

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4196-I

Appeal MA20-00444

Toronto Police Services Board

May 13, 2022

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Services Board (the police) for records arising from a 2001 meeting between the police and their Shanghai counterparts that included a presentation about the appellant. The police searched for and located responsive records, granting partial access to them. The appellant appealed the police's decision and Interim Order MO-3841-I was issued, where the police were ordered to conduct further searches for responsive records. The police conducted these searches and the adjudicator upheld their search as reasonable in Final Order MO-3956-F.

The appellant sought a reconsideration of Final Order MO-3956-F. In Reconsideration Order MO-4065-R, the adjudicator found that there was an omission or other similar error in the final order under section 18.01(c) of the IPC's *Code of Procedure* and allowed the reconsideration, in part. The adjudicator ordered the police to provide affidavit evidence about their retention of records as ordered in the interim order. The police did so.

In this order, the adjudicator finds that the police have not complied with the relevant order provisions of the reconsideration order and orders the police to provide the affidavit required by the reconsideration order as to their retention of responsive records.

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

Orders Considered: Orders MO-3841-I, MO-3956-F, and MO-4065-R.

OVERVIEW:

[1] This order is issued further to Reconsideration Order MO-4065-R (the reconsideration order), which dealt with the appellant's request for a reconsideration of Interim Order MO-3841-I and Final Order MO-3956-F. All of these orders concern the Toronto Police Services Board's (the police) search for certain records related to meetings held between the Toronto Police Service - Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal Public Security Bureau.

[2] The appellant had made the following request to the police under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)*:

Under the powers of [the *Act*], I am requesting copies of all records (including transcripts) of all meetings held between the Toronto Police Service – Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal Public Security Bureau [PSB].

This will include records of the preparatory arrangements made by the [police] for arranging the trip of the Shanghai PSB to Canada. It will include records of airport pickup, accommodation, meeting venues, costs of hosting the event (including hotel bills and meal receipts) directly related to hosting the Shanghai PSB officials.

The request for responsive records will include copies of all presentations made to the Shanghai PSB by [three of the four police officers named in the agenda] (as they then were) and all others who made presentations at the meetings. It will also include records of these meetings as recorded in the [police] officers' official memorandum books and internal communication on the meetings between the [police] and the Shanghai PSB.

The dates of these arrangements and meetings will be from March 20, 2001 (and/or earlier) or dates prior to April 6, 2001 and records created subsequent to the meeting by way of review or follow-up responses to the meeting. This request will also include the personal information about me, in transcript, published and distributed at the official meeting.

[3] The appellant filed an appeal with the Information and Privacy Commissioner of Ontario (the IPC) based on the police's failure to respond to his request in accordance with the procedures set out in the *Act*. Appeal MA17-8 was opened. That appeal file was closed after the police issued a decision letter to the appellant.

[4] The police's decision letter stated that no responsive records existed. The decision letter contained details of the police's search efforts, including inquiries made with the former units of the three officers (now retired) named in the appellant's

request.

[5] The appellant was dissatisfied with the police's decision and appealed it to the IPC. Appeal MA17-8-2 was opened and a mediator was appointed to attempt resolution of the issues in the appeal.

[6] During the mediation stage of that appeal process, the police agreed to conduct another search for records. As mediation did not resolve the issues in the appeal, the appeal in MA17-8-2 was moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] An IPC adjudicator decided to conduct an inquiry into the matter by first seeking representations from the police on the issue of the reasonableness of the police's search for records.

[8] In response, the police provided representations, along with a copy of a revised decision letter to the appellant setting out the results of the further searches conducted at the mediation stage. The police then disclosed records to the appellant by means of a revised decision letter dated September 6, 2017.

[9] The appellant advised the adjudicator that he wished to continue that appeal on the issues of reasonable search and the police's severances to an officer's note and notebook.

[10] After the exchange of further representations, the adjudicator issued Interim Order MO-3841-I (the interim order). In that order, concerning the police's search for records, the adjudicator found that the police had not expended reasonable efforts to locate certain records responsive to the appellant's request and ordered the police to conduct another search for two items as follows:

- police email and network accounts for responsive records containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant); and,
- the Office of the Chief [of Police] for records responsive to the appellant's request. Responsive records may include records that do not contain personal information of the appellant.

[11] This adjudicator ordered the police to provide representations on the specific details of the searches they conducted.¹

¹ The adjudicator also upheld the police's decision to withhold one discrete portion of a one-page note under section 38(b) of the *Act* and upheld the police's decision to withhold portions of a memorandum notebook page on the basis they are not responsive to the appellant's request.

[12] The police conducted the searches as ordered in Interim Order MO-3841-I and additional records were located. The police issued two decisions letters, as they had conducted the searches separately for service-wide email and for network accounts.

[13] After the issuance of the interim order, the appeal was assigned to me to continue the inquiry, as the adjudicator who issued the interim order was no longer available at that time to do so. After reviewing all the file material and representations, I issued Final Order MO-3956-F (the final order), where I upheld the police's search in response to Interim Order MO-3841-I as reasonable, and dismissed the appeal.

[14] The appellant then filed a request to have both the interim order and the final order reconsidered. This file, Appeal MA20-00444, was opened.

[15] After review of the appellant's reconsideration request representations, I issued Reconsideration Order MO-4065-R,² where I denied the appellant's reconsideration request of the interim order on the basis that the appellant had already sought a reconsideration of the interim order and the previous adjudicator had denied this request by letter dated October 16, 2019.

[16] I did, however, allow the appellant's reconsideration request of the final order, in part, as it related to my finding in the final order regarding the police's retention of records. I found that there was an error or omission in the final order, as I had not recognized that the police had not addressed their retention of records in their affidavit made in response to the interim order. I found that this finding constituted an omission or other similar error in the final order under section 18.01(c) of the IPC's *Code of Procedure* (the *Code*).³ I ordered the police to provide affidavit evidence to the IPC and the appellant about their retention of responsive records.

[17] In response, the police provided affidavit evidence on their retention of records. Details of the affidavit are set out below.

[18] I then invited the appellant to respond to the police's affidavit. The appellant provided representations challenging the information in the police's affidavit, disputing that the police had provided the requisite affidavit evidence as to whether further responsive records possibly existed but no longer exist.

² In the reconsideration order, I considered whether there were grounds to reconsider the final order, not the interim order as, after the issuance of the interim order, the appellant had already sought a reconsideration of the interim order by letter dated October 3, 2019. In this letter, the appellant had sought to have certain portions of the interim order amended as, in his view, they contained misinformation. The adjudicator denied this request for the interim order to be reconsidered, as she found that the appellant was seeking to have her either consider the same submissions as she had already considered or was seeking to have her describe the records or the police's conduct in a different way, which had no bearing on the determinations made in the interim order.

³ Section 18.01(c) of the Code reads:

The IPC may reconsider an order or other decision where it is established that there is:
a clerical error, accidental error or omission or other similar error in the decision.

[19] In this order, I find that the police have not complied with the relevant order provision in Reconsideration Order MO-4065-R, as they have not adequately explained whether it is possible that responsive records existed but no longer exist. I order the police to provide additional affidavit evidence.

DISCUSSION:

Have the police complied with the order provisions of Reconsideration Order MO-4065-R?

[20] As stated, in Reconsideration Order MO-4065-R, I allowed the appellant's reconsideration request, in part, regarding the provisions of the final order. I did not order the police to conduct further searches, despite the appellant's submissions that the police should be required to do so.

[21] In the reconsideration order, I found that there had been an omission or other similar error in the final order, Order MO-3956-F, under section 18.01(c) of the *Code*, because I failed to address in the final order that the police had not provided the required evidence in response to the interim order about whether responsive records possibly existed but no longer did.⁴

[22] In the reconsideration order, I ordered the police to provide the IPC and the appellant with an affidavit as to whether it is possible that responsive records existed but no longer exist in:

- the police email and network accounts containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017; and,
- the Office of the Chief of Police.

[23] I also gave the following direction to the police in the reconsideration order:

If responsive records existed but no longer exist, the police must provide details in its affidavit as to when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

[24] The reconsideration order provisions contemplated that the appellant would be

⁴ I also considered whether the appellant's representations established the ground in section 18.01(a) (fundamental defect) at paragraphs 49 and 50 of Reconsideration Order MO-4065-R. However, I concluded that the appellant's arguments, being directed at the police's compliance with the interim order provisions, did not form the basis for a finding that there was a breach of fairness in the adjudication process as the police's compliance with the interim order was related to the police's, not the IPC's, processes.

given an opportunity to provide representations in response to the police's affidavit.

The police's representations

[25] The police provided the affidavit evidence in response to the reconsideration order. The affidavit was sworn by the police's Disclosure Analyst (the analyst) who has been assigned to this position in the police's Access and Privacy Section (APS) since August 2012. Part of the analyst's role is to search for, and provide, records in response to requests for access to information pursuant to the *Act*.

[26] The analyst detailed the searches undertaken for records in this appeal following the issuance of the interim order, as follows:

1. On September 25, 2019, APS received Interim Order MO-3841-I.
2. On or about October 11, 2019, Coordinator [name] consulted with [the police's] Information Security [Unit] regarding the search criteria set out in Interim Order MO-3841-I.
3. On or about October 31, 2019, the results of the additional searches conducted by Information Security of police email, containing the keywords: "Shanghai" or "Combined Forces Asian Investigation Unit," for the expanded search time frame to March 1, 2001 to September 6, 2012 were provided to APS by Information Security Officer [name].
4. The above-mentioned searches, of service wide email only, for these keywords and the expanded time frame, were conducted by Security Examiner [name] of Information Security.
5. On November 22, 2019, a decision was rendered by [name], Coordinator, APS, and full access was granted to records resulting from the above-mentioned search of service wide email for the specified time frame and key words outlined in Interim Order MO-3841-I. At that time, the appellant was also advised that searches of [the police's] network accounts remained ongoing.
6. On or about February 20, 2020, myself and [the Coordinator] met with members of Information Security, and discussed the searches of the network accounts as outlined in Interim Order MO-3841-I. Based on the direction of [the interim] order, [six different] network accounts were searched, with the expanded time frame [of March 1, 2001 to September 6, 2012].
7. On or about February 27, 2020, Security Examiner [name], with the assistance of Information Technology Services, provided APS with the results of the searches of the abovementioned network accounts.

8. [The analyst] and Coordinator [name] reviewed the results of these searches, and based on the parameters of [Interim Order] MO-3841-I no responsive records were located.
9. On or about July 27, 2020, a decision regarding the results of the searches of the network accounts was rendered by [the Coordinator], and access was not provided, as no responsive records were located.
10. On or about June 24, 2021, APS received [IPC] Reconsideration Order MO-4065-R, regarding Interim Order MO-3841-1 and Final Order MO-3956-F.
11. Reconsideration Order MO-4065-R has ordered the [police] to provide details in this affidavit as to when the records at issue in Interim Order MO-3841-I, were destroyed and any relevant maintenance policies and practices, such as evidence of retention schedules.
12. Pursuant to this institution's decision letters dated, November 22, 2019 and July 27, 2020, in response to Interim Order MO-3841-I and the additional searches and expanded time frame, all located records were provided to the appellant and the Information and Privacy Commissioner.
13. In [the] decision letter dated July 27, 2020, the appellant was advised by this institution that the search of the service wide email accounts and the network accounts (which included, that of the Office of the Chief, with the keywords and the expanded time frame, as outlined in Interim Order MO-3841-I, failed to locate any responsive records. Access, therefore cannot be provided.
14. As our searches yielded no results, this institution cannot speak to the destruction or retention of records that we are unable to confirm to have existed. (emphasis added)
15. Information in regards to this institution's record maintenance policies and practices, including retention schedules, is publically available at: https://www.toronto.ca/legdocs/municode/1184_219.pdf

[27] The appellant provided lengthy submissions in response to this affidavit, including on matters that are not before me.⁵ In this order, as set out in the reconsideration order, I am only considering the police's evidence on their retention of

⁵ The appellant provided further representations in May 2022 as this order was being finalized, complaining about the police's conduct towards him and seeking again to have the search issue already addressed in the interim, final and reconsideration orders re-adjudicated upon. I declined to accept these submissions as they were provided many months after the close of representations and because they did not address the issue being decided in this order regarding the sufficiency of the affidavit evidence as to the police's retention of records.

records that were searched for as a result of the interim order.⁶

[28] With respect to the issue before me, the appellant states:

Therefore, in reply to the affidavit submitted by the Police in response to Order MO 4065-R, and referring to the sworn affidavit of 28 July 2021, it is abundantly clear, from the copies of recovered records, some of which are attached to this submission in evidence, that the records requested, including those noted above that had been located on a reasonable search, there are no grounds available for the Police to state at paragraph [14 above]

As our searches yielded no results, the institution cannot speak to the destruction or retention of records that we are unable to confirm existed

whereas searches had yielded results, and copies of records sent to the police, the originals of which must still be under the care and control of the Toronto Police, could not be located, thereby providing a reasonable inference that the *original copies* of the records had been destroyed, contrary to the retention periods of Municipal Bylaw 219 or had not been stored contrary to Section 4 of the MFIPPA. [Emphasis in original].⁷

[29] It appears to me that the appellant's position in response to the police's affidavit is that they must have destroyed records as records had been located and the police are now indicating that no responsive records exist.

Findings

[30] This order results from the reconsideration order and determines whether the police complied with the terms of the reconsideration order. The reconsideration order determined that there had been an error or omission in the final order, as the final order did not recognize that the police had not provided the requisite affidavit evidence about retention of records as ordered to do in the interim order.

[31] Specifically, in Interim Order MO-3841-I, the adjudicator ordered the police to provide an affidavit detailing the searches conducted in response to the interim order and also to include in this affidavit the following information:

⁶ In other parts of his representations, it appears that the appellant is disputing aspects of the police's earlier searches for responsive records, which have been addressed in the previous orders. Specifically, he believes that the police should have located other records other than those responsive to the two items ordered to be searched for in the interim order. In my view, this is a clear effort to have the larger search issue addressed again, which was already addressed in the interim, the final, and the reconsideration orders and is not being addressed in this order.

⁷ This portion of the appellant's submission was also highlighted in yellow.

...whether it is possible that [records responsive to the searches ordered in the interim order] existed but no longer exist. If so, the police must provide details of when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules

[32] In the final order, I upheld the police's search for these records as ordered in the interim order, however, I did not recognize in the final order that the police's affidavit did not address whether it is possible that responsive records existed but no longer exist.

[33] In Reconsideration Order MO-4065-R, I ordered the police to provide an affidavit as to whether it is possible that responsive records existed but no longer exist with respect to the two items ordered to be searched for in the interim order. I did not reconsider the other order provisions in the final order where I upheld the police's search conducted in response to the interim order.

[34] In response to the interim order, the police issued two decision letters to the appellant concerning their searches in response to the interim order.

[35] The first decision letter is dated November 22, 2019. In this decision letter, the police indicate that they located responsive records. This letter states that as a result of searches arising from the interim order:

...full access is now being granted to responsive records resulting from the Information Security Unit's search of police email (document numbers: 12 - 286), as outlined below:

Search: Service-wide emails
Timeframe: 2001.March.01 to 2017.September.06
Keyword(s): "combined forces Asian investigation unit" OR (Shanghai AND "[appellant's name]")

[36] In the same letter, the police stated that searches were completed for responsive records that may be in the Office of the Chief, but these searches yielded negative results.

[37] In the decision letter of November 22, 2019, the police also advised the appellant that searches of the police's network accounts by the Information Security Unit remained ongoing.

[38] After completing the searches of the police's network accounts, the police issued another decision letter dated July 27, 2020. In that letter, the police indicated that, using the search criteria set out in the interim order, they searched service wide email accounts and the following police network accounts:

- Intelligence Department
- [specific police] Division
- Chief's Office
- three named police officers

[39] The police did not locate any additional responsive records as a result of this subsequent search.

[40] The interim order required the police to provide an affidavit as to whether it is possible that responsive records existed but no longer exist with respect to the two items ordered to be searched for in the interim order, namely:

- police email and network accounts for responsive records containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant); and,
- the Office of the Chief [of Police] for records responsive to the appellant's request. Responsive records may include records that do not contain personal information of the appellant.

[41] In the reconsideration order, I advised the police that:

If responsive records existed but no longer exist, the police must provide details in its affidavit as to when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

[42] The appellant takes issue with the police's statement in their affidavit that they cannot speak to the destruction of records as their searches yielded no results. He argues that contrary to this claim in their affidavit (paragraph 14 of the affidavit above), the police did locate certain records responsive to the searches ordered by the interim order, as evidenced by their November 22, 2019 decision letter.

[43] In my view, the appellant's concern here is misplaced. It is clear from the affidavit overall, that the police acknowledged that they found records in earlier searches. It was the latest search that yielded no results.

[44] However, the police have not addressed in their affidavit whether any additional records responsive to the searches ordered by the interim order may have existed but no longer exist. They simply state that "as our searches yielded no results, this institution cannot speak to the destruction or retention of records that we are unable to confirm to have existed."

[45] This is clearly insufficient to answer the question of whether it is possible that responsive records existed and no longer exist. In other words, what are the relevant retention policies for the types of records requested at the relevant time?

[46] The police provided a link to their record maintenance policies and practices,⁸ including retention schedules, however, the police did not indicate where specifically in this June 19, 2019 60-page document the retention policies are for any records that may be responsive to the two items ordered to be searched for in the interim order. Nor can I ascertain the same from my review of this document.

[47] The police have also not addressed in their affidavit what the retention policies would be for any responsive records that may have existed. These records would be dated between 2001 and 2017, which is prior to the 2019 date of the retention policy the police provided.

[48] Based on my review of the police's affidavit, I find that they have not provided the information in their affidavit I ordered them to provide in the reconsideration order regarding whether it is possible that records responsive to these searches have been destroyed.

[49] Specifically, I find that the police have not provided sufficient evidence as ordered to do in the reconsideration order related to the retention of records responsive to the two items ordered to be searched in the interim order.

[50] I also find that the police's affidavit evidence is conflicting, as it indicates that no records were located from their two searches following the interim order (paragraph 14 of the affidavit above), however, as reflected in the November 22, 2019 decision letter, records were located from their first search (paragraph 5 of the affidavit above).

[51] As the police have not complied with the order provisions of the reconsideration order, I will order them to again provide the affidavit evidence that they were ordered to do in the reconsideration order.

[52] Finally, I note that the police stated the following, when they provided the affidavit:

[S]ince 2003, this institution has received of over twenty five requests from the Appellant, in relation to charges laid against him in [date]. Members of various Toronto Police Service units (including, but not limited to the Toronto Police Service's Access and Privacy Section, Information Security Unit, Professional Standards, Legal Services, etc.), have dedicated countless hours to manually searching and processing these matters over the last seventeen years.

⁸ See https://www.toronto.ca/legdocs/municode/1184_219.pdf.

This institution has more than fulfilled its obligation under the Municipal Freedom of Information and Protection of Privacy Act, and now considers any further representations and access requests, relating to the above-mentioned matter (as outlined above and in decision letter dated July 27, 2020 - enclosed), to be frivolous and vexatious. [Emphasis in original].

[53] It is open to the police to refuse further access requests of the appellant on the basis of the provisions of the *Act* relating to frivolous or vexatious requests. Such a decision is subject to appeal to the IPC if the appellant disagrees with it.⁹ Those provisions, however, have no bearing on the police's obligations pursuant to my reconsideration order.

ORDER:

1. I order the police to provide the IPC and the appellant with an affidavit by June 13, 2022, as to whether it is possible that responsive records existed but no longer exist in:
 - the police email and network accounts containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017; and,
 - the Office of the Chief of Police.

If responsive records existed [that are responsive to these two items] but no longer exist, the police must provide details in its affidavit as to when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

2. The appellant is to provide me with any response he has to the police's affidavit by 30 days from the date of his receipt of the police's affidavit.
3. I remain seized of this appeal to deal with any issues arising from the police's affidavit and the appellant's response to this affidavit.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 13, 2022

⁹ See sections 4(1)(b) and 20.1(1).