Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3213

Appeal MA13-542-2

Toronto Police Services Board

June 29, 2015

Summary: The police received a request for records created in response to a prior request made for the correction of an identified occurrence report. The police advised that no responsive records exist. The requester appealed the police's decision and the sole issue to be decided was whether the police conducted a reasonable search for records responsive to the request. In this order, the adjudicator 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 the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

> In 2012, I submitted a Right of Access Request for occurrence report 4531785. Based on that report, I submitted a complaint to the OIPRD [Office of the Independent Police Review Director] under 120004914. The Police *MFIPPA* request file was 12-2674 for that occurrence report that triggered the OIPRD complaint.

> The OIPRD report indicated that a request to the Toronto Police Service [could] be made to exercise my right of correction. A request [for correction] was made on or about (10 days either way) to [named detective] at [named unit commander's] request.
>
> The *MFIPPA* request is to gain access to any notes or other documents under the correction request and should include any officer notes related to any of the officers listed both above and any records related to the file numbers listed above, including, but not limited to, [named individual who was Chief of Police at the time of the request].

[2] The police conducted a search and subsequently, issued a decision advising that no responsive records exist. The requester, now the appellant, appealed that decision.

[3] During mediation, the appellant advised that he was appealing the police's decision on the basis that the following types of records ought to exist:

- Records relating to his OIPRD complaint:

  The appellant submits that a letter that he received from the OIPRD dismissing his complaint stated that a letter advising of the OIPRD's decision not to proceed was forwarded to the Chief of the Toronto Police Service. He takes the position that the police should have located a letter from the OIPRD in their records. He also believes that, in addition to the letter, other records relating to the Chief's review of his OIPRD complaint should exist as information relating to that review was entered into a databased named the "Professional Standard Information System."

- Records relating to his conversations with four police officers:

  The appellant identifies, by name, the four police officers with whom he spoke with regards to having corrections made to his records and takes the position that they must have records. He continues to take this position despite the police's decision which state that two of the named officers were contacted and confirmed that they had no records that would be responsive to the request. He also notes that the police's decision does not advise whether or not one of the named officers was contacted or whether he has any responsive records.

[4] In response to the appellant's concerns, the police conducted an additional search and identified memorandum book notes for the named officer who was not mentioned in the original decision letter. They also located a letter received by the Chief of Police, from the OIPRD, advising that the appellant's complaint had been closed. The

police issued a supplementary decision letter disclosing the memorandum book notes and the letter from the OIRPD. At this time, the police advised that a fourth police officer, who was also not specifically mentioned in the original decision letter, had conducted a search but had not located any responsive records, including memorandum book notes.

[5] The appellant continues to believe that additional records ought to exist. Specifically, he contends that additional memorandum book notes for all four named officers should exist. In addition, he takes the position that two more named officers ought to have responsive records as their names are noted on the occurrence report. The police agreed to conduct another supplemental search for records held by these two officers. One page of memorandum book notes for one of the officers was located and disclosed to the appellant, in part.

[6] As a mediated resolution was not reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police and the appellant. The parties' representations were shared with each other in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure.*

[7] For the reasons that follow, I uphold the police's search for responsive records and find that their efforts to locate the information sought by the appellant were reasonable. As a result, I dismiss the appeal.

DISCUSSION:

[8] The sole issue to be decided is whether the police have conducted a reasonable search for records responsive to the request.

[9] 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. 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.[3]

[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.

[10] 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.[4] 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.[5]

[11] 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.[6]

Representations of the parties

[12] At the outset of their representations, the police highlight the principle outlined in the Notice of Inquiry and followed by this office, which stipulates that a requester must provide a reasonable basis for concluding that the institution has not identified certain records. The police submit that despite the appellant's assertion that he made calls and spoke to numerous officers regarding his complaint and correction request, in their view, this is not sufficient to support his position that additional memorandum book notes exist. They state that calls are "not recorded when they are routed through the mainline." They submit:

> It is not incumbent upon an officer to record every movement, or conversation, nor would such a requirement be practicable. Therefore, there are some officers' notations which are only added to the occurrence report itself, or (especially in the instance of follow-up calls and paperwork), only a general notation is made in the memorandum book to the effect that the officer completed work or made call backs or worked on case preparation, without further elaboration. While their names do show up in an occurrence report, it is obvious that their interaction in the appellant's case may be very limited, which at times would involve no note taking.

[13] The police explain that all divisions, units and squads of the Toronto Police Service have an individual assigned to locate and forward memorandum book notes and any other material requested by the Access and Privacy Section. It submits that the unit which dealt with the appellant's complaints called in officer memorandum book notes for the specific officers noted by the appellant, in addition to communicating directly with those officers.

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[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

[14] The police submit that they relied on the judgment of experienced and qualified staff to locate and review records responsive to the appellant's request. The police submit that they made every effort to locate responsive records. They submit that after the appellant insisted, during mediation, that more responsive records should exist, they conducted additional searches and located additional responsive records. Specifically, the police submit that in one of these additional searches they located memorandum book notes for a named officer who was not mentioned in the request. They further submit that, at that time, they also searched for records held by another officer who had also not been named in the request. However, no additional responsive records were identified.

[15] The police explain that while the appellant may believe that the Chief would be required to review complaints that go before the OIPRD, it is not always necessary if the OIPRD has ruled out the complaint. They submit that no further follow-up might have been required.

[16] In his representations, the appellant takes the position that the police unilaterally defined the scope of his request and only searched memorandum book notes when other records responsive to his request might exist, including emails exchanges, notes, and other communications that would meet the definition of "record," as contemplated by the *Act*.

[17] The appellant submits that he believes that additional records ought to be in the possession of a named detective and a named police constable, both of whom, he submits, he spoke with by telephone. He states that while he accepts that the telephone calls were not recorded, he submits that "there must have at least been some records generated." He states that "it is reasonable to believe that when [he] spoke to [named detective] on the telephone, that she made contact with [named police constable] who made a return call [to the appellant] with respect to the matter…denying [his] request for a correction." The appellant submits that otherwise, if the named police constable made such a call without prompting or not on the request of the detective, it would require investigation under the *Police Service Act* which prohibits the harassment, coercion or intimidation of any person in relation to a complaint made under that act.

[18] The appellant concludes his representations by stating that he is not seeking the creation of additional records, but access to records that already exist.

[19] In reply, the police submit that after considering the additional information provided by the appellant in his representations, they conducted a further search for records. They submit that communication was made between the detective and the police constable who the appellant said should have written proof of conversations with him. As a result of this search, the police located an email exchange between the

detective and the police constable identified by the appellant in his representations, and disclosed it to him, in part, by way of a decision letter that was copied to this office.

[20] In sur-reply, the appellant submits that although he has "received much of what [his] original FOI request specifically asked for, there are still outstanding decisions, including the decision requested by [the mediator] for a search that was to be conducted for notes from [a named police constable]." He also submits that he did not receive a decision with respect to whether any responsive records exist that are in the possession of the former Chief, who was Chief at the time of his complaint.

[21] The appellant submits that he has attempted to be clear in his request and that it is the responsibility of the police to ensure that they obtain the necessary information if they require clarification. He submits that the police have only conducted searches to meet the reasonable search tests established by this office as evidenced by the fact that each subsequent search they have conducted, they have located additional responsive records.

Analysis and findings

[22] Having carefully reviewed the evidence that is before me, including the records that were located by the police during their searches and the representations of the parties, I am satisfied that the search conducted by the police for records responsive to the appellant's request was reasonable and is in compliance with their obligations under the *Act*.

[23] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the police have provided sufficient evidence to demonstrate that they have made a reasonable effort to identify and to locate responsive records within their custody and control. The police conducted a number of searches. I accept that they were conducted by experienced employees who were knowledgeable in the subject matter and that they expended a reasonable effort to locate any additional responsive records.

[24] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding that such records exist. While I acknowledge that the appellant believes that additional records ought to exist, I find that he has not provided a reasonable basis for this conclusion.

[25] The police have searched for records related to all of the officers identified by the appellant (in his request and then subsequently, during the course of mediation, and then finally, in his representations) as having been in communication with him

about his correction request. They have provided an explanation as to why not every communication between these officers and the appellant might have been documented in the manner that the appellant appears to expect. I accept the police's explanation in this regard.

[26] Additionally, the police have explained why additional records relating to the appellant's OIPRD complaint were not located. They advise that if the OIRPD has ruled out the complaint, a review by the Chief is not always required or undertaken. I accept that the police's explanation in this regard responds to the appellant's expectation that records relating to his OIRPD complaint, ought to exist.

[27] In my view, in light of the police's explanations with respect to the lack of records of the specific types that the appellant believes should exist, the appellant has not provided sufficient evidence to support a reasonable basis to conclude that such records might exist.

[28] Moreover, also as set out above and as noted by the police in their representations, the *Act* does not require the police to prove with absolute certainty that additional records do not exist, but only to provide sufficient evidence to establish that they made a reasonable effort to locate any responsive records.

[29] I acknowledge that, in his representations, the appellant appears to suggest that the police did not initially seek clarification of his request and, therefore, did not properly meet their responsibility to ensure that they obtained the necessary information to understand the records sought by his request. I recognize that as a result of further communication with the appellant during mediation and in the course of the inquiry process, additional information was provided that gave rise to additional records being located. From my review of the initial request, on its face it appears to be sufficiently clear and did not necessarily require clarification on the part of the police at the outset. Additionally, I note that in an effort to provide the appellant with the records he sought, the police agreed to conduct new searches for responsive records each time they obtained additional information from the appellant. I recognize that the appellant believes that, despite the searches conducted by the police, more records should exist. However, I accept that the police have made a reasonable effort to locate them.

[30] Therefore, I am satisfied that the police have discharged their onus and have demonstrated that they have conducted a reasonable search in compliance with their obligations under the *Act*. On that basis, I uphold their search for records responsive to the appellant's request and dismiss the appeal.

[31] In his representations, the appellant raised concerns regarding the police's interpretation of the scope of his request by only searching for memorandum book notes. The issue of the scope of the request was not before me in this appeal and I did

not receive representations from the parties on that issue. As a result, it is not incumbent on me to discuss it in this order. Without making a finding on the issue, I note that while the majority of the responsive records located by the police were indeed memorandum book notes, other types of responsive records were also located. Accordingly, there is no evidence before me to suggest that the police's search for records that respond to the appellant's request was restricted to memorandum book notes.

ORDER:

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

Original signed by: June 29, 2015
Catherine Corban
Adjudicator