the work of the Toronto Police Memorial Wall Committee to establish criteria and processes for the inclusion of individuals on the Wall of Honour.

The first order, Interim Order MO-2831-I, was issued on January 18, 2013 to address concerns about the adequacy of the searches conducted by the police to identify responsive records. ... As set out there, the request sought:

[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.

Also provided with the request was a "non-exhaustive" list of 10 individuals who might be in "possession or control" of responsive records and the dates of nine committee meetings where inclusion of the requester's father (identified by name in the initial part of the request) on the "Toronto Police Wall of Honour" may have been discussed.¹ The request also identified correspondence between the Toronto Police Association and the Chief, which was referred to in a specified email to the requester. ...

The decision² of the police was appealed to this office by legal counsel representing the requester.³ During mediation, the adequacy of the police's search was challenged by the appellant and, consequently, was

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 police initially issued a decision denying access to the records identified as relating to the "Memorial Wall Committee" in full under section 11(g) which may be claimed where disclosure could reasonably be expected to result in the premature disclosure of a pending policy decision.

³ Reference to the appellant in this order can be interpreted to mean either the appellant or her legal counsel.

added as an issue in this appeal. The discretionary exemption in section 38(a) of the *Act* was also added, given that at least some of the records appeared to contain the personal information of the appellant. A mediated resolution of the appeal was not possible and the appeal was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry.⁴ ...

Interim Order MO-2831-I

As Adjudicator James was not available to write the interim order, the appeal was transferred to me to do so. In Interim Order MO-2831-I, issued January 18, 2013, I ordered the police to produce copies of all records identified as responsive to the request to this office, with the severances clearly marked. I also found that the searches conducted to date were not reasonable, and I ordered the police to carry out further searches. I did not review the exemptions relied on by the police to withhold information. ...

On February 21, 2013, I received complete copies of the records with the severances marked, an affidavit and a newly identified record from the police. The new record was a three-page draft Memorial Wall Procedure (dated March 29, 2011) and the police claimed no exemptions in relation to it. The following day, the police advised staff from this office that:

... despite providing a draft copy of the Procedure for release, I have been informed that this Procedure has been revamped and forwarded up the chain to our Corporate Planning Section as per established practice. It will then go to the Chief's Office for final review and sign off before becoming a formal Service Procedure. I have been advised that this should occur within six weeks and will be addressing the issues of criteria and other areas outlined in the appellant's request.

... As the requisite decision letter – and the record - had not, in fact, been sent to the appellant, police remedied this by preparing a decision letter dated March 6, 2013, through which the draft procedure was disclosed to the appellant. I received a copy of this decision letter on March 8th.

⁴ The progress of the appeal through the initial inquiry stage up to the issuing of Interim Order MO-2831-I after the appeal was transferred to me is omitted here. Reference may be made to the summary contained in Interim Order MO-2877-I at page 3.

On March 11, 2013, I sent a letter to the appellant, seeking representations on the police's response to Interim Order MO-2831-I ... [and] received the[m] ... After reviewing the representations, I concluded that I ought to dispose of the exemption claims and address the search issue through another interim order.

[2] In Interim Order MO-2877-I, I upheld the police's decision respecting responsiveness, with minor exceptions. I concluded that the exemptions claimed to deny access to the records did not apply, with one limited exception for the personal information of individuals other than the appellant. I ordered most of the withheld portions of the records disclosed to the appellant.

[3] I also concluded that the search for responsive records was not adequate, in part, because I rejected the position taken by the police that records "created by Memorial Wall Committee members who are also affiliated with the various police associations" were beyond the reach of the *Act*. I ordered further searches for responsive records.

[4] The compliance date for Interim Order MO-2877-I was June 4, 2013. The police were to have sent the records ordered disclosed to the appellant by that date. The police were also required to send the affidavits of search and any resulting decision letter to my attention by June 4.

[5] On June 11, I received correspondence from counsel for the appellant, indicating that he had not received the records that were ordered disclosed. At my request, a staff member from this office sent the police an email on my behalf, inquiring about the status of the police's order compliance and requesting an update about the approval of the Memorial Wall Procedure. Shortly after this email inquiry was sent, appellant's counsel telephoned this office to advise that he had just received a June 4, 2013 decision letter and disclosures from the police. However, the records sent to the appellant consisted of only the six pages ordered partially disclosed.⁵

[6] As the set of records disclosed did not include "all other withheld responsive portions of the records," I wrote to the police on June 13 to ask them to address this issue. I also sought an update on the police's response to the searches ordered in Interim Order MO-2877-I, pursuant to provisions 3 to 6, as follows:

... Interim Order MO-2877-I required the police to conduct additional searches, provide search affidavits (including specific details as outlined in Order Provision 4) to me, and to issue a decision letter to the appellant, if any additional records were identified.

⁵ I upheld the police's decision, in part, under section 38(b). Portions of these six pages were to be withheld to avoid disclosure of the personal information of other identifiable individuals.

Interim Order MO-2877-I specifically disallowed recourse to an extension for compliance. Accordingly, the compliance date for the order provisions relating to search was Thursday, May 30, 2013. As of today's date, ... the Toronto Police have not yet complied with the search provisions ... of Interim Order MO-2877-I.

[7] Following subsequent conversations between the police and IPC legal counsel, the police sent me a letter on June 20, enclosing a copy of a June 18 letter sent to the appellant with all records ordered disclosed. This letter also included "two sworn affidavits as outlined in your order."

[8] I provided these affidavits to the appellant and received representations in response.

DISCUSSION:

Preliminary issue – disclosure of records

[9] In the representations submitted respecting the police's response to Interim Order MO-2877-I, the appellant expressed concern that the police had not properly disclosed records pursuant to the order. The appellant enclosed a highlighted copy of page 18 of Interim Order MO-2877-I, as well as pages 45 and 46 of the records.

[10] The appellant's concern was based on the view that "pages 45 and 46 ... were ordered produced in their entirety." This view was based on the following finding on page 18 of Interim Order MO-2877-I:

[63] With respect to personal information about the appellant on pages 45 and 46, I note that this information consists of the views or opinions of other individuals about the appellant, as found in paragraph (e) of the definition. I accept that there may be some circumstances in which an adjudicator would find this type of personal information exempt under section 38(b). However, in a situation where there is no evidence to establish a basis for non-disclosure under one of the listed factors in section 14(2) favouring privacy protection, or otherwise, this type of personal information will be disclosed. This is one such appeal, and I find that the identified personal information on pages 45 and 46 is not exempt under section 38(b).

[11] Having reviewed the appellant's concerns, as well as the records, I am satisfied that the pages were disclosed appropriately. In the paragraph set out above, the finding that section 38(b) did not apply related *only* to the personal information of the appellant. Earlier in Interim Order MO-2877-I, I found that other information on pages

45 and 46 was either exempt under section 38(b)⁶ or not responsive to the request.⁷ Accordingly, I am satisfied that the disclosures by the police were in keeping with the order.

Did the police conduct a “reasonable” search?

[12] The appellant has consistently expressed concern that the police have not identified all of the records responsive to her request, particularly the various draft versions of the Memorial Wall Procedure and associated communications that she maintains can reasonably be expected to exist.

[13] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. As identified in previous orders, including Interim Orders MO-2831-I and MO-2877-I, 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 17.⁸ Similarly, 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. 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.

Representations

[14] As stated, the police provided two search affidavits consequent to Interim Order MO-2877-I: one from the FOI analyst and one from an inspector who is a member of the Memorial Wall Committee.

[15] The affidavit provided by the FOI analyst is nearly identical in content to the one provided following Interim Order MO-2831-I. I have reviewed this affidavit and refer to its content in my reasons, below, without repeating it here.⁹ However, the one new paragraph in the analyst’s affidavit provided in response to Interim Order MO-2877-I states:

⁶ See paragraph 61 on page 17 of Interim Order MO-2877-I where I found personal information of other individuals exempt because I concluded that its disclosure would result in an unjustified invasion of personal privacy.

⁷ See paragraph 23 on page 7 of Interim Order MO-2877-I where I found that coded email headers or signature footers containing no substantive content were not responsive to the request.

⁸ Orders P-85, P-221 and PO-1954-I.

⁹ Some wording has been modified: for example; the opening reference to “A review determined the request was for ‘all materials’ regarding ‘The Toronto Police Wall of Honour’ from 2007-2011” was revised to read “The records requested deal with The Memorial Wall – an area that is overseen by a group of Voluntary members belonging to various organizations affiliated with the Service.” Paragraph 3 now contains additional description of the inspector whose affidavit was provided. Paragraph 8 now includes reference to “in February 2013.”

Further to correspondence with [the Adjudication Review Officer] in April 2013, the writer [analyst] and Coordinator ... met with [the] Inspector ... of the Chief's Office to get a status update on the Memorial Wall Procedure. He confirmed that the Procedure has not yet been given the final sign-off by the TPS Command. He also re-confirmed that the [Access and Privacy Unit] has been provided with all of the records in [the] Service's custody regarding the Memorial Wall that he is aware of.

[16] The affidavit provided by the inspector states:

... I am a member of the team developing the criteria and internal Service procedure on recognizing Service members who have died.

I have searched all of the Service's internal mail system for further e-mails relating to the business of the team. Apart from what has already been disclosed, I am unable to locate any other e-mails relating to this committee's work.

As previously disclosed, the team did not keep or distribute minutes but did exchange versions of the draft procedure.

The team did not create or maintain any other records of its activities other than what has already been disclosed.

[17] In response to the affidavits provided by the police following Interim Order MO-2877-I, the appellant relies on the initial submissions provided in August 2012 and the supplementary representations provided in April 2013, following Interim Order MO-2831-I. The appellant submits that the police have not yet shown that they conducted a reasonable search for records responsive to the request. The appellant emphasizes that a *reasonable* basis has been provided for concluding that additional records – especially draft versions of the Memorial Wall Procedure – ought to exist.

[18] The appellant includes the list of versions of the procedure or other similar documents that was *summarized* in paragraphs 29 and 30 of Interim Order MO-2831-I and reproduced again under paragraph 68 of Interim Order MO-2877-I.¹⁰ The appellant's belief that these records ought to exist is based on references to them in email correspondence disclosed with the June 5, 2012 revised decision.

¹⁰ In paragraph 29, I referred to the appellant's submissions on "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) Toronto Police, which was identified in an email sent to the appellant by the Association representative."

[19] Using the more complete descriptions that were provided by the appellant, the list included the following:

- "I have drafted a first version content document for the procedure regarding the 'memorial wall' {February 4, 2011 email};"
- "The TPA is finalizing draft criteria and the Chief's staff have circulated a draft procedure to the working group {February 4, 2011 email};"
- "... they were working on the suggested criteria from the TPA and a draft procedure from TPS" {March 7, 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};"
- "here is the revised version of the Memorial Wall procedure draft with all today's discussion included {March 29, 2011 email};"
- "I think the content of the document includes everything that we have discussed. In my humble opinion, the wording of the first sentence of the submission criteria section [is] a bit confusing {March 30, 2011 email};"
- "... the draft procedure was circulated. The partners discussed the draft and several minor changes were suggested. The changes were made to the draft procedure and it was recirculated later in the day. Since I've received a few more suggestions for changes from the partners which will be worked into the draft over the weekend... this coming week the draft will go to our planning group for formatting {April 1, 2011 email};"
- "The 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
- "There is now some basic agreement on the selection criteria and process but some further revisions to the procedure were recommended {May 27, 2011 email}."

[20] According to the appellant, the outlined list provides a reasonable basis for concluding that additional drafts or versions of the selection documents other than the March 29, 2011 version have not been located. The appellant refers to the evidence provided by the police, as follows:

The affidavits of the [analyst] and [named inspector] fail to set out in any acceptable detail the scope and method of the search that was conducted. They also fail to comply with the details of the search ordered ... in Interim Order MO-2877-I.

The emails which attached the foregoing documents, which have not been produced, were all sent or received using Toronto Police Service email addresses. ...

Analysis and findings

[21] This appeal remains before me to determine the issue of the reasonableness of the searches conducted by the police for responsive records. In the two interim orders preceding this one, I concluded that the appellant had provided a reasonable basis for the belief that additional records ought to exist. I also concluded that the police had failed to provide sufficient evidence to establish that reasonable searches were conducted to identify them.¹¹

[22] In Interim Order MO-2831-I, I required the police to:

[35] ... 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.

[23] In both interim orders, the search provisions contained direction to the police about the evidence required, including: "information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search" and "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."

[24] Of the scant evidence provided by the police after the first interim order, I stated the following (in Interim Order MO-2877-I):

[77] Provision 2 of Interim Order MO-2831-I referred to "further searches for responsive records... within their record holdings," including affidavits sworn by the individual or individuals who conducted the additional searches required. The affidavit was to contain, at a minimum, certain

¹¹ At paragraph 34 of Interim Order MO-2831-I, I addressed the police's choice not to provide representations in response to the Notices of Inquiry sent to them.

specified information or details, with the intent being to provide specific details and elaboration on the police's response to the required searches. Paragraph d), in particular, asked for "information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search." However, in my view, the affidavit evidence provides a less-than-fulsome explanation of the efforts of the police ...

[78] My concern with respect to the adequacy of the searches conducted by the police in this appeal, and in response to Interim Order MO-2831-I, stems in part, from the lack of evidence on the issue. ... Due to the brevity of, and lack of clarity, in the evidence provided by the police, it is not clear whether the police included all of those individuals in their searches, or if only the identified inspector was contacted. Accordingly, I am not satisfied that the police conducted a reasonable search, that is, one that included appropriate searches of all types of records generated by the individuals affiliated with the Toronto Police Association, Toronto Senior Officers Association and the Toronto Police Amateur Athletic Association who were contributing members to the Toronto Police Wall of Honour Committee.¹²

[25] Before outlining my conclusions in this order, I will repeat the following important observation I made in Interim Order MO-2877-I:

[80] The jurisdiction of the Commissioner and her delegates on this issue does not include the authority to dictate the record-keeping practices of an institution. In this context, therefore, I am not able to order the police to create records where I am satisfied that none exist, even if better documentation is desirable. Having said that, in circumstances where I am not satisfied by the evidence that an institution has conducted a reasonable search for responsive records, and where an appellant has provided a reasonable basis for her belief that additional records may exist, I may order further searches.

¹² I had previously addressed and rejected the position taken by the police (in the analyst's affidavit) that "the records at issue involving members of the Committee exceed the scope of the Toronto Police Service. The involved stakeholders also included the Toronto Police Association, the Toronto Police Amateur Athletic Association and the Toronto Police Senior Officer's [sic] Association who are all governed under the ... *Act*." At paragraph 50 of Interim Order MO-2877-I (pages 14-15), I rejected this submission, in part because I agreed with the appellant that the Memorial Wall Committee was clearly a Toronto Police Service initiative. Notwithstanding, the same statement is repeated in the analyst's second affidavit provided following Interim Order MO-2877-I.

[26] Previously, in Order MO-2877-I, I concluded that there was not sufficiently clear evidence to determine if the police consulted any of the other individuals identified by the appellant, or if only the identified inspector was contacted.¹³ It is now clearer, in my view, that only the inspector was contacted to search for records. I am, however, satisfied that the named inspector was the most appropriate individual to contact with regard to the functioning of the Memorial Wall Committee; he is based in the Chief's office and was the author of a number of the emails listed by the appellant in the representations. I am, therefore, satisfied that he could reasonably be expected to have the appropriate level of knowledge about the types of records that would have been created by the committee and where such records might be found. To this extent, I find that relevant, reasonably informed staff were consulted with respect to identifying records responsive to the request.¹⁴

[27] I will now address the *types* of records that were identified by the request. As stated earlier, "all records" was previously defined as including "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."¹⁵

[28] Regarding the types of records created and identified, I noted in the previous interim orders the explanation provided by the police that most of the records consisted of emails since the Memorial Wall Committee "convened" chiefly by this method. The police had also elaborated on this point by submitting that the committee did not create the types of records the appellant maintains ought to exist, such as agendas, minutes, memoranda, notes or other materials, due to the nature of its operations (by email). At paragraph of Interim Order MO-2877-I, I observed that:

The police indicate that FOI staff followed up with the Committee contact (the identified inspector) in March and April of 2012 regarding certain types of documents that might exist, based on references to those documents in the emails identified to that point. However, the affidavit does not provide further information with respect to clarification that may have been given by the inspector in response.

[29] With the benefit of the inspector's affidavit evidence, the argument that additional "types of documents" related to the Memorial Wall Committee's business do not exist carries more weight. This suggests, in turn, that the searches for such types of documents may have been reasonable.

¹³ Paragraph 78 on page 24.

¹⁴ See Order PO-2592.

¹⁵ See paragraph 36 of Interim Order MO-2831-I.

[30] Although the detail in the inspector's affidavit regarding the searches completed is sparse, when combined with that provided previously by the analyst, I am prepared to accept that the police have conducted a reasonable search for *most types* of records that the appellant believes should exist.

[31] However, there is one obstacle to concluding this matter of the police's search for records related to its Memorial Wall Committee. This rests with the contradiction inherent in the following two paragraphs of the inspector's affidavit.

As previously disclosed, the team did not keep or distribute minutes **but did exchange versions of the draft procedure**. [emphasis added]

The team did not create or maintain any other records of its activities other than what has already been disclosed.

[32] The inspector's evidence clearly alludes to multiple drafts of the procedure, even while making what appears to be an incongruous statement in the next paragraph. Only one draft of the Memorial Wall Procedure, dated March 29, 2011, has been identified and disclosed to the appellant.

[33] The appellant has persistently and persuasively, in my view, maintained throughout this inquiry that additional draft versions of the Memorial Wall Procedure or its criteria ought to exist, but have not been located by what she describes as the police's "woefully inadequate" searches.

[34] As stated, the inspector's evidence lends credence to the suggestion that additional draft versions exist. However, because the inspector's affidavit lacks detail about the type of files searched, or the nature and location of the search (other than the aforementioned email system), I conclude that it does not rebut the reasonable basis established by the appellant for her belief that additional versions of the draft procedure (or criteria) may exist. I agree with the appellant that one might reasonably expect that the various drafts were attached as Word documents to the emails exchanged by the committee members. It is striking that, apart from the March 2011 version of the draft procedure, no such attachments were identified; nor was any indication given by the police that computer home (or shared) drives were searched.

[35] I find, therefore, that the evidence submitted in response to Interim Order MO-2877-I does not satisfy the obligation of the police to provide sufficient evidence to support a finding that a reasonable search for *draft versions of the Memorial Wall Procedure* or *criteria* has been conducted. Accordingly, I will order the police to conduct additional searches of their computer hard drives for any such records.

ORDER:

1. I order the police to conduct further searches for draft versions of the Memorial Wall Procedure or criteria in their computer hard drives. I order the police to provide me with an affidavit sworn by the individual who conducts the search(es) within 30 days of the date of this Interim Order – **September 30, 2013**. 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) 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.
2. If responsive records are located as a result of the search(es) referred to in Provision 1, 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.
3. The affidavit referred to in Provision 1 should be forwarded to my attention and may be shared with the appellant, unless there is an overriding confidentiality concern.

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

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ August 30, 2013