Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2863

Appeal MA12-111

Hamilton Police Services Board

March 28, 2013

Summary: The police received a request for access to records identifying houses which have been used for illegal drug operations. The police stated that no responsive records exist, and the issue in this appeal is whether the police conducted reasonable searches for responsive records. This order determines that the searches conducted by the police were not reasonable, and orders further searches to be conducted. It also finds that the requested records fit within the definition of the word "record" for the purpose of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of record), 17. Regulation 823, section 1.

Orders and Investigation Reports Considered: Orders PO-909, PO-1744, PO-2151.

OVERVIEW:

[1] The Hamilton Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about houses used for illegal operations. The request read as follows:

> Records which allow me to determine the locations where and dates when Hamilton Police Services have identified houses which have been used for illegal drug operations commonly known as "Grow Houses" or illegal

> chemical labs. "Year 2000 to Present" Require: Date, Address, Quantity Seized, Type of Building.

[2] In response to the request, the police issued a decision in which they stated:

> The Hamilton Police Service does not compile random statistical information on grow operations addresses. We are however able to search individual addresses …

[3] In its decision letter, the police also stated that if the appellant was asking for information about an individual address, any responsive information would only be disclosed to the owner of the premises at that address. The police stated that access to any such information would be denied on the basis of the exemptions in sections 8(1)(c), 8(1)(l), 8(2)(a) and 8(2)(c) (law enforcement), and section 14(1) (personal privacy) of the *Act*.

[4] The appellant appealed the decision of the police.

[5] During mediation, the police confirmed their position that no responsive records exist as the police do not compile "random statistical information on houses used for illegal drug operations." The police advised that no records exist that would identify houses used for illegal drug operations commonly known as "Grow Houses" or illegal chemical labs. The police also confirmed that they could search for records if the individual home address is known.

[6] The appellant took the position that responsive records should exist, and that he wished to appeal on the basis that the police did not conduct a reasonable search for responsive records pursuant to section 17 of the *Act*. As a result, reasonable search was identified as an issue in this appeal.

[7] At the end of the mediation process, a Mediator's Report was sent to the parties. In that report, the issues identified were whether the police conducted a reasonable search for responsive records, and whether the exemptions in sections 8 and 14 applied. Under the heading "Records remaining at issue" the Mediators Report confirmed that no responsive records were identified.

[8] This file was then transferred to the inquiry stage of the process.

[9] On my review of the issues in this file I noted that issues concerning access to any portions of records are premature because the existence and nature of responsive records had not yet been determined. Accordingly, I decided to initially address only the issue of whether the police's search for responsive records was reasonable. In that context, I also invited the parties to address the issue of whether or not the requested information is a "record" for the purpose of the *Act*.

[10] I sent a Notice of Inquiry identifying the facts and issues in this appeal to the police, initially. The police provided representations to me. After reviewing the representations of the police, and based on the information provided by them, I decided it was not necessary for me to hear from the appellant in the circumstances.

[11] In this order, I find that the searches conducted for responsive records were not reasonable, and I order the police to conduct further searches and provide a proper decision letter to the appellant.

ISSUES:

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

B. Is the requested information a "record" as defined in section 2 of the *Act* and section 1 of Regulation 823?

DISCUSSION:

Issue A. Did the police conduct a reasonable search for records?

[12] In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the police conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the police will be upheld. If I am not satisfied, further searches may be ordered.

[13] A number of previous orders have identified the requirements in reasonable search appeals.[1] In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[14] I agree with Acting-Adjudicator Jiwan's statement.

[15] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my

[1] See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[16] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

[17] The representations of the police begin by referring to the wording of the request, and state that no records exist that would identify houses used for illegal drug operations commonly known as grow houses or illegal chemical labs. The police state that "the data does not exist in the format responsive to this request."

[18] With respect to whether the police conducted a reasonable search, the police state:

> As reasonable a search as possible was conducted. The located data is not complete nor is it a true and accurate reflection of our entire drug offences due to the fact that between the time period of 2005-2007 our RMS [Records Management System] did not have the ability to identify possible records of this type through a specific incident classification sub-code.
>
> As a result we would only be able to access the information using specific addresses for that time period. Any information that predated our current [RMS] does exist but does not appear nor is searchable in the format requested. As stated in the decision letter and for clarification purposes the data does *not exist in the format* requested.

[19] However, the police then state the following:

> The information that we do possess should be viewed as "law enforcement" records created by Members of this Service in the course of the performance of their duties. Data is compiled in the Records Management system identifying Grow Operations or Chemical Labs identified by a UCR code (Uniform Crime Reporting Code). This data is not prepared for public consumption but for law enforcement investigative purposes and crime analysis. This information is released to Statistics Canada once a year.

[20] The police also identify a concern regarding the nature and extent of the specific information requested. They state:

> The Controlled Drugs and Substances Act does not provide a statutory definition of a "marihuana grow operation". The term Grow Operation and Chemical Lab are informal terms used by Law Enforcement. This informal term can cover anywhere from one plant to numerous plants. …

[21] Furthermore, the police refer to similar information that they provide to the local municipality. They state that they contacted the local municipality to clarify the municipality's process under the *Municipal Act*. They then state:

> In 2006 the *Municipal Act* was amended to mandate that all Police Services notify [the municipality] of any illegal drug operations when we locate them in our Region. The Municipality compiles this information and is responsible for ensuring that the properties are inspected and rehabilitated. Requests can be made through a Municipality's Building Department to obtain the history of an address.

[22] Lastly, the police provide representations on the issue of whether the responsive record is a "record" as defined in section 2(1)(b) of the *Act*, and I address that issue below.

Findings

[23] As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the police's search for responsive records was reasonable in the circumstances, the decision of the police will be upheld. If I am not satisfied, I may order that further searches be conducted.

[24] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.[2] In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be

[2] Order M-909.

> located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[25] I adopt the approach taken in the above orders for the purposes of the present appeal.

[26] I find that in the course of responding to this request, the police have not conducted a reasonable search for responsive records.

[27] To begin, I find that the police read the request in what can only be considered an overly narrow manner. They did so both by interpreting the request to be for records "in a particular format" and by deciding that, if responsive records for the full period of time referred to in the request could not be located, no records exist.

[28] Previous orders have confirmed the importance of properly determining the scope of a request. In Order P-880, former Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request.

[29] Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

[30] In addition, previous orders have clearly stated that, upon receipt of an access request, an institution has "an obligation to identify and locate any records which it believes are responsive to the request."[3]

[3] Order P-337

[31] I agree with the above statements. Clarity concerning the scope of a request and what the responsive records are is a fundamental first step in responding to a request and, subsequently, determining the issues in an appeal. Furthermore, adopting a liberal interpretation of the request ensures that records which might be responsive to the request are not omitted from the search. In addition, if an institution chooses to adopt a limited interpretation of a request, it ought to indicate to a requester the limits of its search.

Nature of the request

[32] In its decision letter the police apparently took the position that, because not all of the requested information can be located, no responsive records exist. They also considered the request to be for records in a particular format.

[33] The request in this appeal was for specific information. In their decision letter, the police responded by stating that the information does not exist "in the format requested." It appears from the representations of the police that have now been provided to me that at least some responsive information does exist in various formats.

[34] It is clear that the police did not fulfil their obligation to identify for the appellant the records that are responsive to the request. Rather than responding to the request by stating that no responsive records exist, the police ought to have identified for the appellant the various responsive records that did exist, or the reasons why the police were taking the position that responsive records did not exist. By merely stating that records "in the format requested" did not exist (when, in fact, the request was not for records in a particular format), and by failing to identify what responsive records may exist, the response of the police was inadequate.

[35] Accordingly, I find that in its initial response to the request, the police improperly interpreted the scope of the request in a narrow manner, failed to identify for the requester the existence of records that appear to be responsive to the request, and also failed to identify for the requester the limits of its search.

Adequacy of search

[36] I also find that the police have failed to provide detailed information about the searches conducted and the results of the searches.

[37] The Notice of Inquiry sent to the police asked them to provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what the results of the searches were. The representations of the police in response to these questions are set out above.

[38] Other than the narrative information provided in their representations, the police have not identified any records which have been located, nor have they described any such records in detail. The representations of the police refer to the "located data" and their concern that this data is "not complete nor is it a true and accurate reflection of our entire drug offences," but they have not provided any other information regarding what data was located. Although the representations of the police suggest that responsive records from 2007 to the date of the request exist in a particular format, they have not provided any additional information about these records. Their representations also suggest that the requested information is maintained by the police in different formats for different periods of time as follows:

Records from 2007 to the date of the request:

[39] The representations of the police suggest that, after 2007, their RMS system had the ability to identify possible responsive records through a specific incident classification sub-code. They also state that the information they do possess is data:

> … compiled in the Records Management system identifying Grow Operations or Chemical Labs identified by a UCR code (Uniform Crime Reporting Code). This data is [prepared] … for law enforcement investigative purposes and crime analysis. This information is released to Statistics Canada once a year.

[40] The police also refer to similar information that they provide to the local municipality under the requirements of the *Municipal Act*. The representations suggest that these records clearly exist.

Records from 2005 to 2007:

[41] The police state that during this time period their Records Management System "did not have the ability to identify possible records of this type through a specific incident classification sub-code." They also state:

> As a result we would only be able to access the information using specific addresses for that time period. Any information that predated our current [RMS] does exist but does not appear nor is searchable in the format requested. …

[42] This appears to suggest that, for these years, the information requested by the appellant exists, but that it cannot be searched electronically. The police have not provided any information on other ways in which this information may be located (ie: by manual searches through all the records).

Records from 2000 to 2005:

[43] Other than stating that the records for this period of time do not exist "in the requested format," the police have not provided information regarding whether any records exist, nor in what format any such records exist. In addition, the police have not provided any information about the searches conducted for such records.

Summary

[44] In the circumstances, I find that the police have failed to conduct reasonable searches for responsive records that may exist. They have done so by interpreting the request in a narrow manner and by failing in their obligation to "identify and locate any records which it believes are responsive to the request."[4] The police have also failed to provide the appellant with sufficient information regarding any such records, and have not satisfied me that they have conducted reasonable searches for responsive records.

[45] As a result, I will order the police to conduct further searches for responsive records, and to provide the appellant with a decision letter relating to any records located as a result of those searches.

Issue B. Is the requested information a "record" as defined in section 2 of the *Act* and section 1 of Regulation 823?

[46] The term "record" is defined in section 2(1) of the *Act* as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

[4] Order P-337.

[47] Section 1 of Regulation 823 also addresses the definition of the term "record" and states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Creation of a record

[48] In their representations the police argue that providing the requester with the relevant records would require them to create a record. They state:

> In reviewing previous orders relating to the issue of records it was noted that the *Act* requires the institution to provide the requester with access to all relevant records, however, in most cases, the *Act* does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format.

[49] The police then refer to section 2(1) of the *Act* and section 1 of Regulation 823, and state that they are "not convinced that [they] are under any obligation to create this record."

[50] It is clear from previous orders that an institution is not, in most instances, required to create a record in response to a request. As stated in Order MO-1422, "... section 17 does not, as a rule, oblige an institution to create a record where one does not currently exist."[5] Generally speaking, an institution's "... only obligation is to locate records which already exist and which contain the requested information."[6]

[51] Previous orders have also confirmed that the *Act* allows for different considerations to apply when dealing with electronic records [referenced in paragraph (b) of the definition of "record" in section 2(1)]. In these circumstances, if a record is capable of being produced, the *Act* requires the institution to produce it, subject to the regulations.[7]

[52] In the circumstances of this appeal, it appears that responsive records exist in different formats – earlier records presumably in hardcopy format, and more recent records in electronic format.

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[5] See also Orders M-436, MO-1381 and MO-1396.
[6] Order M-436.
[7] See Orders P-50, MO-1989, upheld on judicial review in *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 90 (C.A.); reversing [2007] O.J. No. 2442 (Div. Ct.).

[53] The police have an obligation to search for responsive records. With respect to any hardcopy records, these searches are ordinarily conducted manually, and the police have not satisfied me that conducting manual searches for responsive hardcopy records would result in the need to "create" a record. Although a search of this nature may take time and result in costs to an institution, the *Act* provides for these considerations.[8]

[54] With respect to records that exist in electronic format, subject to the regulations (one part of which is discussed below), if a record is capable of being produced, the *Act* requires the institution to produce it, and doing so is not considered to be "creating" a record.

Unreasonable interference with the operations of an institution

[55] As identified above, Regulation 823 states that an electronic record is not included in the definition of "record" under the *Act* if the process of producing it would "unreasonably interfere with the operations of an institution."

[56] The police provide representations in support of their position that producing the record would unreasonably interfere with their operations. They indicate that the work required to produce the record necessitates that the individual producing this record has the following:

- knowledge of the police's in-house Records Management Systems (current and past);
- knowledge of the police's system to run event summaries (created from another system);
- the use of a computer that has access to these three systems;
- query and extraction capabilities (which not all staff are required to have); and
- familiarity with the Uniform Crime Reporting codes (as there are many variables and several possible codes for the category of offences requested).

[57] The police also identify the category of staff that currently have the capability to search and extract the data without requiring additional training, and state that having these staff members do so would "be a hardship as their regular duties would suffer." The police also provide some details concerning the workload issues faced by these staff members.

[8] See the sections of the *Act* that provide for fees, fees estimates and time extensions.

[58] The police then state:

> In conclusion [the police] assert … that taking the time to create this information will interfere with staff's ability to perform their regular duties. There is also an issue of the availability of experienced people with the skill set to extract this information in a timely manner.

[59] These representations, by definition, would only relate to the portion of responsive records which are stored in an electronic format ("machine readable" records).

Findings

[60] Previous orders have considered the approach to take in determining this issue. In Order P-50, former Commissioner Sidney B. Linden made comments that are instructive in approaching this issue. He reviewed the regulation and confirmed that other sections of that regulation clearly provide for a fee to be charged by an institution "for developing a computer program or other method of producing a record from a machine readable record...." He then stated:

> What constitutes an "unreasonable interference" is a matter which must be considered on a case-by-case basis, but it is clear that the Regulation is intended to impose limits on the institution's responsibility to create a new record.
>
> Thus it appears that, subject to the Regulation, the *Act* does place an obligation on an institution to locate information and to produce it in the requested format whenever that information can be produced from an existing machine readable record, and providing that to do so will not unreasonably interfere with the operation of the institution.

[61] In Order P-1572, former Assistant Commissioner Tom Mitchinson found that producing the record requested in that appeal would unreasonably interfere with the institution's operations. In that appeal, the Ministry of Consumer and Commercial Relations submitted evidence that it would take senior technical and business personnel approximately 275 days to produce and sever the record, and that the production and severance of the record would require a significant service interruption to all users of the database.

[62] In Order PO-2151, Adjudicator Laurel Cropley identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

> … in order to establish "interference", an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities" (Order M-850). …
>
> …[W]here an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488).
>
> In Order M-583, former Commissioner Tom Wright noted that, "government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."
>
> Similarly, government organizations are not obligated to retain more staff than is required to meet its operational requirements. I qualify this point, however, by adding, as I noted above, that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).
>
> In my view, a determination that producing a record would unreasonably interfere with the operations of an institution is dependent on the facts of each case.

[63] Lastly, in Order MO-1989,[9] I determined that an institution must provide sufficient evidence beyond stating that extracting information would take "time and effort" in order to support a finding that the process of extracting the information would unreasonably interfere with its operations. This finding was not challenged on judicial review.

[64] On my review of the representations of the police, I find that I have not been provided with sufficient evidence to satisfy me that the process of producing responsive records from machine readable records would unreasonably interfere with the operations of the police. The police provide information regarding the training and experience of the individuals who are able to produce the records containing the responsive information, and some indication that having these staff members take the time to produce the record would "interfere" with their regular duties and "be a hardship." However, I find this is insufficient to establish unreasonable interference with the operations of the police. As identified by Adjudicator Cropley, although an

[9] This order was the subject of the judicial review and subsequent appeal in *Toronto Police Services Board*, supra.

institution is not obligated to retain more staff than is required to meet its operational requirements, an institution must allocate sufficient resources to meet its freedom of information obligations.[10]

[65] In the absence of sufficiently compelling representations to satisfy me that the process of producing responsive records from machine readable records would unreasonably interfere with the operations of the police, I find that section 1 of Regulation 823 does not apply. Accordingly, the information sought is a record as defined by section 2(1) of the *Act*, and the police are required to respond to the request in accordance with the provisions of the *Act*.

Additional note

[66] As a final note, the police provide brief representations in support of their view that, in any event, the appellant would not be entitled to access the requested "law enforcement information." They refer to possible notification issues if any personal information is included in the records. As noted above, this order does not address access or notifications issues, but only the issues set out above.

ORDER:

1. I order the police to conduct further searches for records responsive to the request. If records responsive to the request are situated in different locations or stored in different formats, I order the police to conduct searches for records in each of those locations or formats. I order the police to provide a decision letter to the appellant regarding the records requested, in the form contemplated by sections 19, 22 and 23 of the *Act*, on or before **May 2, 2013**.

2. I order that a copy of the decision letter referred to in Provision 1 be forwarded to me.

Original signed by: March 28, 2013
Frank DeVries
Adjudicator

[10] Order MO-1488.