

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3047

Appeal MA13-147

Toronto Police Services Board

May 9, 2014

Summary: The appellant sought access to all records held by the police relating to the investigation, location and arrest of his client. The police granted partial access to nine pages of records, claiming sections 38(a), in conjunction with section 8(1)(l) (facilitate commission of unlawful act or hamper control of crime), and 38(b) (personal privacy) to withhold portions of the record from disclosure. The police also advised the appellant that they could not locate the memorandum notebook notes for a named detective involving his client. The appellant appealed the police's decision to this office, claiming that they did not conduct a reasonable search for records. The appellant advised that he seeks access to the outstanding memorandum notebook of the named detective. This order upholds the police's search and dismisses the appeal.

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 Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

All records – as the term 'record' is defined under the [*Act*] – related to [requester's client], including but not limited to all police reports, notes, occurrence reports and other documents generated during the course of

the investigation, location and arrest of [requester's client] on [specified date].

[2] The police located nine pages of responsive records consisting of a record of arrest/supplementary record of arrest and notebook entries of three named detectives. The police granted the requester partial access to the responsive records, claiming the discretionary exemptions in sections 38(a), read in conjunction with section 8(1)(l) (facilitate commission of unlawful act or hamper control of crime), and 38(b) (personal privacy) to withhold portions of the records from disclosure. In addition, the police advised the requester that certain information was severed from the records, as the information was found to be non-responsive to the request. Finally, the police advised the requester that:

To date, the Toronto Police Service, Provincial ROPE [Repeat Offenders Parole Inforcement] Squad cannot locate the memorandum notebook notes for [named detective] involving your client... If these notes are located and given to our office, they will be forwarded to you as soon as possible.

[3] The requester, now the appellant, appealed the police's decision.

[4] During mediation, the appellant advised the mediator that he was satisfied with the police's severances and confirmed that he would not pursue access to the severed information. The appellant also advised the mediator that he continues to seek access to the named detective's (the detective) notes that were not located during the police's search. The appellant asked whether the police had located the detective's notebook and whether any additional records were located.

[5] In response, the police advised that it contacted the detective and he informed the police that his notebooks were boxed and left at the Provincial ROPE Squad prior to his retirement. The police advised that members of the squad were asked to search for the box containing the detective's memorandum notebooks, but that after a search of the entire building, they were unable to locate the box. Regarding the existence of any additional records, the police advised that the records provided to the appellant were the only records located in the search. The police also advised that it worked with Canadian Border Services in the execution of the immigration warrant and that the police were not involved in the investigation beyond the arrest of the appellant's client.

[6] The appellant subsequently asked the police whether it could advise which electronic databases were included in its search of responsive records, specifically whether the following databases were searched: Fugitive Extradition System (FES), Canada Police Information Centre (CPIC), Master Name Index (MANIX), ECOPS, Criminal Information Processing System (CIPS) and Criminal Name Index (CNI).

In response to this query, the police conducted another search and located an additional record from FES and released it to the appellant in full. The police also advised it had granted the appellant access to the CIPS records already and that it did not make entries in the CPIC, MANIX, ECOPS and CNI databases. Further, the police informed the appellant the CPIC and the CNI databases are RCMP databases.

[7] The appellant then asked whether the police could advise him which police services made entries in the databases so that he can make access requests to the appropriate service(s). The mediator advised the appellant that he could submit an access request to the RCMP under the federal *Access to Information Act* with respect to the CPIC and CNI databases. In addition, the appellant sought clarification as to whether the police's search had been for records in relation to his client's arrest or for all records, as originally requested. The police confirmed that its involvement was limited to the execution of the immigration warrant and did not extend beyond the arrest of the appellant's client.

[8] The appellant informed the mediator that he continues to seek access to the outstanding memorandum notebook of the named detective. Mediation did not resolve the issue under appeal and it was transferred to the adjudication stage where a written inquiry is conducted by an adjudicator. I began my inquiry by inviting the police to make representations in response to a Notice of Inquiry. The police submitted representations. I then invited the appellant to make submissions in response to the issues raised in the Notice of Inquiry and the police's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction* number 7. The appellant also submitted representations.

[9] In this order, I find that the police conducted a reasonable search for responsive records and dismiss the appeal.

DISCUSSION:

Did the police conduct a reasonable search for responsive records?

[10] As the appellant stated in his representations, the only issue to be addressed in this order is whether the police conducted a reasonable search for the detective's memorandum notebooks.

[11] 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 of the *Act*.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.

¹ Orders P-85, P-221 and PO-1954-I.

[12] 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.² To be responsive, a record must be "reasonably related" to the request.

[13] 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.³ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁵

[15] In its representations, the police submit that they adhere to the Toronto Police Service Retention Schedule which states that memorandum books are to be retained for eight years from last entry. The police state that, generally, memorandum books are stored using the Integrated Records and Information Management System (Livelink) at the City of Toronto Record Centre. However, the police advised that the Fugitive and ROPE Squad are not "set up to use this [records management] system, at this time, due to the lack of required equipment." As the ROPE Squad is not a part of the same records management system, the police state that the ROPE Squad stores its memorandum notebooks at their own location.

[16] The police provided me with an affidavit signed by the Detective Sergeant of the ROPE Squad, Fugitive Squad and Bail and Parole Unit (the unit). The Detective Sergeant stated that he is the Officer in Charge of the unit. The Detective Sergeant stated that the individual that replaced the detective upon his retirement contacted the detective, who advised that he boxed and labelled all of his memorandum books prior to his retirement. The detective advised that the box or boxes containing his memorandum books were left at the unit. The individual that replaced the detective further advised that he searched the unit's building, but was unable to locate any of the detective's memorandum books. A subsequent search showed that there was no record of the memorandum books being archived or sent to the Property Bureau for storage. The Detective Sergeant stated that he located boxes of memorandum books for all current members of the unit in the secure storage area at the rear of the unit. The Detective Sergeant also advised that he located boxes of memorandum books belonging to other retired members of his units, but not those belonging to the detective. The Detective Sergeant stated that he spoke with the detective again and

² Orders P-624 and PO-2559.

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2185.

⁵ Order MO-2246.

was advised that he searched his home for the missing books, but did not find the responsive book. The detective reiterated that all of his memorandum books were boxed and left at the unit prior to his retirement.

[17] In response to the police's representations, the appellant submits that there is a reasonable basis for his belief that the outstanding memorandum book exists due to the detective's role in the arrest of his client. The appellant also submits that the detective had a duty to record the arrest of the appellant's client in his memorandum notebook and ensure that the notebook was properly stored. The appellant submits that the police did not conduct a reasonable search for records, as the search was not conducted by an experienced employee familiar with the storage and retrieval policies at the unit. In this case, the appellant submits that the Detective Sergeant who conducted the search was transferred to the unit less than three months earlier, after serving with a different unit at a different location. Further, the appellant submits that the storages practices at the unit are unique, as the police have indicated that the unit does not use the Integrated Records and Information Management System at the City of Toronto Records Centre. The appellant submits that in light of the unit's unique system and the relatively new Detective Sergeant, the police failed to provide evidence to demonstrate that the Detective Sergeant is familiar with the unit's storage and retrieval practices. The appellant submits that the police failed to provide evidence with respect to the following:

- the Detective Sergeant's prior experience in responding to freedom of information requests;
- what steps, if any, the Detective Sergeant took to obtain assistance from unit employees familiar with the unit's storage and retrieval practices and who were employed at the unit at the time the detective retired;
- what steps, if any, the Detective Sergeant took to follow up with the unit employees responsible for archiving the detective's notebooks and sending them to the Property Bureau for storage; and
- what steps, if any, the Detective Sergeant took to follow up with his predecessor who, at the time of the detective's retirement, was responsible for ensuring that the detective's notebooks were properly retained in accordance with the police's Record Retention Schedule and Policies and Procedures.

[18] The appellant also submits that the police failed to provide sufficient information about the prior searches conducted or why, when the detective retired, his notebooks were not properly stored in accordance with the police's policies and procedures. The appellant submits that the police failed to provide any evidence with respect to the following:

- whether the searches were conducted by the staff member who replaced the detective or by unit employees familiar with its storage and retrieval practices; and
- when the “subsequent search” was conducted.

[19] Finally, the appellant submits that the police failed to provide sufficient information about why the memorandum books were not properly stored in the unit’s secured storage area. The appellant also notes that the police failed to address a number of the questions posed in the Notice of Inquiry, including what the policies or procedures are for the storage of memorandum notebooks or other similar materials for retiring or departing police officers.

[20] I shared the appellant’s representations with the police and invited them to make representations in reply. The police advised that not only did they contact the detective with regard to the location of his memorandum notebooks, but a physical search of the entire building was conducted by an experienced member of the unit. In addition, the police advised that the Detective Sergeant conducted another search which went beyond the storage areas for the unit. The police conclude that it conducted a reasonable search for the responsive records.

[21] The issue for me to decide in this case is whether the police have taken *reasonable* steps to search for the outstanding memorandum notebooks that are responsive to the appellant’s request⁶. In this appeal, the existence of the memorandum notebooks is not in dispute. A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request⁷. The key, therefore, is reasonableness. An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request⁸.

[22] Based on my review of the parties’ representations, I am satisfied that the police have provided me with sufficient evidence to demonstrate that they discharged their responsibilities under the *Act* and made a reasonable effort to identify and locate records responsive to the appellant’s request. While I appreciate the appellant’s frustration that the detective’s memorandum books were not located, I find that the searches were conducted by experienced employees knowledgeable in the subject matter of the request who expended a reasonable effort to locate records which are reasonably related to the request, in accordance with the police’s obligations under the

⁶ Orders P-85, P-221 and PO-1954-I.

⁷ Order M-909.

⁸ Order P-624.

*Act*⁹. I find that the police provided me with sufficient evidence to demonstrate that they made a reasonable effort to locate the missing memorandum notebooks. While the Detective Sergeant may be a newer member of the unit, there is no evidence to suggest that he is unfamiliar with the police's records storage system. Further, reviewing the police's evidence, I do not agree with the appellant that the police have insinuated that the unit uses unique storage practices that only longer serving members of the unit would be familiar with. While the police advised that the unit does not use the Livelink System, I find that this does not necessarily mean that the storage and retrieval practices of the unit are unique and that the unit does not apply the institution's general storage policies and procedures. Reviewing the police's representations, I note that the police confirmed that the entire institution complies with its Retention Schedule and accept that the unit complies with the institution's storage policies and procedures, even though it does not have the required equipment to use the Livelink System.

[23] In his representations, the appellant questions the access to information and search experience of the individuals conducting the searches. The police advised that an experienced member of the unit, specifically the detective who replaced the detective whose notebooks are sought, conducted a physical search of the entire building for the missing notebooks. Reviewing the police's representations, I accept that both the Detective Sergeant, who is the Officer in Charge of the unit, and the detective who conducted the searches are sufficiently knowledgeable about the records and the subject matter of the request to appropriately determine the best way in which to conduct a reasonable search for responsive records. I find support for this conclusion in the fact that the Detective Sergeant advised, in his affidavit, that he located boxes of memorandum books belonging to both current and retired members of the unit. The police's representations have made it clear that the Detective Sergeant and the individual that replaced the detective conducted a number of searches for responsive records and contacted the retired detective for further information, but were still unable to locate the box containing the missing notebooks.

[24] While I acknowledge the appellant's submission that the police failed to respond to a number of the questions posed in the Notice of Inquiry, I find that they responded to the questions that are relevant to the issue of search and the missing notebooks. Further, although the appellant identifies what he purports to be a number of evidentiary gaps in the police's representations, I find that the police have provided me with sufficient evidence to demonstrate that they conducted a reasonable search for the missing notebooks. As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. Additionally, the institution is not required to go to extraordinary lengths to search for responsive records. An institution is only required to provide sufficient evidence to show that it has made a *reasonable* effort to identify and locate records responsive to the request. In the

⁹ Orders M-909 and PO-1744.

circumstances of this appeal, I find that the police have provided a sufficiently detailed explanation of the reasonable efforts to identify and locate any records responsive to the appellant's request. Therefore, I am satisfied that the police's searches were reasonable.

ORDER:

The appeal is dismissed.

Original Signed By:
Justine Wai
Adjudicator

May 9, 2014