

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2775

Appeal MA11-367-2

London Police Services Board

July 31, 2012

Summary: The appellant submitted a 15-part request for information to the London Police Services Board relating to his criminal record history. The appellant subsequently narrowed the scope of his request. The police granted access to records responsive to the appellant's narrowed request, comprised of his Person Hardcopy and Delete Log, both dated September 9, 2011. The appellant believes that further records should exist and he appealed the police's access decision. During the course of mediation, the appellant narrowed the scope of his appeal further to records that show the date upon which nine charges that had been incorrectly added to his Person Hardcopy were removed from his Person Hardcopy, the nature of each offence, and the officer's name or badge number that made any entries or deletions. Following an oral inquiry, the police's search for responsive records was upheld.

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

OVERVIEW:

[1] The appellant submitted a 15-part access request under *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the London Police Services Board (the police) for information relating to the requester.

[2] The police issued an interim decision, in which they advised that they were extending the time to respond to the request, in accordance with section 20 of the *Act*,

for an additional 60 days due to the large volume of records that needed to be searched.

[3] The appellant appealed the police's decision to extend the time to the IPC, and file MA11-367 was opened.

[4] During the course of this appeal, the appellant narrowed the scope of his request to the following:

This is the information that I need released without further delay:

1. I still need the most current or most recent version of my hardcopy report that I have requested. This is one document that relates almost exclusively to myself, and I have no need of any information relating to any other person that may exist on that document.
2. I still need the confirmation of any additions to or deletions from my own criminal records information kept by your police department. I believe that the person hardcopy in #1 (above), should confirm all additions that have not been deleted. There should not be a lot of deletions from my records, and I think you should have records of any decision or process that resulted in a deletion from my criminal information. The information that I need is the date on which the records was entered, the date on which the record was removed (if applicable), the nature of the offence, and the officer's name or badge number.

[5] The police issued a final decision in which they granted access to records responsive to the appellant's narrowed request, comprised of his Person Hardcopy (2 pages) and Delete Log (1 page), both dated September 9, 2011. The police advised the appellant that if he wished to proceed with the remaining portions of his first request he would have to file a new request.

[6] As a result of the police's final decision, the time-extension appeal was concluded and appeal MA11-367 closed.

[7] The appellant subsequently appealed the police's final decision on the basis that additional records should exist, and appeal MA11-367-2 was opened.

[8] During the mediation stage of the appeal process for appeal MA11-367-2, the appellant advised that he had obtained a copy of an earlier version of his Person Hardcopy, dated March 18, 2003, through a court process. This Person Hardcopy listed nine charges related to another individual with the same first and last name as the appellant, which had been incorrectly added to his Person Hardcopy.

[9] The appellant acknowledges that the incorrect charges were subsequently removed from his Person Hardcopy, as confirmed by the information contained in the September 9, 2011 version that was disclosed to him. However, the appellant notes that the Delete Log, dated September 9, 2011, does not show the dates upon which the incorrect charges were entered and then removed from his Person Hardcopy, the nature of those charges and the name or badge number of the officer that made the entries or deletions.

[10] The appellant confirmed that he is seeking any documentation that would show the date upon which the nine incorrect charges were entered and removed from his Person Hardcopy and that this was the sole focus of his appeal.

[11] The police stated in response that while they understood the appellant's position, no additional records exist. The police reiterated that they had provided the appellant with a copy of his current Person Hardcopy and Delete Log, which shows when charges were deleted from the appellant's Person Hardcopy. The police explained that the delete log document that existed in 2003 did not track when charges were inadvertently added to a person hardcopy and then, subsequently, removed. The police indicated that there are no records that show when the entries were inadvertently added and then subsequently removed from the appellant's Person Hardcopy.

[12] The police pointed out that the delete log document that exists today is more technologically advanced, as it tracks when entries are added or deleted. The police state that this technology was not available at the time in question in this case.

[13] The appellant questioned whether there are any police officer's notes or other documents that would describe when the incorrect charges were removed from his Person Hardcopy. The police confirmed that it had conducted subsequent searches but that no additional records were located.

[14] The appellant maintains that additional records should exist that show when his Person Hardcopy was updated, and asked that the appeal proceed to the adjudication stage of the appeal process.

[15] The file was transferred to the adjudication stage of the appeal process for an oral inquiry with the sole issue to be determined whether the police have conducted a reasonable search for records that show the date upon which the nine charges were removed from the appellant's Person Hardcopy, the nature of each offence, and the officer's name or badge number that made any entries or deletions.

[16] I conducted an oral inquiry via teleconference into the reasonable search issue over parts of May 23, 2012 and June 20, 2012. The appellant participated and made oral representations on both days. Attending and providing oral evidence on behalf of

the police on both days were their Freedom of Information Co-ordinator (FOIC) and a Freedom of Information Analyst (the Analyst).

[17] Prior to the initial May 23, 2012 hearing date, the parties were invited to provide written documentation that they intended to rely on at the inquiry. The appellant provided two sets of documentation to this office on May 10, 2012 and May 11, 2012 respectively. Prior to the commencement of the oral inquiry I confirmed with the police that they had received all of this written documentation.

ISSUE:

Did the police conduct a reasonable search for records responsive to the appellant's request?

DISCUSSION:

[18] 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.

[19] 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.

[20] Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.²

[21] A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.³

¹ Orders P-85, P-221, PO-1954-I.

² Order P-624.

³ Order M-909.

Parties' representations – May 23, 2012

Appellant's representations

[22] The appellant is seeking records relating to the nine charges that appear on his Person Hardcopy prepared by the police, dated March 18, 2003. The appellant states that the nine charges do not relate to him, but to another individual with the same last name. Somehow these charges found their way on to the appellant's Person Hardcopy and while he has been assured that they have now been removed, he seeks information as to how these charges found their way on to his Person Hardcopy and the process the police followed to correct the issue. The appellant acknowledges that while he has obtained some information, he has not been provided with the details of the police investigation and information relating to the correction process.

[23] The appellant submits that criminal records are not destroyed arbitrarily without an investigation. Before a criminal record can be altered and corrected the police must first confirm the need for the correction and then make a decision about whether or not to make a correction. Accordingly, it is the appellant's view that there should be records documenting the police's investigation and the decisions they reached with regard to corrections made to his Person Hardcopy. The appellant states he cannot fathom that the police would not retain some sort of paper trail that documents corrections made to his Person Hardcopy due to the importance and sensitivity of the information involved.

[24] The appellant states that if records do not exist regarding corrections to his Person Hardcopy, he believes that at one time they did exist and they were improperly destroyed to conceal this information from the appellant.

[25] The appellant also asserts that past actions of the police have left him feeling that they cannot be trusted to respond honestly to his request for information. The appellant cited two examples.

[26] The appellant noted that he made an access request in 2003 for information regarding the removal of a charge from his police record. At the time, the police responded that no responsive records exist. The appellant states that pursuant to his current request, the information he sought in 2003 was located and disclosed. Accordingly, the appellant believes that these records existed in 2003 and were suppressed.

[27] The appellant believes that the police have improperly attributed two convictions to him and then concealed information about the origin of these convictions. In support of this view, the appellant cites two references, one made to past charges and convictions in the summary portion of a police charge sheet, dated January 25, 2012, relating to a new criminal charge, and a reference to a second conviction in paragraph

5 of a statement of defence prepared by outside counsel for the police and filed by the police with respect to a civil action commenced by the plaintiff against the police. The appellant asserts that these references to the convictions were inaccurate; he is committed to determining how they came to exist. He believes that the answer to this question is within the police's record holdings and that the police have elected to suppress this information.

[28] The appellant also questions whether the search efforts of the police have been responsive to his narrowed request and, in particular, the portion of part 2 of the narrowed request that seeks "the date on which the records was entered, the date on which the record was removed (if applicable), the nature of the offence, and the officer's name or badge number."

Police's representations

[29] The FOIC commented on the appellant's 2003 request and the police decision at the time that confirmed no records exist. The FOIC states while she was employed in the police's Freedom of Information Office at the time, she was not the FOIC when this request was processed and she does not recall what records were searched. However, she suspects that the search that was conducted in response to the appellant's current request was not conducted in 2003. The FOIC adds that, unfortunately, the FOIC at the time of the 2003 request cannot be consulted to determine what was searched as she has since passed away.

[30] With regard to the appellant's current request for the dates upon which the incorrect charges were added and then subsequently deleted from his Person Hardcopy, the FOIC indicates that the only charges they have a record of deleting are those charges that were properly related to the appellant. The FOIC adds that the incorrect charges would have been transferred to the Person Hardcopy of the correct person, but at the time this was done the police did not maintain a log of such transfers and, therefore, no records exist.

[31] The FOIC states that the police did conduct an additional search for any documentation that might have addressed the procedure followed by the police in deleting records, but that no documentation was found on such a process.

[32] The FOIC states that during the course of conducting their search she consulted the police's Information and Technology Department (IT Department). She states that the Director of the IT Department (the IT Director), with 30 years of experience, oversaw a search and verified that the transfer logs for the period in question were not available. The FOIC submits that the actual searches were conducted by a supervisor, with over 20 years of experience in this area.

[33] The FOIC acknowledged that the police have since changed their procedure for recording transfers of this information and that if the same search was conducted today the transfer logs would be available. However, the FOIC also acknowledged that the police, to this day, do not have a written procedure for addressing the deletion of incorrect charges found on an individual's Person Hardcopy and the transfer of those charges to the proper individual's Person Hardcopy.

[34] The FOIC submits that during the mediation stage of the appeal process each of the searches was re-visited and she was satisfied that nothing had been overlooked. The FOIC submits that the police also checked with their Forensic Identification Unit (FIU), which is responsible for the destruction of criminal records; however, the FIU was not able to assist since the records sought by the appellant were not destroyed but rather transferred to the correct person's Person Hardcopy.

[35] The FOIC added that she checked with their Legal Department (Legal) to determine whether it might have a record of the transfer; however, Legal did not have any record of the transfer.

[36] The FOIC notes as well that the appellant requested the destruction of his criminal record in March 2003 after he had a charge withdrawn and a conviction overturned. The FOIC states, that at that time, the appellant met the criteria for the destruction of his criminal record. The appellant's criminal record was, subsequently, destroyed in accordance with the appellant's request and any back-up information relating to past charges and convictions that would have appeared on the appellant's record was destroyed along with it.

[37] During the course of the inquiry, the Analyst also provided evidence outlining her involvement in the police's search efforts in response to the appellant's request. The Analyst states that she conducted an initial search on August 26, 2011. The Analyst states that this search included personally reviewing the appellant's Person Hardcopy, which was responsive to part 1 of the appellant's request, the police's Records Management System (RMS) and consulting with the IT Director and Legal.

[38] The Analyst states that the IT Director conducted a search of the appellant's delete log dating back to 2003 and located three responsive records. The Analyst states that the IT Director also searched certain change logs and found no responsive records. The IT Director also reported that he did not locate a transfer report.

[39] The Analyst also states that Legal reported back that no records responsive to the appellant's request exist.

[40] The Analyst states that a further search was conducted by the FIU for electronic records relating to deletions from the appellant's Known Offender (KO) file and no records were found.

[41] The Analyst states that she assisted the FOIC with the secondary search conducted during the course of mediation. Each of the searches conducted on August 26, 2011 was revisited. As a result of this review, the FIU confirmed that the retention period for electronic records is five years, the IT Department confirmed that the transfer logs did not exist in 2003 and Legal confirmed that no information responsive to the appellant's request existed.

[42] The FOIC also states that on September 9, 2011 the Analyst conducted a second search of the RMS and reported that no responsive records exist.

[43] With regard to searching for the information set out in part 2 of the appellant's narrowed request, specifically the dates upon which charges and/or convictions were entered and removed (if applicable), the nature of each offence, and the officer's name or badge number involved in each matter, the FOIC states that she consulted the police procedure manual and found nothing regarding the removal and transfer of the incorrect charges on the appellant's Person Hardcopy. She states that she also checked with senior officers and confirmed that the police have no documented process for dealing with the deletion and transfer of charges from one person's record to another person's record. The FOIC added that any police investigative notes that might have documented the deletion/transfer process in this case would have been filed in appellant's KO file, which was destroyed at the same time that the appellant's criminal record was destroyed.

[44] During the mediation stage, the FOIC states that she also viewed the criminal record of the other individual in question to determine when the charges that had been incorrectly placed on the appellant's file were transferred to this individual's record. The FOIC states she did not find any responsive information.

[45] During the course of the first day of the inquiry, questions arose concerning the following issues, which the police's representatives were not able to address:

- a reference to past charges and convictions in the summary portion of a police charge sheet, dated January 25, 2012, relating to a new criminal charge against the appellant
- a reference to a second conviction in paragraph 5 of a statement of defence prepared by counsel for the police and filed by the police with respect to a civil action commenced by the plaintiff against the police.

[46] Accordingly, I adjourned the inquiry to enable the police to do the following:

1. consult the police officer whose name is associated with the charge summary contained in the January 25, 2012 charge sheet and, in particular, the reference

to the appellant being "charged and convicted" of serious criminal offences, to determine the source of this information; and,

2. consult with outside counsel for the police to determine the source of the reference to a second criminal conviction in paragraph 5 of the police's statement of defence.

Resumption of inquiry – June 20, 2012

[47] Two days before the resumption of the inquiry, I received the following three documents from the police, which were also provided to the appellant:

- letter from the Director of Legal Services (Legal Director) for the police, dated June 18, 2012, in response to my request for information relating to the reference to "charged and convicted" in the charge summary portion of the charge sheet for the January 2012 charge against the appellant
- affidavit sworn June 18, 2012 by outside counsel for the police regarding the source of the reference to a second criminal conviction in paragraph 5 of the police's statement of defence
- a new Delete Log for the appellant, run on May 25, 2012

[48] In the June 18, 2012 letter from the Legal Director, he provides the name of a second police officer who was the arresting officer of the appellant for the charge arising from the January 25, 2012 incident. In the letter, the Legal Director advises that the police object to providing information about where that officer obtained the charge wording that references "charged and convicted", on the basis that

- the current charge against the appellant relates to an incident that arose subsequent to the appellant's access request
- the current charge is still before the court and, therefore, pursuant to section 52(2.1) the *Act* does not apply

[49] In his June 18, 2012 sworn affidavit, outside counsel for the police states that in using the words "[t]he defendant agrees that the plaintiff was convicted of a second criminal offence but otherwise disagrees with paragraph 16 of the statement of claim" in paragraph 5 of the police's statement of defence, he was "agreeing with [the appellant's] own pleading, wherein he stated in his paragraph 16 that he had been convicted of a second criminal offence."

[50] On June 20, 2012 I resumed the oral inquiry. The appellant participated as did the FOIC and the Analyst on behalf of the police.

[51] I invited the participants to comment on the documentation that had been forwarded by the police.

[52] With regard to the position taken by the Legal Director in the June 18, 2012 letter, the FOIC reiterated that she was not in a position to discuss the source of the wording "charged and convicted" that appears in the charge sheet relating to the January 25, 2012 charge for the reasons provided by the police's Legal Director. Although not satisfied with this explanation, the appellant did not dispute that the criminal charge is still before the court.

[53] The appellant also did not dispute outside counsel's explanation that he obtained the reference to a second criminal conviction from the appellant's statement of claim. However, he stated that he had advised outside counsel that the reference to a second conviction in his statement of claim was made in error. As a result, the appellant had an expectation that the police's outside counsel would amend his statement of defence to correct this error.

[54] During the course of the inquiry, it became apparent that the appellant believes the scope of his appeal included records relating to both the deletion of charges and convictions from his Person Hardcopy. The police disputed this position pointing to the Mediator's Report issued February 3, 2012, which confirms the appellant's further narrowing of the scope of his appeal to information relating to the deletion and transfer of the nine charges that had been incorrectly placed on his Person Hardcopy. I will address this below.

[55] During the inquiry, the appellant made it clear that he would be interested in receiving any information that might confirm that the nine charges that had been incorrectly placed on his Person Hardcopy had, in fact, been transferred to the other individual's Person Hardcopy. Although not required as part of the inquiry, after consulting with legal counsel, the FOIC agreed to deliver in confidence to me the Person Hardcopy and Delete Log for the other individual and permit me to advise the appellant whether or not the nine charges that appeared incorrectly on the appellant's Person Hardcopy had been transferred to the other individual's Person Hardcopy.

[56] During the inquiry, the police also provided the portions of its retention schedule that address the retention and destruction of "criminal records, fingerprint records and photographs" and "administrative correspondence."

[57] The FOIC states that the appellant's criminal record was destroyed in accordance with the appellant's request and pursuant to section 12B(5) which states:

Persons who have charges that are withdrawn by the Crown Attorney or reflect a record of dismissal may apply to have such entries removed from their local record after thirty days from the disposition date.

[58] The FOIC further states that all administrative records pertaining to the appellant (for example, the appellant's formal request to have his criminal record destroyed) would have been retained for a period for a period of five years and then destroyed, pursuant to the portion of the police's retention schedule that addresses the retention and destruction of administrative records.

[59] The FOIC reiterates that the police have no records that document the process they followed in deleting and subsequently transferring the nine incorrect charges from the appellant's Person Hardcopy and further that any records relating to the destruction of the appellant's criminal record, including the criminal record itself and the request for destruction, were properly destroyed in accordance with the police's retention schedule.

Analysis and findings

[60] This was an unusually long oral inquiry. The parties delivered close to six hours of representations over two days of hearings.

[61] Having carefully reviewed all of the evidence, I conclude that the police conducted a reasonable search for records responsive to the appellant's narrowed request for information relating to the deletion and transfer of the nine charges that had been incorrectly placed on the appellant's Person Hardcopy.

[62] In reaching this decision, I acknowledge the appellant's strong desire for closure regarding this unfortunate chapter of his life. He has a right to know how nine charges were erroneously placed on his Person Hardcopy and he has a right to confirm the details of how and when these charges were removed from his Person Hardcopy and transferred to the appropriate individual's record. Accordingly, I can understand his frustration when the information he seeks is not produced.

[63] I have grave concerns with the police's record keeping practices. Given that the handling of criminal records and related documentation is a highly sensitive and confidential matter, it is surprising that the police did not have a clear and well documented process in place to manage the deletion and transfer of incorrect entries on an individual's Person Hardcopy at the time the errors in the appellant's Person Hardcopy were discovered. It appears that even today, the police lack a transparent written process for handling this type of situation. Given this appellant's experience, I

would hope that the police consider taking steps to develop a transparent documented process for addressing corrections to individuals' criminal records.

[64] However, as stated above, the issue before me is rather straightforward. Have the police conducted a reasonable search for records relating to the deletion and transfer of the nine charges that appeared incorrectly on the appellant's Person Hardcopy?

[65] I appreciate that the appellant would like me to view the scope of his narrowed request more widely, to include both charges *and* convictions. However, I note that both the Mediator's Report, dated February 3, 2012, and a follow-up letter from the mediator to the appellant, dated March 20, 2012, clearly articulate the narrowed request to include information only relating to the deletion and transfer of the nine charges. The appellant had an opportunity to bring any errors or omissions in the Mediator's Report to the attention of the mediator. I have not been presented with evidence that would suggest the appellant felt the mediator had incorrectly framed the narrowed request. The appellant was also invited to contact the mediator if he had any questions about the contents of the March 20, 2012 letter. Again, I have no evidence before me that would suggest the appellant raised any issues with the mediator's framing of the narrowed request. Accordingly, if the appellant wishes to try to pursue access to information relating to the disposition of past convictions that may have been placed in error on his criminal record, he will have to make a new access request.

[66] Having concluded that the scope of the appeal is restricted to records relating to the deletion and transfer of the nine charges, I find the appellant's interest in information relating to the origin of the two references to convictions (one made in a statement of defence and the other in the charge summary of the charge sheet for the January 25, 2012 charge against the appellant) beyond the scope of this appeal. Accordingly, I will not address this issue further in this order.

[67] Turning then to the police's search, despite my concerns regarding their internal processes and record keeping practices, I found their two representatives at the inquiry to be forthright and direct and their evidence regarding their search efforts thorough and credible. I see no evidence of any attempt on the part of the police to withhold or conceal records from the appellant, as he alleges. Furthermore, I find the evidence provided by the police regarding its retention practices to be clear and I am satisfied that the relevant retention practices were properly followed in this case. To conclude, I find that the police have made a reasonable effort to identify and locate records responsive to the appellant's narrowed request and that no records exist. I see no benefit in ordering the police to conduct further searches for responsive records.

[68] Finally, for the appellant's benefit, I will comment briefly on the Person Hardcopy and Delete Log for the other individual. The police, as promised, provided me with the other individual's Person Hardcopy, which I reviewed carefully and compared with the

appellant's Person Hardcopy. While it appears that the charges that were incorrectly placed on the appellant's Person Hardcopy may have been transferred to the other individual's Person Hardcopy, I am not able to state conclusively, just based on these documents, that this has occurred. Some of the descriptive information pertaining to the charges in the two records is not identical and there are no dates provided to help establish when any such transfers would have been completed. The other individual's Delete Log does not assist in addressing these issues.

ORDER:

I uphold the police's search for records responsive to the appellant's request and I dismiss the appeal.

Original signed by: _____ July 31, 2012
Bernard Morrow
Adjudicator