Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3865-I

Appeal MA13-610-2

Toronto Police Services Board

November 25, 2019

Summary: This Interim Order follows Interim Order MO-3812-I, in which the adjudicator found that the police did not conduct a reasonable search for records responsive to the appellant's access requests, and ordered the police to conduct another search. In this interim order, the adjudicator finds that the police's additional search was not reasonable, and orders a further search.

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

Orders Considered: Interim Order MO-3812-I.

OVERVIEW:

[1] This interim order pertains to the one remaining issue in Appeal MA13-610-2, specifically whether the Toronto Police Service (the police) conducted a reasonable search for records in response to Interim Order MO-3812-I, as required by section 17 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] As noted in Interim Order MO-3812-I, the appellant submitted two separate access requests to the police under the *Act*. One request was for "all personal

information"[1] and the other request was for "all records"[2] in physical or electronic form, from all locations, in respect of:

1. the requester;
2. the residence at [identified location in Toronto] for the period from January 1, 2001 to February 15, 2013;
3. the residence at [identified location in Hamilton] for the period January 1, 1989 to November 20, 2013 (the Hamilton property).

[3] The police conducted a search and located records that it identified as being responsive to the appellant's requests. The police issued a decision granting partial access to the responsive records. In doing so, the police relied on the exemption in section 38(b) (personal privacy) of the *Act*, with reference to section 14(3)(b) (investigation into possible violation of law). The police also withheld other information, claiming that it was not responsive to the request.

[4] The appellant appealed the police's decision. Part of the reason for the appellant's appeal was his belief that additional records responsive to his requests ought to exist. The appellant also objected to the police's decision to withhold some information from the responsive records.

[5] In Interim Order MO-3812-I, I found that some of the information that the police withheld under the personal privacy exemption did not constitute "personal information" as that term is defined in the *Act*, and I ordered the police to disclose that information to the appellant. I upheld the police's decision to withhold other personal information in the records under section 38(b). I found that the information withheld as non-responsive was, in fact, responsive to the appellant's request, and I ordered the police to issue an access decision regarding that information. Finally, I found that the police failed to establish that they conducted a reasonable search for records responsive to the appellant's requests. Accordingly, I ordered them to conduct an additional search and to provide the appellant with a decision letter regarding any additional responsive records located as a result of the search.

[6] In response to Interim Order MO-3812-I, the police conducted a further search for records. The police located one additional record, and issued a supplementary decision to the appellant. The appellant has appealed that decision to this office, and a separate appeal has been opened. This order only reviews the reasonableness of the police's search for records in accordance with Order Provisions 3 and 5 of Interim Order MO-3812-I.

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[1] The "personal information request."
[2] The "general information request."

[7] The police also provided this office with an affidavit describing its search efforts, which I shared with the appellant in accordance with this office's *Code of Procedure* and Practice Direction Number 7. The appellant provided representations in response.[3]

[8] In this interim order, I conclude that the police have not conducted a reasonable search for responsive records, and I order them to conduct another search.

DISCUSSION:

[9] The only issue before me in this order is whether the police conducted a reasonable search for responsive records.

[10] Where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.[4] If, after conducting an inquiry, the adjudicator is satisfied the institution carried out a reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the adjudicator may order further searches.

[11] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show they made a reasonable effort to identify and locate responsive records.[5] To be responsive, a record must be *reasonably related* to the request.[6]

[12] 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 reasonably related to the request.[7] An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[8]

[13] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable

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[3] Although the appellant was invited to provide representations, I determined that it was not necessary to invite the police to provide representations in reply as my conclusions requiring the police to conduct further searches are based on my own review of the police's decision letter and affidavit evidence, and not on the appellant's representations.
[4] Orders P-85, P-221 and PO-1954-I.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2469 and PO-2592.
[8] Order MO-2185.

basis for concluding that such records exist.[9]

Interim Order MO-3812-I

[14] The appellant's two requests sought similar information, but one request was framed as seeking access to the appellant's own personal information, while the other request was seeking access to records of a general nature, which do not necessarily contain his personal information. In Interim Order MO-3812-I, I made a number of findings regarding the scope of the appellant's requests that were relevant to my findings on the adequacy of the police's search.

[15] My first finding on scope that is relevant to the adequacy of the police's search efforts in response to the interim order had to do with the police's treatment of the appellant's two requests. In their original submissions, the police explained that they had informed the appellant that his general information request pertained to records and occurrences in which he was involved, which negated the "general" classification. Accordingly, the police returned the appellant's general request application fee, and proceeded to search for records responsive to the personal information request. The appellant took the position that his two requests were independent of each other and that the police erred in deciding to process only the personal information request. In Interim Order MO-3812-I, I found that the scope of the appellant's requests clearly included access to his own personal information as well as access to records of a general nature (i.e., general records). In this regard, I found that the police had unilaterally and incorrectly combined the appellant's two access requests into one request for the purpose of providing an access decision under the *Act*.

[16] Another relevant scope-related finding was with regard to the types of records that the police searched in processing the appellant's requests. In his submissions during my initial inquiry, the appellant provided email correspondence to substantiate his claim that additional responsive records exist that had not yet been located by the police. In response, the police maintained that given the size of their institution, it was not feasible to consider email exchanges as records responsive to every access to information request. Rather, they would undertake a search of email records when a requester specifically indicates that such records are within the scope of their request. In Interim Order MO-3812-I, I found that the police's exclusion of email records from their search was not reasonable. I noted that in order to serve the purpose and spirit of the *Act*, institutions are required to adopt a liberal interpretation of requests and to approach any ambiguity in the requester's favour.[10] In light of the ubiquitous nature of email communications in workplaces today, I found that it would be reasonable to conclude that a request for "all records" would include emails. Accordingly, I found that

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[9] Order MO-2246.
[10] Orders P-134 and P-880.

email records were within the scope of the appellant's requests.

[17] My last finding on the scope of the appellant's requests that is relevant to the adequacy of the police's search had to do with the police's ability to search for records relating to a property in another jurisdiction. The police's decision letter had advised the appellant to contact the Hamilton Police Service for access to records relating to the Hamilton property (specified in part 3 of both of his requests), on the basis that "the Toronto Police Service would not have any records in relation to incidents occurring in Hamilton, Ontario." The appellant objected to the police's assertion that they would not have any records relating to the Hamilton property. He maintained that it was at least conceivable that they might have records relating to the Hamilton property due to various program initiatives, such as joint-force projects. I accepted the appellant's argument and found that the police had not provided sufficient evidence to support the assertion that they would not have records relating to the Hamilton property.

[18] With regard to the reasonableness of the police's search, I noted in Interim Order MO-3812-I that the police had provided very few details to substantiate the reasonableness of their search efforts. This was true despite being asked to describe who conducted the search, what places and files were searched, and the results of the search. For example, while the police identified two databases that were searched, they did not explain why these databases were selected to be queried. In addition, the police provided no evidence that would have allowed me to find that "an experienced employee knowledgeable in the subject matter of the request" conducted the search, as required by the *Act*.

[19] Moreover, I found that the appellant had provided a reasonable basis for concluding that additional responsive records exist, which had not yet been identified as responsive by the police. For example, the appellant provided an email exchange from December 2012, which was between himself and a member of the Toronto Police Services Board, and which had not been identified by the police. The police maintained that an email between the appellant and the Toronto Police Services Board would not be held by the Toronto Police Service. However, based on the wording of the *Act*, I found that in certain circumstances and depending on the nature of a request, a search for responsive records may need to include the email accounts of staff at both the Toronto Police Service and the Toronto Police Services Board. I found that while the police did not originally consider the need to search Toronto Police Services Board records, the need to do so became evident during my inquiry.

[20] The appellant also provided a second email exchange, dated October 2012 and between himself and a member of the Toronto Police Service, which the police had not identified as responsive. Based on this evidence, I found that there may be email accounts of both Toronto Police Service and Toronto Police Services Board staff that contain responsive records and that have not yet been searched.

[21] Based on the above, I concluded that the police had failed to demonstrate that

they conducted a reasonable search for responsive records, while the appellant had provided a reasonable basis for concluding that additional responsive records may exist within their record holdings. I ordered the police to conduct a further search for records responsive to the entirety of the appellant's two requests, which, based on my findings on scope and search, was to include records of a general nature, email records of both the Toronto Police Service and the Toronto Police Services Board, and records relating to the Hamilton property. I ordered the police to issue a decision letter to the appellant regarding any additional responsive records located as a result of the search, and to provide me with an affidavit describing their search efforts.

The police's search and the parties' representations

[22] In response to Interim Order MO-3812-I, the police conducted a further search, which located one additional responsive record. The police issued an access decision to the appellant, advising that, "one additional report, [report number], based on a search of your Hamilton address, was located." The police also provided this office with an affidavit sworn by the Coordinator of the police's Access and Privacy Section regarding the search conducted.

[23] In the affidavit, the Coordinator attests to having been employed in the police's Access and Privacy Section since 2007. The Coordinator advises that he was an analyst when the appellant initially submitted his request, and he attests to having conducted an "unbiased search of all relevant Toronto Police Service databases" when the request was received. The Coordinator explains that the search yielded results (reports), which were partially disclosed to the appellant in accordance with the *Act*.

[24] The Coordinator explains that upon receiving Interim Order MO-3812-I, he conducted another "unbiased search" of the police's databases. He explains that for the most part, this search yielded the same results; however, one additional record, an occurrence report from 2000, was located.

[25] After reviewing the records located through this additional search, the Coordinator identified "all attending/investigating officers associated with each incident." Another member of the Access and Privacy Section then requested the respective divisions to forward the responsive memorandum book notes to the Access and Privacy Section in electronic format.

[26] The Coordinator explains that the Access and Privacy Section was advised that four of the identified police officers' memorandum books/notes for periods of time in 2000, 2010, and 2012 could not be located. The Coordinator explains that he believes the notes from 2000 and 2010 were purged as a result of the police's former eight-year memorandum book retention period. In support of this, the Coordinator refers to a "Toronto Police Service Routine Order from the Office of the Chief of Police," which outlines changes that were made to the memorandum book retention schedule in December 2018. In particular, he refers to Routine Order, 2018.12.24 - #1426 – Memorandum Book Retention Periods, which states, "Effective immediately, the

retention period for all approved memorandum books and casebooks shall be 25 years. The previous memo book retention period was 8 years…" Regarding the memorandum book from 2012, the Coordinator notes that it was not located, despite the searches conducted of the relevant Unit/Divisional storage room, and the City of Toronto archives.

[27] The Coordinator attests to sending an email to the Toronto Police Service – Information and Security Unit to request assistance in locating emails responsive to the appellant's request. The Coordinator explains that this was necessary because this is the only department that is able to conduct a computer search of the police's email system. In response to this request, the police's Information and Security Examiner advised that a search was conducted for "all emails based on the criteria set out in the appellant's request." The responsive email records were provided to the Coordinator. The Information and Security Examiner explained that some records that once existed may have been deleted. The Information and Security Examiner explained that this may be the case because, since October 2012, it has been their practice to purge any emails that have been archived for over 42 months, unless they are tagged as emails that should never be deleted.

[28] The appellant raised a number of concerns with the police's most recent search effort and subsequent decision. For example, having reviewed the police's affidavit and decision, the appellant submits that the police have either failed to process his general information request as required by Interim Order MO-3812-I, or, if they have processed it, they have failed to provide any evidence to establish that their search for responsive general information records was reasonable. He also continues to maintain that the police have not conducted a reasonable search for records responsive to his personal information request.

[29] The appellant submits that the police continue to unilaterally narrow the scope of his requests. He notes that throughout the affidavit, the Coordinator uses the term "request," which he says is distinguishable from "requests." The appellant maintains that the police's affidavit gives no indication of whether the police searched for records responsive to his general information request, which would consist of records containing de-identified information about him, such that they would not fall within the scope of his personal information request. The appellant also submits that the police's affidavit gives no indication of whether they searched for records relating to the Hamilton property, which was found to be within the scope of both of his requests in Interim Order MO-3812-I.

[30] The appellant also takes issue with the police's affidavit evidence, most notably the portions relating to the potential purging of archived emails, as well as the police's reliance on a "routine order", which they did not provide to this office to review.

[31] In his submissions, the appellant provided additional examples of the programs or activities that may have generated responsive records; however, in my view, Interim

Order MO-3812-I provided the police sufficient direction to enable them to conduct the required further search for responsive records. In sum, however, the appellant continues to maintain that the police may have additional responsive records in databases related to various program areas, projects, and activities, such as joint-force projects and covert operations.[11]

Analysis and findings

[32] For the reasons that follow, I find that the police have not established that they conducted a reasonable search for records responsive to the appellant's requests, as required by section 17 of the *Act* and Interim Order MO-3812-I.

[33] In Interim Order MO-3812-I, I ordered the police to conduct a further search for records responsive to both of the appellant's access requests. I specified that their search was to include records responsive to the appellant's general information request, in addition to his personal information request. I also specified that the police must search for records relating to the Hamilton property referred to in part three of both of the appellant's requests, as well as records held by the Toronto Police Services Board, including email records. I ordered the police to provide me with an affidavit describing its search efforts once the search was completed.

[34] I note that in both the police's decision letter and affidavit of search, the police only refer to the appellant's "request" in the singular form. Moreover, while the Coordinator specifically refers to the appellant's personal information request, he makes no reference of the general information request. This alone sows doubt as to whether the police considered the appellant's general information request when conducting their most recent search; however, my findings are also influenced by the fact that the police affiant did not identify the databases that were searched, explain why they were selected to be searched, outline the methods that he used in conducting the searches, or specify the types of records that would likely be found in each. Without more information about the searches conducted, and particulars regarding the types of information that might be found as a result, I am unable to conclude that the police have conducted a reasonable search for records responsive to either of the appellant's requests.

[35] Also relevant is my inability to discern whether the police's search included records held by the Toronto Police Services Board, or just the Toronto Police Service. In my initial inquiry, the police argued that Toronto Police Services Board emails were not "under the care and control of the Toronto Police Service," which I dismissed by noting

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[11] Other examples of program areas and activities are referred to in the appellant's submissions; however, given that he also mentioned these program areas and activities in the representations he submitted during my initial inquiry, and considering that those representations were shared with the police, it is not necessary for me to refer to them in detail here.

that the definition of "institution" under section 2(1) of the *Act* stipulates that "police services boards" are institutions for the purpose of the *Act*. I was satisfied that in the context of this appeal, it was clear that the police would need to search both Toronto Police Service and Toronto Police Services Board records for ones that are responsive to the appellant's requests.

[36] Despite this instruction, it is not evident from the police's decision letter or affidavit whether they did, in fact, search Toronto Police Services Board records. Given the police's position during my initial inquiry, I am not satisfied that its search of "all relevant databases" included Toronto Police Services Board databases. I am also not satisfied, based on the paucity of evidence currently before me, that the search conducted by the Toronto Police Service – Information and Security Unit would capture Toronto Police Services Board emails.

[37] In addition, although the police's affidavit does not indicate whether they searched for records relating to the Hamilton property, the police's decision letter clearly says that the one additional record was located based on a search of the Hamilton address. Accordingly, I am satisfied that the police were cognizant of their obligation to search for records relating to the Hamilton property when conducting their search following Interim Order MO-3812-I. This finding is limited, however, by my previous findings such that I am only satisfied that the police searched for records relating to the Hamilton property that would be responsive to the appellant's personal information request. Given that I am not satisfied that the police have searched for records relating to the appellant's general information request, it follows that I am not satisfied that they searched for records specified in part three of that request, relating to the Hamilton property.

[38] The police's affidavit addressed the possibility that responsive records that once existed may no longer exist. In particular, the Coordinator explained that until December 2018, the police's memorandum book retention schedule only required memorandum books to be retained for a period of eight years. The Coordinator also advised that ever since 2012, the police have engaged in a practice of purging emails that have been archived for longer than 42 months, unless they are tagged as emails that should not be deleted.

[39] Without commenting on the propriety of the police having disposed of certain memorandum books and emails, I accept that they may have done so in accordance with their records retention policies. For example, in my view, it is reasonable to conclude that the potentially responsive memorandum books from 2000 and 2010 that were not located by the police's most recent search were likely disposed of in accordance with the police's former memorandum book retention policy. I also accept that the same may be true for certain email records, such as those email exchanges from 2012 that were provided by the appellant during my initial inquiry in support of his assertion that additional responsive records exist.

[40] I am not satisfied, however, that the same reasons explain why the police were

unable to locate a memorandum book from 2012, despite searching the relevant unit and divisional storage room and the City of Toronto Archives. The memorandum book was only six years old at the time the former policy was replaced by a new policy requiring retention of memorandum books for 25 years; therefore, it ought not have been disposed of pursuant to the former eight-year retention policy. The police have offered no other explanation for their inability to locate this record.

[41] Accordingly, based on the evidence before me, I am unable to conclude that the police's most recent search covered the entire scope of the appellant's two requests. I find, therefore, that the police have failed to demonstrate that they conducted a reasonable search for responsive records. I will order the police to conduct a further search for records responsive to the entirety of both of the appellant's requests, as detailed in the provisions of this order and with consideration of my findings in Interim Order MO-3812-I.

ORDER:

1. I order the police to conduct a further search for records responsive to the appellant's requests, including for records responsive to the general information request, records relating to the identified Hamilton property, and records held by the Toronto Police Services Board, all of which should include responsive email records.

2. I order the police to issue an access decision to the appellant regarding any records located as a result of the searches ordered in provision 1, in accordance with the *Act*, treating the date of this order as the date of the request.

3. I order the police to provide me with an affidavit sworn by the individual(s) who conduct the searches by **December 31, 2019** describing their search efforts. At a minimum, the affidavit(s) should include the following information:

    a. The names and positions of the individuals who conducted the searches;

    b. Information about the types of files searched, the nature and location of the searches, including the names of any databases, and the steps taken in conducting the searches;

    c. The results of the search; and

    d. Details of whether additional records could have been destroyed, including information about record maintenance polices and practices and retention schedules.

   The police's affidavits and any accompanying representations may be shared with the appellant, unless there is an overriding confidentiality concern. The

procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The police should indicate whether they consent to the sharing of their representations and affidavits with the appellant.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 1 and 3.

5. I reserve the right to require the police to provide me with a copy of the access decision referred to in order provision 2.

Original signed by
Jaime Cardy
Adjudicator

November 25, 2019