

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2965-I

Appeal MA12-447

South Simcoe Police Services Board

October 18, 2013

Summary: The appellant sought the cost of a specific investigation conducted by another police service. The police did not locate responsive records. This order requires the police to conduct another search for responsive records.

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

OVERVIEW:

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

I require the total sum of the costs paid to [a specified police service, from [two named towns] and/or the South Simcoe Police Service (SSPS) and/or [two named police services boards] for the investigation that [the specified police service] are conducting and or assisting in, concerning the downloading of data from SSPS computers and or photocopiers and/or material taken from SSPS offices (conducted approximately from March to May 2012 and could be ongoing).

If there is no cost, or the cost has been reduced, associated with this investigation that [the specified police service] is involved in, please explain why.

[2] The police issued an access decision denying access pursuant to the discretionary law enforcement exemptions in sections 8(1)(a), 8(1)(b) and 8(1)(f) of the *Act*. They indicated that because the case is currently under investigation disclosure may interfere with an ongoing law enforcement investigation. The police advised that the records might be subject to release once the case is closed and all appeal periods have expired.

[3] The requester (now the appellant) appealed the police's decision.

[4] During mediation, the appellant explained that he believed that an agreement between the police and the other specified police service setting out the cost, or if no cost, setting out some other arrangement to compensate the other police service for its assistance in the investigation exists. After conducting another search, the police issued a decision letter to the appellant advising that "no records exist to this date". The police also referred to a number of exclusions and exemptions in the *Act* that they would rely on to deny access "in the event that any future records may exist".

[5] Following receipt of the police's decision letter, the appellant advised the mediator that he continues to believe that responsive records exist and, accordingly, the reasonableness of the police's search remains at issue in this appeal.

[6] As no further mediation was possible, this file was transferred to adjudication. Representations were received and exchanged between both parties in accordance with section 7 of the *IPC Code of Procedure* and *Practice Direction 7*.

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

DISCUSSION:

Did the institution conduct a reasonable search for records?

[8] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

¹ Orders P-85, P-221 and PO-1954-I.

[9] 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.² To be responsive, a record must be "reasonably related" to the request.³

[10] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[11] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

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

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469, PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

This information is to be provided in affidavit form. The affidavit should be signed by the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations. [Emphasis in original]

[14] In their initial representations, the police state:

As per your Notice of Inquiry for the above mentioned appeal number, we are standing by our original decision letter that no further information has been found, thus we have no further representations to provide.

[15] The police's first decision letter is dated September 13, 2012 and reads, in part:

...The information you requested is denied as the case is currently under investigation. This institution takes the view that any premature disclosure of the records may interfere should the matter go to trial. Once the case is closed and has been through the court system and all appeal periods have expired, the records may then be subject to release. You may reapply to our institution for access.

The following were considered in making this determination:

- 8(1)(a) Disclosure could interfere with a law enforcement matter
- 8(1)(b) Disclosure could interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- 8(1)(f) Disclosure could deprive a person of the right to a fair trial or impartial adjudication...

[16] The second decision letter is dated October 15, 2012 and reads, in part:

...following a thorough search by Deputy Chief of Police [name] you are hereby notified that the search concluded that no records exist...

[17] The third decision letter is dated December 7, 2012 and reads, in part:

...Following a thorough search and further additional search by Deputy Chief [name], you are hereby notified that the search concluded that no records exist to this date. We uphold our decision that no records exist.

In the event that any future records may exist, your request for this information is excluded under the following sections of the *Municipal Freedom of Information & Privacy Protection Act*:

- 8(1)(a) Disclosure of a record could interfere with a law enforcement matter;
- 8(1)(b) Disclosure of a record could interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- 8(1)(f) Disclosure of a record could deprive a person of the right to a fair trial or impartial adjudication;
- 8(2)(a) Disclosure of a record that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Access is also denied because disclosure would constitute an unjustified invasion of another person's personal privacy. The following were considered in making this decision:

- 14(2)(f) The personal information is highly sensitive;
- 14(2)(i) Disclosure may unfairly damage the reputation of any person referred to in the record;
- 14(3)(b) The personal information was compiled and is identifiable as part of an investigation into a possible violation of law;

The following sections of the Act were used to exempt the 10-codes and statistical codes:

- 8(1)(e) Disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person;
- 8(1)(l) Disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime;

The following sections exclude the records from the Act:

- 52(3) This Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 - 52(3) 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 - 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding...

[18] In response to the police's representations, the appellant states that he did not request any details of an investigation proper, the subject officer and or any information concerning pertinent evidence. He states that he "...was simply requesting the cost of the investigation."

[19] The appellant relies on the statement in the police's initial decision letter of September 13, 2012 which states that, "...the records may then be subject to release," and the statement in their December 7, 2012 letter that, "...In the event that any future records may exist, your request for this information is excluded under the following sections of the [Act]..." to mean that responsive records do exist.

[20] Relying on the fact that specific exemptions were quoted in the decision letters, the appellant states that he believes that the police had not conducted a proper search for the information he requested.

[21] In reply, the police state that the request is related to a *Police Service Act* investigation which does not involve the appellant. They state that the first decision letter of September 13, 2012 was issued denying access in whole as the request

involved current proceedings or anticipated proceedings. The request was interpreted as a whole and access was denied because the information being requested the subject of a current investigation.

[22] The police further state that a mistake was made in the original decision letter and in the interpretation of the request. After consultations with the mediator appointed by this office, it was determined the appellant was asking for something specific information that was included in the request, and not for all the information regarding the human resources matter referred to in the request.

[23] The police state that the second and third decision letters were sent out after consultations with the mediator about searching for records.

[24] The police state that the proper resources were used to search for the information in the request, which included senior staff and the Deputy Chief of Police, who was also conducting the investigation and outsourcing assistance. The Deputy Chief advised that no payment was made to the other police service that conducted the investigation and no bill for payment had been received from them.

[25] The police state that:

The [appellant] is basing his belief that records do exist upon the first decision letter dated September 13, 2013 where the request has been answered in its entirety. Access was denied due to the request being outside the *Act* and under investigation. As per the form letters used through FOI when a request is before the courts, the information may be subject to be released at a later date. The requester was notified in that letter that he may re-apply after the proceedings have been completed. Until then it is not known if the records would be denied or access granted. A request is answered with the current information at the time of request.

The [appellant] notes that he does not understand how the service could provide the exemptions for his request if the records do not exist. The requester does not understand that HR [human resources] and employment related matters are outside of the *Act* and would be exempted from the release of information should records exist.

As stated to the [appellant] in the revised decision letter, in the event that [the police] were ever to receive charges for exchange of services for the assistance provided, the information would not be released as per the exemptions provided. This would assist him in understanding that he is not entitled to the information requested as it involves a record that does

not fall under the scope of the act, is employment related, involves personal information, etc., as well as deter him from reapplying for these records again or multiple times with the belief that they may exist in the future.

[26] In surrepley, the appellant states that if no records existed then the police should have stated this in the first decision letter. This first letter demonstrates to the appellant that the police did not search for the records initially. He also states that his request was simple and only sought records related to the cost of the investigation, not the details of the investigation. He disputes the police's claim that they did not understand what the request sought until it was explained to them by the mediator.

[27] The appellant also states that the SSPS ought to know whether they would be charged for the downloading of data investigation by the other police service before the work was started and that it is highly unlikely that this other police service would conduct an investigation for the police at no cost. He also states that in response to his request, the SSPS should have asked the other police service conducting the investigation outlined in the request if they were charging the SSPS.

Analysis/Findings

[28] As stated above, the Notice of Inquiry (NOI) sent to the police asked them to provide specific details of the search they conducted for responsive records. The police have not responded to specific questions in the NOI, as set out above, including the questions that 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 were the results of the searches? Please include details of any searches carried out to respond to the request.

...Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[29] Initially, the police did not provide any response to the Notice of Inquiry, other than relying on its decision letters. In their reply representations, the police merely state that the proper resources were used to search for the information in the request which included senior staff and the Deputy Chief of Police and that the Deputy Chief advised that no payment was made and no bill for payment had been received from the other police service that conducted the investigation.

[30] I have reviewed the police's three decision letters, which I find confusing and conflicting, and the police's representations, which do not respond to the questions asked in the Notice of Inquiry concerning the details of the searches they conducted. As a result, I find that the police have not conducted a reasonable search for the responsive records.

[31] Referring to the police's decision letters, it is apparent that they issued the first letter without even conducting a search for the responsive records. Neither the second nor the third decision letters provide sufficient details of the searches the police claim were carried out, including what places and files were searched, who was contacted in the course of any searches and if any responsive records were destroyed. In addition, by listing exemptions that they claim may apply in the third decision letter, it appears that the police may be suggesting or insinuating that responsive records exist. Although the police may not have custody of these records, it appears that they may have control of responsive records, such as a responsive invoice from the other police service that provided the services to them that they had not yet received, for example.

[32] Accordingly, I find that the police have not provided sufficient evidence to demonstrate that they have made a reasonable effort to identify and locate all of the responsive records within their custody or control. I find that the police's search for responsive records was not reasonable and I will order them to conduct another search for responsive records.

ORDER:

1. I order the police to conduct a further search for records responsive to the request of the appellant seeking the total sum of the costs paid to the police service investigating the downloading of data from SSPS computers and/or photocopiers and/or material taken from SSPS offices. I order the police to provide me with an affidavit sworn by the individual(s) who conduct(s) the search(es), by **November 19, 2013** deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:
 - (a) information about the individual(s) swearing the affidavit describing his or her qualifications, positions and responsibilities;
 - (b) a statement describing their knowledge and understanding of the subject matter of the request;
 - (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

- (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - (e) the results of the search;
 - (f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules;
 - (g) if as a result of the further searches it appears that responsive records exist that are not in the possession of the SSPS, details of whether the police have a right to possession of these records.
2. The affidavit(s) referred to above should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit(s) provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC *Practice Direction 7*.
 3. If, as a result of the further searches, records responsive to the request are identified, I order the police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.
 4. I remain seized of this appeal with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original Signed by: _____
Diane Smith
Adjudicator

October 18, 2013