

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-2990-F

Appeal MA11-521-2

Toronto Police Services Board

December 23, 2013

**Summary:** This order is the fourth and final in a series of orders issued to conclude a lengthy inquiry into the appellant's request to the Toronto Police Services (the police) under the *Municipal Freedom of Information and Protection of Privacy Act*. The requester was seeking records related to the decision-making process for determining eligibility criteria for the Toronto Police Wall of Honour. Three previous interim orders addressed the access decision, production of records and the adequacy of the police's search for responsive records. In Interim Order MO-2831-I, I ordered the police to conduct further searches and to produce the records at issue to this office, along with a revised index of records. In Interim Order MO-2877-I, I ordered disclosure of the records withheld under sections 9(1)(d) (relations with other governments) and 14(1) (invasion of privacy), with limited exceptions. I also concluded that the searches conducted in response to Interim Order MO-2831-I were not reasonable, and I ordered additional searches. After compliance issues regarding the terms of Interim Order MO-2877-I were addressed and the ordered record disclosures and additional affidavit evidence were provided, I issued a third order, Interim Order MO-2938-I, in which further searches and affidavit evidence were ordered. In this final order, I find that although the evidence provided by the police remains scant, no useful purpose would be served by ordering further searches.

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

**Orders and Investigation Reports Considered:** Orders MO-2831-I, MO-2877-I, and MO-2938-I.

## **OVERVIEW:**

[1] This is the fourth and final order respecting Appeal MA11-521-2. It follows three interim orders<sup>1</sup> issued to address the issues surrounding the police's protracted search for records responsive to a request for records about the Toronto Police Wall of Honour and the related Toronto Police Memorial Wall Committee. This order concludes our office's review of the issues.

[2] The appeal's history was outlined in greater detail as it developed through each of Interim Orders MO-2831-I, MO-2877-I and MO-2938-I. The following summary of it should not be taken to be comprehensive.

[3] As the child of an individual whose candidacy for the Toronto Police Wall of Honour was being put forward, the requester was interested in information about the Toronto Police Memorial Wall Committee, particularly their work to establish criteria and processes for the inclusion of individuals on the Wall of Honour. The request sought:

[a]ll correspondence, communications, deleted emails, emails, meeting minutes, records, memorandums, notes and material...relating to or involving [two named individuals] and/or the Toronto Police Wall of Honour between May 28, 2007 – October 30, 2011.

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

[5] The appeal of the police's decision (by legal counsel representing the requester) initiated the opening of the appeal and the appointment of a mediator to explore resolution.<sup>2</sup> Early in the mediation stage, the appellant challenged the adequacy of the police's search. It was not possible to resolve the concerns and issues related to search and the denial of access to the records through a mediated resolution, and the appeal was transferred to the adjudication stage of the appeals process for an inquiry.

[6] During adjudication, this office encountered difficulty obtaining a complete copy of the records at issue. As the former adjudicator was not available to write an interim order to address the production of records and the search issue, the appeal was transferred to me.

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<sup>1</sup> Interim Orders MO-2831-I, MO-2877-I and MO-2938-I, which were issued on January 18, April 29 and August 30, 2013, respectively.

<sup>2</sup> The appellant and her legal counsel are referred to interchangeably as the appellant in this order.

[7] In Interim Order MO-2831-I, issued January 18, 2013, I ordered the police to produce copies of all records identified as responsive to the request to this office, with the severances clearly marked. I also found that the searches conducted to date were not reasonable, and I ordered the police to carry out further searches and to provide affidavit evidence of the search.<sup>3</sup> In that order, I did not review the exemptions relied on by the police to deny access to the records.

[8] On February 21, 2013, the police provided complete copies of the records with the severances marked, an affidavit and a newly identified record – a three-page draft Memorial Wall Procedure (dated March 29, 2011), apparently intended for this office to disclose to the appellant. The following day, the police advised staff from this office that:

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

[9] The police subsequently sent a revised decision letter, dated March 6, 2013, to the appellant, disclosing the draft procedure.<sup>4</sup> Next, I sought representations from the appellant regarding the police's response to Interim Order MO-2831-I.

[10] After reviewing the appellant's representations, I issued Interim Order MO-2877-I to address the exemption claims and the search issue. In this second interim order, I upheld the police's decision on responsiveness, with minor exceptions. I did not uphold the exemption claims, with one limited exception for another individual's personal information, and I ordered the non-exempt portions of the records disclosed to the appellant. I also concluded that the search for responsive records was not adequate, in part, because I rejected the position taken by the police that records "created by Memorial Wall Committee members who are also affiliated with the various police associations" were outside the scope of the *Act*. Accordingly, I ordered that further searches for responsive records be undertaken.<sup>5</sup>

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<sup>3</sup> The compliance date for Interim Order MO-2831-I was February 19, 2013, as clarified in correspondence I sent to the police and the appellant January 31, 2013.

<sup>4</sup> The approval of this procedure and its possible status as a "formal Service Procedure" remains unconfirmed by this office.

<sup>5</sup> The compliance dates for Interim Order MO-2877-I were May 30, 2013 for the search provisions and June 4 for the disclosure provisions.

[11] As the police did not send the records ordered disclosed to the appellant or submit the search affidavits (and any resulting decision letter) required by Interim Order MO-2877-I by the compliance dates, follow-up was required. On June 13, I wrote to the police to remind them of their obligations under Interim Order MO-2877-I. Next, after conversations between the police and IPC legal counsel, the police sent me a letter on June 20, enclosing a copy of a June 18 letter sent to the appellant with all records ordered disclosed. This letter also included "two sworn affidavits as outlined in your order."

[12] I sent the two affidavits to the appellant and received representations in response. Based on those representations and the affidavit evidence provided by the police, I issued a third order, Interim Order MO-2938-I, on August 30, 2013, dealing with the search issue. Starting on page 12, I wrote:

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

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

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

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

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

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

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

[35] I find, therefore, that the evidence submitted in response to Interim Order MO-2877-I does not satisfy the obligation of the police to provide sufficient evidence to support a finding that a reasonable search for draft versions of the Memorial Wall Procedure or criteria has been conducted. Accordingly, I will order the police to conduct additional searches of their computer hard drives for any such records.<sup>6</sup>

[13] On October 8, 2013, I received the affidavit provided by the police. Upon review of the affidavit, I concluded that I would issue a final order to conclude this appeal.

## **DISCUSSION:**

### **Did the police conduct a "reasonable" search?**

[14] Over the course of this lengthy inquiry, the appellant expressed cogent concerns about the adequacy of the searches conducted by the police for records responsive to her request. As indicated, the most recent order (Interim Order MO-2938-I) represented my third review of the search issue. In this final order, it might seem unnecessary to outline the general requirements and obligations placed on institutions and requesters under section 17 of the *Act*. However, insofar as these principles and the approach to the issue of reasonable search in past orders necessarily underpin my final conclusions in this matter, I will set them out again.

[15] Section 17(1)(b) of the *Act* requires a requester to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." As I stated in the interim orders, the *Act* does not impose a requirement that the police prove with absolute certainty that further records do not exist. Those orders, and many before them, have emphasized that once a requester provides a reasonable basis for concluding that additional records exist, the institution whose

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<sup>6</sup> The compliance date for Interim Order MO-2938-I was September 30, 2013.

search efforts are being challenged must respond by providing sufficient evidence to show that a reasonable effort to identify and locate responsive records has been made.<sup>7</sup>

[16] If satisfied by the evidence that the search carried out was reasonable in the circumstances, the matter may then be concluded. However, as long as the reasonableness of the searches conducted by an institution is in dispute, based on concerns fairly raised by the evidence before me, I may order further searches. In this appeal, I have found it necessary to issue three successive interim orders requiring additional searches and affidavit evidence. It is, therefore, fair to say that the evidence provided by the police to this point has fallen short of the comprehensiveness required to establish the reasonableness of their searches.

[17] After reviewing the evidence before me in the most recent interim order (MO-2938-I), I concluded that there was one remaining aspect of the police's search for records regarding the Memorial Wall Committee that had not been demonstrably shown to have been pursued. As outlined above, I commented on the failure of the affidavit evidence regarding "the type of files searched, or the nature and location of the search (other than the aforementioned email system)" to "rebut the reasonable basis established by the appellant for her belief that additional versions of the draft procedure (or criteria) may exist."

[18] In ordering additional searches and affidavit evidence in support of the searches, I remarked on the lack of evidence from the police "that computer home (or shared) drives were searched." I found this striking, given the inspector's evidence about the committee members exchanging successive drafts of the Memorial Wall procedure, only one of which had been identified and disclosed to the appellant.

[19] In response to Interim Order MO-2938-I, the police submitted a new affidavit, which was sworn by the same inspector who provided affidavit evidence in response to Interim Order MO-2877-I.<sup>8</sup> The inspector states:

My name is [SE]. I am an Inspector with the Toronto Police Service. I have knowledge of the matters herein discussed. I am the Chief's Executive Officer and have been assigned to the Chief's Office since 2000.

I am a member of the team developing the criteria and internal Service procedure on recognizing Service members who have died. The team is composed of the following members: Deputy Chief [MF] from Corporate Command, S/Sgt. [JC] of the Chief's Staff, S/Sgt. [CB] who was representing the TPAAA [Toronto Police Amateur Athletic Association] and WOF [Widows and Orphans Fund], [HT] who was representing the TPS

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<sup>7</sup> Order P-624.

<sup>8</sup> Two search affidavits were provided by the police in response to Interim Order MO-2877-I: one from the FOI analyst and one from this inspector.

SOO [Senior Officers' Association] and [MA] who was representing the TPA and me. For a short period of time, S/Sgt. [IS] was a member of the team from the Chief's Staff but he left the Chief's Office and was replaced by S/Sgt. [C].

My role on the team was that of co-ordinator, organizing and facilitating the meetings and the process of developing a procedure. I have a complete understanding of the issues around the subject matter.

I have been a member of the Toronto Police Service since ... 1975 and, as a result, have been present through the technological change that introduced computers to the Service. I have extensive practical experience in use of our computer systems and storage methods available to our members.

In September 2013, I contacted each member of the team with the exception of [MA] to search their internal e-mail files and their file storage areas (both removable and fixed drives) to look for further responsive documents. None of the people involved in the project located any responsive record that has not already been disclosed.<sup>9</sup>

[20] I considered whether I ought to send the inspector's affidavit to the appellant to seek further representations. Given the history of this appeal, the content of the affidavit and my conclusions below, I decided not to do so.

### ***Analysis and findings***

[21] The basis of my decision to conclude this appeal can be found in comments I made in Interim Order MO-2877-I. On page 24, I wrote:

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

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<sup>9</sup> The names of the individuals listed in the inspector's affidavit have been replaced with initials, even though these individuals are identified in their professional capacities.

[22] The appellant's submissions over the course of the appeal cogently and, with some force, convey concerns with the manner in which this request was dealt with by the police. As suggested by the paragraph above, however, there are limits to the relief this office may offer.

[23] The Commissioner's order-making power is established by sections 43(1) and (3) of the *Act*, which state:

After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Subject to this *Act*, the Commissioner's order may contain any conditions the Commissioner considers appropriate.

[24] In Order M-618, former Commissioner Tom Wright explained that sections 43(1) and 43(3) do not give the Commissioner unlimited remedial power, but they do embody the Legislature's intention that the Commissioner should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act*.<sup>10</sup> Examples of orders of a permissible nature by the Commissioner relate to the issue of access to requested records and include orders to: disclose non-exempt records; conduct further searches for responsive records where a search has been found not to be reasonable; issue an adequate decision to a requester; and waive fees. Orders that have been found not to be permissible include making an award of costs<sup>11</sup> and ordering disclosure of records subject to restrictions on use.<sup>12</sup>

[25] For the purposes of this appeal, therefore, I acknowledge the limits on my authority to offer a remedy for any lack of documentation that may be suggested by the evidence and also internal processes related to that paucity, even if concerns linger about the possible impact of these issues on matters, such as search, that I do have the jurisdiction to address.

[26] I return to the issue before me in this final order, which is the review of the police's search for responsive records in relation to only those aspects of it that remained insufficiently supported by evidence following Interim Order MO-2938-I. To begin, I accept the inspector's evidence that he was responsible for coordinating the Memorial Wall Committee, including the organization and facilitation of the committee meetings, as well as the process of developing the procedure. I accept that the

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<sup>10</sup> M-618; upheld on judicial review *Riley v. Ontario (Information and Privacy Commissioner)* (March 23, 1999), Toronto Doc. 59/98 (Ont. Div. Ct.).

<sup>11</sup> Orders P-604, M-593 and P-724.

<sup>12</sup> Order PO-2018.



inspector was in the most informed, or best, position of any of the individuals (internal to the Toronto Police Service) to provide instruction to other members of the committee with respect to the further searches required by Order MO-2938-I. I accept that he contacted four of the five other members of the Memorial Wall Committee (apart from himself) to direct them to conduct another search for responsive records that might be found on their computers, specifically, "their internal e-mail files and their file storage areas (both removable and fixed drives)." No further responsive records were identified by this search.

[27] The police provide no explanation regarding the choice not to ask the committee's TPA representative to conduct another search. Earlier in this inquiry, the police took the position that records created by committee members who represented various police associations, such as the Toronto Police Association, the Toronto Police Amateur Athletic Association and the Toronto Police Senior Officers Association, fell outside the *Act* since these associations were not "governed by the *Act*." The appellant challenged this position, observing that "the emails which attached the foregoing documents, which have not been produced, were all sent or received using Toronto Police Service email addresses." I agreed, and in Interim Order MO-2877-I, I stated that "the police appear to have been operating under the mistaken impression that records created by, and for, the Memorial Wall Committee are not subject to the *Act*, if created by a member affiliated with a police association." I have not changed my thinking on this point.

[28] However, it is evident that the police have reconsidered this position with respect to all of the named associations with the exception of the TPA. Given this revised position, I reviewed the evidence that had formed the basis for my earlier findings regarding inadequate (unreasonable) searches by the police. This evidence included references in disclosed emails to committee work and, particularly, the TPA's involvement in it.<sup>13</sup> Based on the list of individuals named in the inspector's new affidavit, I am satisfied that relevant police staff conducted additional searches of their "computer home (or shared) drives" consequent to Interim Order MO-2938-I. Specifically, and with regard to my comments about the TPA, above, I am also satisfied that any email contributions by the TPA representative could reasonably be expected to have been captured by the searches conducted by all of the other Memorial Wall Committee members in the context of the circulation of committee business by email.

[29] The *Act* does not demand perfection, but rather only that sufficient evidence be provided to establish that a reasonable search has been conducted. It is regrettable that it proved necessary to shepherd the parties, and the appellant in particular, through three interim orders before the police provided me with a sufficient basis upon

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<sup>13</sup> As outlined most recently in Interim Order MO-2938-I on page 8, paragraph 19: "The TPA is finalizing draft criteria and the Chief's staff have circulated a draft procedure to the working group {February 4, 2011 email};" [and] "... they were working on the suggested criteria from the TPA and a draft procedure from TPS" {March 7, 2011 emails}..."

which I could conclude that they had met the reasonableness standard required of an institution in completing a search.

[30] Nonetheless, in the circumstances, I am satisfied that the evidence provided by the police respecting their response to the concerns identified with their search activities in Interim Orders MO-2831-I, MO-2877-I and MO-2938-I is now sufficient to adequately discharge the statutory responsibility of the police under section 17 of the *Act*. To the extent that any reluctance remains, I find that no useful purpose would be served by revisiting the search issue further, and I uphold the police's search for records.

**ORDER:**

I dismiss the appeal.

Original signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ December 23, 2013