Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-3107-F

Appeal MA11-23-2

Toronto Police Services Board

September 30, 2014

Summary: This is a final order following Interim Order MO-2841-I. Interim Order MO-2841-I addressed the appellant's request for 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) (discretion to refuse requester's own information), as well as section 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 applied the exemptions as well as their conduct in the course of the appeal. In Interim Order MO-2841-I, the adjudicator found that the police did not conduct a reasonable search for responsive records and required them to conduct a further search, with other issues being addressed after the police provided the results of their search and a federal government agency was notified of the appellant's request for access to the record. In this order, the adjudicator finds that sections 38(a) and 38(b) do not apply to the responsive record identified by the police and orders the police to conduct a further targeted search for specific categories of responsive records.

Statutes Considered: *Provincial Offences Act*, R.S.O. 1990, c. P.33, section 23; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (personal information), 9(1)(d), 17, 36(2)(a), 38(a), 38(b), 48(1)(d), 48(1)(e).

Orders Considered: P-230, MO-1581, MO-1968-R and MO-2953-R.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received the following access request dated November 29, 2010, 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 17 October 2003 [identified request][1] 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 police officer]". This will include all internal or external records, of any and all sorts and formats of communication between "[named police officer]" 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 police officer]". 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,[2] the police issued a decision letter. The police advised that their search yielded only one responsive record, which consisted of a series of emails. The police granted partial access to this record, relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 9(1)(d) (relations with other governments) and section 38(b) (personal privacy) to deny access to the portion they withheld. The appellant sought access to the withheld portion of the record identified as responsive by the police and took 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, and their conduct during the course of this appeal.

[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.

---

[1] The earlier request was the subject of Order MO-1908-I and Reconsideration Order MO-1968-R, both of which were subject to applications for judicial review. Those Orders were further reconsidered in Reconsideration Order MO-2953-R, and the applications for judicial review were abandoned.

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

> 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.
>
> 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*.[3]

[6] The parties were unable to resolve the issue of whether the police's search was reasonable through the process of mediation. The file was transferred to the adjudication stage and I conducted an inquiry.

[7] I subsequently issued Interim Order MO-2841-I. As set out in my Interim Order, primarily because the police choose to provide an "additional clarification" letter rather than representations and/or an affidavit in response to a Notice of Inquiry, I found that the police did not conduct a reasonable search for responsive records. Accordingly, I ordered them to conduct further focussed searches and to provide a reasonable amount of detail to this office regarding the results of those searches, including those conducted by the police officer named in the request whom I described as an affected party in my interim order.

---

[3] 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*.

[8] I determined that other outstanding issues would be addressed after the police provided the results of their search and a federal government agency was notified of the appellant's access request.

[9] In particular, my interim order provided as follows:

> 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;
> >
> > (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.

[10] As discussed in more detail below, the police conducted a further search in response to my interim order, but did not identify any additional records responsive to the request.

[11] The police also provided documentation from their analyst and the police officer in support of their position that they conducted a reasonable search for responsive records. I sent a copy of the analyst's materials and the non-confidential portions of the police officer's materials to the appellant and invited his submissions in response. The appellant provided me with voluminous responding materials.

[12] In making my determinations in this appeal I have considered all the materials provided by the parties, including their confidential and non-confidential submissions.

RECORD:

[13] The record that the police identified as responsive to the request consists of a six-page email exchange, portions of which have already been disclosed to the appellant.

PRELIMINARY MATTER:

[14] The appellant provides voluminous representations in support of his contention that the police have committed offences that fall within the provisions of sections 48(1)(d) and/or (e) of the *Act*, including allegations that this office was misled by the police and the police took an inordinate amount of time to address the search for responsive records. These sections require a wilful act by the offending party, and need the consent of the Attorney General to commence a prosecution. The *Provincial Offences Act*[4] permits any member of the public to lay a charge under section 48(1) of the *Act*, and the appellant was always at liberty to attend on a Justice of the Peace and lay an information.[5] Accordingly, it is not necessary for me to further address this issue in this order.

ISSUES:

[15] Remaining to be addressed in this appeal is the following:

A. Does the email exchange contain personal information?

B. Does the discretionary exemption at section 38(a), in conjunction with section 9(1)(d), apply to the email exchange?

C. Does the discretionary exemption at section 38(b) apply to the email exchange?

D. Did the police conduct a reasonable search for responsive records?

---

[4] R.S.O. 1990, c. P.33.

[5] See section 23 of the *Provincial Offences Act* and also see Privacy Investigation Report MC-000014-I and Orders M-777, MO-1540 and P-1534.

DISCUSSION:

A. Does the email exchange contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[6]

[18] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[19] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[7]

[20] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[8]

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[9]

[22] In their "additional clarification" letter discussed in the Overview section above, the police stated the following:

> In response to the query about emails sent to an officer's personal external email box, these emails are protected though the use of the section 14 exemptions. Any emails/Victim Impact Statements from victims would also be protected by the section 14 exemptions.

---

[6] Order 11.
[7] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.
[9] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[23] In their decision letter, and in their index of records, the police indicate that they applied the exemption at section 38(b), with emphasis on the presumption in section 14(3)(b) (investigation into possible violation of law), to certain portions of the record. That said, the police made no specific representations on how the information in the email exchange qualifies as "personal information" under the *Act*, or to whom the personal information relates.

[24] As discussed in more detail below, the Federal Government Agency took the position that certain information in the record should be withheld as exempt under certain sections of the federal *Privacy Act.*[10] The Federal Government Agency, however, made no specific representations on how the information in the email exchange qualifies as "personal information" under *MFIPPA*, or to whom the personal information relates.

Analysis and finding

[25] As set out above, "personal information" means recorded information about an identifiable individual. In Order P-230, former Commissioner Tom Wright set out the basic requirements of identifiability as follows:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

[26] Having reviewed the email exchange, I find that it contains the personal information of the appellant as that term is defined in section 2(1) of the *Act*. However, I also find that it does not contain the personal information of any other identifiable individual. In that regard, although the email refers to victim impact statements, it does not contain a victim impact statement, does not refer to any victim by name nor does it provide any information which would link a particular identifiable victim to the content of the email. In my view, there is no reasonable expectation that an individual can be identified from the information in the record at issue.

[27] Accordingly, I find that the email exchange contains the personal information of the appellant, only.

[10] RSC 1985, c P-21.

B. Does the discretionary exemption at section 38(a), in conjunction with section 9(1)(d), apply to the email exchange?

Section 38(a)

[28] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[29] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[30] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[11]

[31] In this case, the police claim that the withheld portions of the record qualify for exemption under section 38(a) in conjunction with section 9(1)(d).

Section 9(1)(d)

[32] The section 9 exemption provides that:

> 9. (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> > (a) the Government of Canada;
> >
> > (b) the Government of Ontario or the government of a province or territory in Canada;
> >
> > (c) the government of a foreign country or state;
> >
> > (d) an agency of a government referred to in clause (a), (b) or (c); or

[11] Order M-352.

> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[33] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure".[12]

[34] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[13]

[35] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.[14]

[36] The focus of this exemption is to protect the interests of the supplier of information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.[15]

Representations

[37] In their decision letter, the police claimed that the withheld portions of the email exchange were subject to exemption under section 38(a), in conjunction with section 9(1)(d). Although invited to do so in the Notice of Inquiry, unlike the representations that the adjudicator considered in Order MO-1968-R, no representations were provided in support of the application of section 9(1)(d) in this appeal.

[38] Furthermore, in response to my request to the Federal Government Agency for representations on the potential application of section 9(1)(d) of the *Act*, I received correspondence from the agency accompanied by a highlighted copy of the responsive

---

[12] Orders M-844 and M-912.
[13] Order P-1552.
[14] Orders MO-1581, MO-1896 and MO-2314.
[15] Orders M-844 and MO-2032-F.

record. The correspondence recommended that the highlighted portions be withheld as exempt under certain sections of the *Privacy Act.*[16] No specific representations were provided in relation to section 9(1)(d) of *MFIPPA*.

[39] In his representations, the appellant states that it would be absurd to withhold the information at issue on the basis of section 9(1)(d), as he has already received redacted versions of records, including the one at issue in this appeal, from the notified Federal Government Agency as well as another Federal Government Agency. He submits:

> Given that the records were disclosed by the Heads of other Institutions, there can be no reasonable expectation that the information was "received in confidence" … .

Analysis and Finding

[40] In Order MO-1581, Adjudicator Sherry Liang[17] provided a detailed review of past decisions of this office addressing the application of section 9(1)(d) and its equivalent in the Provincial *Freedom of Information and Protection of Privacy Act.* In the following excerpt from Order MO-1581, Adjudicator Liang described the approach to be taken and provided several examples where the exemption had been found to apply, stating:

> The section 9(1) exemption has been applied in a variety of circumstances, including information provided to a police service from other police services (Order M-202), information provided to a municipality by the Ontario Realty Corporation (an agency of the provincial government) (Order M-1131), information provided to a police service by a ministry of the provincial government (Order MO-1569-F), and information provided to a police service by Crown Attorneys … .
>
> In these cases, it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section and that the information was received by the institution in confidence.

[41] Accordingly, to find that section 38(a), in conjunction with section 9(1)(d), applies, I must be persuaded that disclosure of the information withheld on this basis could reasonably be expected to reveal information the police received in confidence from an agency of a government. In this appeal, I conclude that I have not been

[16] RSC 1985, c P-21.
[17] Now Senior Adjudicator.

provided with "detailed and convincing evidence" to support the required element that the information be supplied "in confidence".

[42] Specifically, there is no evidentiary basis upon which I could conclude that the police received information from one of the governments, agencies or organizations listed in the section in confidence. Neither the notified Federal Government Agency nor the police provide any evidence, let alone "detailed and convincing evidence" that the information in the record at issue was supplied "in confidence".

[43] As the police have failed to satisfy this basic requirement of section 9(1)(d), I find that the section 38(a) exemption, in conjunction with section 9(1)(d), does not apply.

[44] I will now review the possible application of the personal privacy exemption in section 38(b) to the email exchange.

C. Does the discretionary exemption at section 38(b) apply to the email exchange?

[45] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[46] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[47] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[48] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[18]

[49] I concluded above that the email exchange contains the personal information of the appellant, only. Accordingly, disclosing this information to the appellant would not

[18] Order MO-2954.

result in an "unjustified invasion" of another individual's personal privacy. Therefore, the information in the email exchange does not qualify for exemption under section 38(b) of the *Act*.

[50] As I have found that the information in the email exchange does not qualify for exemption under sections 38(a) or (b) of the *Act*, and no mandatory exemptions apply to it, I will order that the information be disclosed to the appellant.

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

[51] 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.[19] 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.

[52] 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.[20] To be responsive, a record must be "reasonably related" to the request.[21]

[53] 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.[22]

[54] 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.[23]

[55] 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.[24]

[56] From a review of the appellant's voluminous materials, it would appear that his concern regarding the reasonableness of the police's search for responsive records primarily arose out of the following:

---

[19] Orders P-85, P-221 and PO-1954-I.
[20] Orders P-624 and PO-2559.
[21] Order PO-2554.
[22] Orders M-909, PO-2469 and PO-2592.
[23] Order MO-2185.
[24] Order MO-2246.

- he obtained certain records from access to information requests to Federal government agencies and through disclosure in criminal proceedings, which were not also identified as responsive records by the police or which indicated, in his view, that the police officer had, or would have, communicated with those agencies;

- the police's failure to produce notes written by the police officer during the appellant's various court appearances, although the appellant had observed the police officer taking notes at these proceedings;

- the existence of an email demonstrating that an individual had sent an email to the police officer's personal email account

- that two boxes of records had been identified at mediation but were deemed by the police not to contain records that were responsive to his request.

[57] The appellant's position was clearly set out at mediation and extensive discussions took place with the mediator regarding the respective positions of the police and the appellant. This was supplemented by correspondence forwarded by the appellant to the police in the course of mediation.

[58] However, as discussed above, at the initial stages of my inquiry, instead of providing detailed representations addressing the facts and issues set out in the Notice of Inquiry, the police responded by way of an "additional clarification". Had the police initially provided representations, supplemented by an affidavit, or simply an affidavit, on the issue of reasonable search, it would have been easier to crystallize the issues and focus the inquiry. This may also have resulted in the appellant's representations being more concise. The police's failure to provide representations (supplemented by an affidavit) or simply an affidavit, on the issue of reasonable search, made an interim order requiring affidavits from the police and the police officer detailing their search efforts almost inevitable.

[59] As well, the sheer volume of materials provided by the appellant during the course of this appeal, and his position that certain information in his materials should not be shared with the police, added an unnecessary layer of complexity.

Initial Matter: form of affidavits

[60] My interim order required affidavits from the police and the police officer detailing their search efforts. After a series of extensions, I was ultimately provided with separate materials from each of the police's Freedom of Information analyst and the police officer. These consisted of a cover page sworn by the analyst and the police officer followed by a series of pages entitled "Addendum to the Affidavit". The cover

pages do not mention the Addendum nor incorporate the Addendum by reference. That said, each page of the police officer's Addendum is initialled.

[61] The appellant takes issue with the form and validity of the affidavits provided. He further asserts that there was no affidavit provided by an identified Freedom of Information Coordinator who signed a number of letters in relation to the appellant's access request.

Analysis and finding

[62] The sufficiency of an affidavit, and the identity of the individual who provides it, goes to the burden the police bear to establish that they conducted a reasonable search for responsive records. Simply put, if the police have not provided sufficient evidence to establish that they conducted a reasonable search, I may order them to conduct a further search.

[63] That said, the materials provided by the analyst and the police officer, to my knowledge, are not in the typical form of an affidavit. The Addendum does not appear to be sworn; nor is it even mentioned in either cover page. Although the police officer's Addendum has initials on each page, I am not certain why that is so. Frankly, it is not clear to me whether or not the Addendum is a stand-alone document. In all the circumstances therefore, in making my determinations in this final order, I have decided to treat the first page as a sworn affidavit and the Addendum as simply that, an unsworn Addendum.

[64] However, even if I were to find that the entirety of the materials provided by the analyst and the police officer in response to my interim order qualified as affidavits, my determinations herein would not change.

Initial matter: Conduct of the police with respect to reasonable search

[65] As set out above, the appellant challenges the conduct of the police with respect to the manner in which they addressed the reasonable search issue. I have commented on how the police added to the complexity of the appeal by deciding to respond to the Notice of Inquiry with a "clarification letter". I have also addressed the appellant's assertion that the police should be charged with an offence under the *Act*, above. I will address these matters no further in this order.

Reasonable Search

[66] With respect to the police's search for responsive records, the type of responsive record that the appellant alleges should exist falls within the following general categories:

a) Records found in boxes located by the police during mediation

b) Records contained in an official file concerning the police officer identified by the appellant by specific file number

c) Records generated by the police officer when he took notes while attending at the appellant's various court appearances

d) Records exchanged between the police officer and Correctional Service of Canada and the Parole Board of Canada, including what the appellant described as "new versions and significantly altered occurrence reports"

e) Records forwarded by the police officer to the RCMP "relative to alterations in CPIC records based on reports, including occurrence reports generated by" the police officer

f) Records sent or received from the police officer's personal email address

g) Records exchanged between the police officer and the Attorney General of Ontario

h) Records exchanged between the police officer and the Solicitor's Office of the City of Toronto

[67] With respect to the police's search efforts, the analyst and the police officer provided general submissions supplemented by specific submissions addressing each of the items above.

[68] The police officer stated that upon receiving correspondence from the Access & Privacy Section of the Toronto Police Services Board (APS) he responded by email and forwarded to the APS all records under his "control".

[69] The analyst made a general statement that:

> The writer and Coordinator of APS met with the [police officer] on March 13th, 2013, to ensure that there was nothing else available to his recollection, or areas where responsive records could be located that had not been searched.

[70] Amongst other things, the appellant asserts generally that there is no definitive statement contained in the materials provided by the police officer that a complete search of all his records was conducted.

[71] I now turn to the listed categories of records discussed above.

Records found in boxes located by the police during mediation

[72] The appellant was troubled by the police's discovery of boxes of records at mediation, without them subsequently identifying that the contents included responsive records.

[73] The analyst deposes that as of the date of the police's last decision letter "[a]ll records had been called in via emails to the originating Division … and other Units who were identified as being involved. A review of the boxed items provided by the Division did not produce any records responsive to the appellant's request."

[74] In support of his position that the police's search was inadequate, the appellant questions why these records were not listed in detail and addressed by the police. He suggests that the content of the boxes should have been provided to this office or the police should have reviewed the documents or, at the very least, provided a detailed inventory of the contents of the boxes.

[75] In my view, the police have provided sufficient evidence to demonstrate that they took sufficient steps to review the boxes of records that were located during mediation and have satisfied me that the contents are not responsive to the request. Although the appellant questions the timing and scope of the review, I am satisfied that such an inspection took place, the person who conducted the review was an experienced employee knowledgeable in the subject matter of the request and that individual expended a reasonable effort to locate responsive records. Unfortunately, none were found.

Records contained in an official file concerning the police officer identified by the appellant by specific file number

[76] As set out in the request, the appellant sought access to all personal references and documentation in an Internal Investigation File that the appellant identified by a specific file number.

[77] With respect to the reasonableness of the search for this specified file, the analyst stated that:

> On [a specified date], the writer contacted the Professional Standards Investigative unit of the Toronto Police Services further to the appellant's request for "all personal references and documentation in Internal Investigation File [specified number]". The writer received a response from [identified police sargeant] indicating that the Unit did not have such a file number and further no information pertaining to the appellant.

[78] I am satisfied that the police have provided sufficient evidence to demonstrate that they conducted a reasonable search for the contents of the file specified by the appellant in his request.

Records generated by the police officer while attending at the appellant's various court appearances

[79] The appellant alleged that the police officer took notes while he attended at the appellant's various court appearances.

[80] The police originally addressed this allegation in their "additional clarification" letter, as follows:

> …, 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 police officer] that this is the case, in this instance.

[81] In the materials provided in response to my interim order, the police officer states:

> … The writer contends that notes were taken (bullet point form) in a steno note book during the trial while seated at the Crown's table. These pads were not part of the notes that were retained by the Police Service. The notes taken were regarding parts of the testimony given on the stand and is typical for officers to do as information revealed may lead to the uncovering of additional evidence for further investigation.

[82] The appellant points out that the police officer conceded that notes were taken and asserts that the steno notebooks should be produced for all of the appellant's court appearances that the police officer attended. The appellant further asserts that no extensive search was conducted for these steno notebooks.

[83] Based on the materials provided, I am satisfied that the appellant has established that the police officer took notes at court proceedings involving the appellant. Accordingly, I will order the police to conduct a search for any steno notebooks containing these notes and to issue a decision letter with respect to them as set out in the order provision below.

Records exchanged between the police officer and Correctional Service of Canada and the Parole Board of Canada, including what the appellant described as "new versions and significantly altered occurrence reports"

[84] After receiving disclosure pursuant to access to information requests under the Federal *Privacy Act* the appellant took the position that certain records differed from ones that he had received previously and/or were improperly altered by the police officer. The records that concerned the appellant consisted of Records of Arrest (ROA), an indictment and a document entitled "Otis Client Profile".

[85] The appellant also provided copies of portions of certain victim impact statements that were dated within the time frame of the request before me. I note that the facsimile number of the police TPS CCR Operational Floor appears on the pages provided.

[86] The appellant asserts that the existence of these records demonstrates that the police officer forwarded these records to the Parole Board of Canada (PB) and/or Correctional Service of Canada (CSC) and these records with any associated records reflecting communications about them, would accordingly, be responsive records captured by the time frame of the request before me. And yet, the appellant states, the police did not identify any of those records, or related communications as being responsive to the request.

[87] In their "additional clarification" letter, the police explained the difference in versions of the ROA in the following way:

> 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.

[88] The police officer posited that the differences may have arisen from the appellant having been arrested on two occasions resulting in there being "two different booking officer's therefore different initials and times on the CIPS case."

[89] The appellant was not satisfied with this explanation. He also took the position that these records were "new" records rather than versions of certain records that existed at a specific point in time. He submitted that:

> Thus, the records requested under the application for an UPDATE of the records dated from October 2003 and newly created in January 2005, are "new" records , and not "copies" of older records (they are not) with "just a supposition" or "guesswork" by an Analyst that "initials had been added along the way", when in fact initials, names and occurrence numbers were deleted and erased (for a purpose yet to be investigated) and, as such, are subject of my application for this group of records.

[90] With respect to communications pertaining to the Victim Impact Statements, the police officer stated in the materials provided in response to my interim order:

> … Electronic mail between the writer and Corrections Canada in [specified year] and [specified year] were forwarded to the APS section and portions may have been released. At the end of the trial, the CSC contacted the writer regarding the return of the Victim Impact Statements. The correspondence also dealt with when the parole hearing was going to occur and whether any victims were going to attend to provide testimony.

[91] The appellant submits that this is an acknowledgement that other responsive records exist that he never received. He further submits that copies of these responsive records have been provided by other institutions, but not the police. He submits that:

> … the original copies remained on the police fax machine in Toronto and remain under the care and control of [the police]. While the copies were received in [named location] (and then disclosed through FOI requests) remain under the care and control of the CSC and [PB] (who both disclosed them).

Analysis and finding

[92] With respect to the communication between the police officer and the PB regarding victim impact statements, this email communication is the very record at issue in this appeal that the police identified as responsive to the request. I have ordered that the withheld portions of this record be disclosed to the appellant.

[93] The top portion of the victim impact statements provided by the appellant indicate that the statements were sent from a facsimile number of the TPS CCR Operational Floor on a date that falls within the time frame of the request before me. However, that does not lead me to conclude that those records were actually sent by the police officer or were accompanied by a cover letter of some kind.

[94] With respect to the variations in records, I note that certain versions of the ROA appear to have been generated in 2005, more likely than not, by the reprinting of a record that was originally dated within the time frame of the appellant's first request. In

my view, however, what is germane to the reasonable search issue is not the date of the original record, or that it was reprinted at a later date, but rather whether there is a record reflecting the reprinted record being sent by the police officer to a federal government agency. There is nothing on the records themselves to indicate that the police officer had a role in reprinting them. Nor is there sufficiently clear and convincing evidence that there would be any record reflecting the reprinted record being sent by the police officer to a federal government agency.

[95] Finally, in the materials provided by the appellant at the mediation stage of the appeal, there is an allegation that the police officer's handwriting appears on a document entitled "Otis Client Profile". This is the source of the appellant's belief that the record was somehow communicated by the police officer and falls within the scope of the request. I am not satisfied on the basis of the evidence led by the appellant that there is any foundation for the belief that handwriting on the document is that of the police officer. I am also not satisfied that the appellant has otherwise established that this record is responsive to the request before me.

Records forwarded by the police officer to the RCMP "relative to alterations in CPIC records based on reports, including occurrence reports generated by" the police officer

[96] This category is related to the previous one. The appellant's position appears to be that, as a result of the receipt of information from the police officer, certain CPIC entries were altered.

[97] The police officer stated in the materials provided in response to my interim order, that any dealing with the RCMP "[w]ould have been done pre-2003, after the commencement of the investigation".

[98] The appellant submits that there is a considerable body of contacts between the RCMP and the police after October 2003 owing to errors in occurrence reports and records of conviction. The appellant submits that the police officer:

> … has been disingenuous about the subsequent significant communication between himself as Case Manager and the RCMP in 2007 and 2008 about the grounds of the alleged Canada wide warrant (if any), the Interpol Records and the changes made to the data entries along the way.

[99] In the materials provided in response to my interim order, the police officer advises that he:

> … [i]s unaware of what this is referring to. If the appellant can indicate which Police Service and Institutional Officers provided the information, it would assist in figuring out what records "being generated" is being addressed.

[100] The affected party refers to a particular Police service as being a participant in this exchange and provides evidence in support of this assertion which he asks be held "in strict confidence".

Analysis and Findings

[101] I discuss the issue of records relating to any Canada Wide Warrant below.

[102] I have reviewed the evidence the appellant provided in support of his position that records of communication between the police officer and the identified Police service ought to exist. I am not satisfied that this is the case. The materials provided indicate that the communication was one-way. There is no indication in the materials before me that the police officer actually communicated with the identified Police service. As a result, I am not satisfied that any records would have been generated in the hands of the police that are responsive to the request before me.

Records sent or received from the police officer's personal email address

[103] The appellant submitted that the police officer's personal email address was used for police work, and provided an example of one email exchange with a witness.

[104] At paragraph 19 of my interim order, I characterized the allegation as being:

- the use by the affected party of his personal ISP [Internet Service Provider] email address to conduct official police business

[105] In the materials provided in response to my interim order, the police officer stated that:

> … The writer contends that the home computer was never used for work. There may have been emails sent by one of the victims however nothing was ever retained. The archived data was wiped out with the migration [from one application to another].

[106] The appellant asserts that a migration from one application to another does not wipe out archived data on an email server. The appellant submits that the information is archived on the ISP servers.

[107] In support of his assertion that the police officer used his personal email account for police business the appellant provides a copy of one email. It may be that that was one-off, however, it does beg the question whether other responsive emails appear on the police officer's personal email address.

[108] In that regard, without some technical supporting evidence, I do not accept the police officer's assertion that migration from one application to another would delete emails on the police officer's personal email account identified by the appellant.

[109] Accordingly, I will order that a search be conducted, in accordance with the provisions of the *Act*, for any responsive records that may be found in the police officer's personal email account identified by the appellant and for the police to issue a decision letter with respect to them as set out in the order provision below.

Records exchanged between the police officer and the Attorney General of Ontario

[110] I characterized this issue at paragraph 19 of my interim order in the following way:

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

[111] In the materials provided in response to my interim order, the police officer stated that:

> … No new records required as case was already underway. The writer has reviewed memonotes from October to November 2006 and the only reference to the appellant's case was to note who the Crown Attorney assigned to the appeal was.
>
> … There are no extensive records with the Attorney General's Office unless referring to the Head Crown Attorney, who is consulted before a Canada Wide warrant can be issued.

[112] The appellant submits that this is a concession by the police officer that there was correspondence with the Head Crown Attorney as well as communication regarding an alleged Canada Wide Warrant. He submits that the scope of his request should be amended to include any records relating to a Canada wide warrant, including a copy of the warrant itself.

[113] He further submits that while there is a concession that a notation was made in the police officer's memorandum book, that record was never produced. The appellant further asserts that it would appear that neither the police officer nor the police actually conducted a review of the police officer's steno notebooks to verify their contents.

Analysis and Findings

[114] I am satisfied that information pertaining to a Canada Wide Warrant, including the warrant itself, would have been generated before the date of the request before me, and would therefore not fall within the time frame of the appellant's request at issue in this appeal.

[115] In my view, the notation in the police officer's steno notebooks regarding the name of the crown attorney is a responsive record. As a result, I will order that the police conduct a search for this responsive record and issue a decision letter with respect to it as set out in the order provision below.

[116] In the materials provided by the appellant, he included a copy of a notebook page provided as disclosure, at the request of a crown attorney. This indicates that the police officer did send certain notes to the crown attorney, in the context of providing disclosure in the appellant's criminal proceedings which appear to fall within the time frame of the request before me. I will, accordingly, order the police to conduct a further search for a copy of any materials that the police officer provided to a crown attorney in the context of disclosure and to issue a decision letter with respect to them as set out in the order provision below.

Records exchanged between the police officer and the City Solicitor's Office of the City of Toronto

[117] The appellant submits that records exist with respect to a specified year pertaining to communications with the City Solicitor's Office of the City of Toronto. From my review of the voluminous materials provided by the appellant, this appears to be communication pertaining to the requests for judicial review of decisions involving the appellant made by other adjudicators of this office. In that regard the City Solicitor's Office of the City of Toronto would have been involved in the capacity of counsel to the police.

[118] In response, the police officer states that he "is unclear of what is being referred to – if the appellant is referred to contact with City Legal, the writer is unaware."

[119] In my view, the police have provided sufficient evidence to demonstrate that they took reasonable steps to identify any responsive records that fall within this category of responsive records.

FINAL MATTER:

[120] In his materials the appellant asserts that various records should be subject to correction. Subsection 36(2)(a) of the *Act* provides that a person who is given access under section 36(1) of the *Act* to personal information is entitled to a right of correction, in certain circumstances. Section 36(2)(a) reads as follows:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> > request correction of the personal information if the individual believes there is an error or omission;

[121] For section 36(2)(a) to apply, the information must be personal information and must be "inexact, incomplete or ambiguous". This section will not apply if the information consists of an opinion.[25]

[122] Section 36(2)(a) gives the institution discretion to accept or reject a correction request.[26] Even if the information is "inexact, incomplete or ambiguous", this office may uphold the institution's exercise of discretion if it is reasonable in the circumstances.[27]

[123] As was the case with respect to the appellant laying an information regarding his allegation that the police engaged in offences under the *Act*, discussed above, the appellant was always at liberty to file a correction request to the police, for their consideration. I will not address the request in the abstract.

ORDER:

1. I order the police to disclose to the appellant the balance of the withheld information in the record at issue by sending it to him by **November 5, 2014** but not before **October 31, 2014**.

2. I order the police to conduct further searches for the records that I have specified at paragraphs 83, 109, 115 and 116 in the order above.

3. If, as a result of the further searches, responsive records are identified, I order the police to provide a decision letter to the appellant by **November 5, 2014** regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.

---

[25] Orders P-186 and PO-2079.
[26] Order PO-2079.
[27] Order PO-2258.

4. In order to ensure compliance with paragraph 1 of this order I reserve the right to require the police to provide me with a copy of the record as disclosed to the appellant.

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

Original Signed by: September 30, 2014
Steven Faughnan
Adjudicator