Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2825

Appeal MA12-323

York Regional Police Services Board

January 8, 2013

Summary: The appellant sought access to notes made by a police inspector about the appellant's conduct. The police did not locate any responsive records. This order upholds the police's search for records.

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

OVERVIEW:

The York Regional Police Services Board (the police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following records:

> Between [date] to [date], all police officer rough, draft and finished notes and notebook entries, including notes regarding the CFSEU-Toronto Joint Managers meetings made by Inspector [name (the inspector)] of the York Regional Police, that reference [the requester].

The police issued an access decision, denying access pursuant to sections 9(1)(d) (relations with governments), and 8(1)(d) and 8(1)(g) (law enforcement) of the *Act*. They further stated:

> Any records that may exist of [the inspector] would have been created in relation to the Combined Forces Special Enforcement Unit (CFSEU). The CFSEU is a joint-force operation tasked with the mandate to expose, investigate, prosecute, dismantle and disrupt organized criminal enterprises and therefore is considered an agency of the Government of Ontario.

The requester, now the appellant, filed an appeal.

During mediation, the police clarified their decision indicating that it should have stated that no records exist, rather than indicating that access was denied. They also indicated that the inspector had advised that he had made no notes regarding the appellant.

The appellant advised the mediator that he believes that responsive records exist, thereby raising the issue of whether the police conducted a reasonable search for records. He contended that the information he is seeking may be found in the inspector's notebook entries or in other paper or electronic notes. In addition, the appellant clarified that he is only interested in information relating to his conduct (e.g. comments made about his conduct) and that he is not interested in the identity of confidential sources or other details relating to investigations.

As the appeal was not resolved at the mediation stage, the appeal was transferred to the adjudication stage where an adjudicator conducts an inquiry. The sole issue in this appeal was whether the police conducted a reasonable search under section 17 of the *Act* for all notes made by the inspector relating to the appellant's conduct. An oral inquiry was held by teleconference on December 14, 2012, in accordance with this office's *Code of Procedure*[1] and *Practice Direction 8*.

At the oral inquiry, the police were represented by its freedom of information co-ordinator (the FOIC) and its legal counsel. The appellant represented himself. All three individuals provided oral testimony.

In this order, I uphold the police's search for responsive records.

DISCUSSION:

In appeals involving a denial of access based on a claim that records do not exist, the sole issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 17 of the *Act*.

[1] See section 9 of the *Code of Procedure*.

If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the police will be upheld. If I am not satisfied, further searches may be ordered.

In this appeal, I asked the appellant to inform me of any details he was aware of concerning records which have not been located, or any other information to indicate that the search carried out by the police was not reasonable.

I also asked that the police provide a summary of all steps taken in response to the appellant's request and also to provide details of any searches carried out, including:

- By who were they conducted
- What places were searched
- Who was contacted in the course of the search
- What types of files were searched and finally
- What were the results of the searches

The appellant testified first and provided five reasons why he believed responsive records should exist. The police responded to each of these reasons. I will summarize the parties' evidence and then provide my analysis on each point, as follows:

Reason #1

The appellant submitted that since the decision letter specifically identified the exemptions that applied to the records, responsive records must have existed at the time this letter was written.

The police stated at the oral inquiry that since the CFSEU is an agency of the Government of Ontario, its record are automatically exempt under section 9(1)(d) of the *Act*. Accordingly, the police issued the decision letter before the search had been completed. They also advised that, after the appellant filed his appeal, the inspector completed two searches of his notebook and no responsive records were found. The police stated that as the inspector worked in operations, not administration, he would not be in a position to make notes about the appellant's conduct.

Analysis/Findings

During the mediation stage of this appeal, the appellant informed the mediator that he believed that the information he is seeking may be found in the inspector's notebook entries or in the inspector's other paper or electronic notes. Accordingly, at the conclusion of the mediation stage of this appeal, the issue to be decided at adjudication was whether the police had conducted a reasonable search of the inspector's notes.

Although the police's decision letter appears to indicate that responsive records had been located, a careful reading of this letter reveals otherwise. This letter states that:

> Any records that may exist of [the inspector] would have been created in relation to the Combined Forces Special Enforcement Unit (CFSEU)...
>
> The following subsections of the Act…were used to exempt the information…[sections 8(1)(d) and (g) and 9(1)(d)]…[emphasis added].

Section 9(1) reads in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c);

It is clear that, in this appeal, the police failed to complete a search before they issued a decision letter. Nevertheless, they did conduct a search for responsive records after the appellant filed his appeal. The searches consisted of the inspector twice reviewing 1200 pages of notes for any responsive records that he had taken during the time period specified in the request.

I advised the police at the oral inquiry that they should have completed a search before issuing the decision letter as it is not automatically evident that the responsive records would have been subject to section 9(1)(d).

The CFSEU is an RCMP-led unit, comprised of multiple federal or law enforcement agencies and is described on the RCMP's website as:[2]

> A multi-partner operation specifically tasked with the mandate to expose, investigate, prosecute, dismantle, and disrupt organized criminal enterprises.

[2] See http://www.rcmp-grc.gc.ca/on/prog-serv/index-eng.htm.

This office has considered the application of section 9(1)(d) to information provided to police forces from the RCMP operated Canadian Police Information Centre system (CPIC). The RCMP is an agency of the Government of Canada. It has been found that section 9(1)(d) of the *Act* does not apply to exempt information if the appellant is the individual referred to in the record and there was not a reasonable expectation of confidentiality.[3] Given the wording of the request, the appellant is the individual who would be mentioned in the records. Therefore, section 9(1)(d) may not have applied to exempt any responsive records.

In any event, I find that the police's decision letter stating that exemptions apply in this case, does not mean that the police had actually located responsive records before issuing their decision letter. I also find that the fact that the police took more than 30 days to issue the decision letter does not mean that they had located responsive records.[4]

Reason #2

The appellant submitted that he believes that responsive records should exist due to a statement he procured from a detective. The appellant attached this statement to his appeal letter he sent to this office. He did not indicate prior to the hearing date that he would be relying on this statement.[5] This statement reads:

> Within the last 12 months, [I] was given access to review a York Regional police file that contained several reports and documents. [I] refer to this file as a "secret disciplinary investigational" file conducted by York Regional Police. York Regional Police consider the file as a personal file regarding [me]. The file was produced for review by the human resource officer within York Regional Police.
>
> The file had no file number reference and [I] was told that the file would eventually be destroyed. While reviewing the file, [I] noted that the name [the appellant's name] appeared on documents.

The police stated that they had no prior notice of the appellant's intention to rely on this statement, nor had they seen a copy of this statement prior to the oral inquiry. Nevertheless, the police argued that the detective's file is a personal file of that detective containing information about that detective's own conduct and that any reference to the appellant would have been in relation to the detective's conduct, not the appellant's. As such, the police stated that any such reference to the appellant

[3] See Orders MO-1288 and MO-2534.
[4] See section 19 of the *Act* regarding time for head to respond to request for access to records.
[5] The Notice of Inquiry asks the appellant to send to the adjudicator and the police, by no later November 28, 2012, a copy of any documents he intends to rely on.

would have been non-responsive, as the appellant had asked for the inspector's notes in his request, not for a copy of any information about himself in a specific detective's personal file.

Analysis/Findings

Based on my review of the appellant's request and the statement of the detective, I agree with the police that any information in the detective's file would be non-responsive. The sole issue in this appeal was whether the police conducted a reasonable search under section 17 of the *Act* for all notes made by the inspector relating to the appellant's conduct.

The detective's file contains information about the detective and, more importantly, there is no evidence that the inspector wrote any notes in this file. The evidence before me was that the inspector's notes would all be written in his notebook, which had been reviewed twice by the inspector for responsive information.

Reason #3

The appellant testified that the police superintendent in charge of the CFSEU had told him that partner agencies had issues with the appellant.

In response, the police stated that the superintendent is not an employee of the York Regional Police and his records would not be in their custody or control.[6]

Analysis/Findings

The appellant's request sought access to records of a named inspector in the custody or control of the police. The appellant did not seek access to the superintendent's records in his request. Accordingly, I am unable to consider whether any records of the superintendent about the appellant's conduct are in the custody or control of the police.

Reason #4

The appellant referred to a policy guideline that requires an officer in an operational capacity, such as the inspector, to maintain a notebook and also to note down information about conduct.

In response, the police agreed that the inspector was required to maintain a notebook; however, they submit that the inspector's notebook did not contain any notations of the appellant's conduct during the time period specified in the request.

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[6] See section 4(1) of the *Act*.

Analysis/Findings

I accept that the policy guideline requires the inspector to maintain a notebook, which he did. Nevertheless, the evidence of the police, based on two searches through this notebook, is that it did not contain any information responsive to the request.

I find that the fact that the inspector had a notebook, in and of itself, does not mean that this notebook would contain information responsive to the appellant's request.

Reason #5

The appellant pointed out that he had made two other requests for notes of senior officers and both these officers produced records in response. The police acknowledged the other two requests, but stated that this does not mean that the inspector himself had responsive records. The police also confirmed that all of the inspector's notes would have been made in his notebook.

Analysis/Findings

The sole issue in this appeal was whether the police conducted a reasonable search under section 17 of the *Act* for all notes made by the inspector relating to the appellant's conduct. The fact that the police located information responsive to other requests made by the appellant in the notebooks of two senior police officers does not mean that the inspector made notes about the appellant's conduct in his notebook.

Conclusion

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.[7]

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[8] To be responsive, a record must be "reasonably related" to the request.[9]

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

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[7] Orders P-85, P-221 and PO-1954-I.
[8] Orders P-624 and PO-2559.
[9] Order PO-2554.
[10] Orders M-909, PO-2469, and PO-2592.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

I have carefully considered all of the evidence presented at the oral inquiry both by the appellant and by the police. I find that the appellant's five reasons that form the basis for his belief that responsive records exist are not substantiated. In this appeal, I find that the appellant has not provided a reasonable basis for me to conclude that responsive records exist. I find that the police have conducted a reasonable search for responsive records.

ORDER:

I uphold the police's search for records and dismiss the appeal.

Original Signed by: January 8, 2012
Diane Smith
Adjudicator