

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3719-F

Appeal MA17-525

Timmins Police Services Board

January 15, 2019

Summary: This final order disposes of the only remaining issue in this appeal: whether the Timmins Police Services Board (the police) conducted a reasonable search in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the death of the appellant's brother. In Interim Order MO-3666-I, the adjudicator upheld the police's access decision, but ordered a further search for records of telephone conversations between the appellant and duty officer(s). In response, the police conducted another search and retrieved a responsive record, and disclosed it to the appellant in its entirety. The parties also provided the adjudicator with representations following the police's further search. The adjudicator upholds the reasonableness of the police's further 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] In Interim Order MO-3666-I, I upheld the access decision of the Timmins Police Services Board (the police) made in response to the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Please give me a copy of anything and everything pertaining to the death of [named individual]. I already filled out and signed a form for the 911 recordings in audio made on June 21, 2017 – apparently there should be

at least [two] 911 calls. If there is no extra charge, I'd also like to have the written form of these 911 calls also.

I would like any and all transcripts and records of both my conversations with [named constable] (phone I made to him on Sunday June 25, 2017 about 3:20pm) and also my conversations with (named constable).

[2] The deceased individual referenced in the request is the appellant's brother.

[3] The police had disclosed to the appellant the officer's notes and occurrence reports (both of which included statements made to police by identifiable individuals in the course of an investigation into the cause of death of the deceased). The police withheld discrete portions of these records from the appellant (mostly witness' names). I upheld those severances for the reasons explained in Order MO-3666-I.

[4] Interim Order MO-3666-I required the police to conduct a further search for records of recorded telephone conversations between the appellant and any duty officer(s). In compliance with that order, they conducted a further search. They located another responsive record, and explained that this record had not been initially retrieved because there was an inadvertent error in the date they had initially searched. The police disclosed this record to the appellant in full.

[5] The appellant provided representations in response.

[6] For the reasons that follow, I am upholding the reasonableness of the police's search and dismissing this appeal.

DISCUSSION:

[7] The appellant claims that additional records exist beyond those identified by the police, so the issue to be decided is whether the police have conducted a reasonable search for records as required by section 17,¹ and as specified by the provisions of Interim Order MO-3666-I.

[8] The *Act* does not require an 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 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 If records were not generated by an institution (for example, because an investigation at a certain time was not made, as it

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Order MO-2185.

appears from the initial representations of the police, and other evidence before me), that is not a matter that can be addressed in a reasonable search appeal.

The appellant's evidence on the issue of reasonable search

[9] 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.⁵

[10] The appellant indicated to this office that she would not agree to her representations being referenced, so I can only provide very general comments in response to her representations here.

[11] The appellant was given an opportunity to respond to the police's representations and affidavit that were provided after Interim Order MO-3666-I was issued. Having reviewed all of her representations, I can confirm that most of them address issues that this office does not have jurisdiction to address.

[12] Regarding the appellant's representations that reference the police's further search efforts, I do not find that they establish a reasonable basis for her belief that additional responsive records within the custody or control of the police exist, beyond her assertions that such records do.

The police's evidence about their search efforts

[13] In their initial representations during the adjudication process, the police advised that they provided all records within their holdings to the appellant, but made certain severances before disclosing them to the appellant. These severances concern the access decision of the police, which was discussed at length and upheld for the reasons set out in Order MO-3666-I. That portion of the appeal has been dismissed.

[14] I would also clarify that in their initial representations, the police indicated that the 9-1-1 calls were routed to the ambulance dispatcher. It is not in dispute that the ambulance service did not contact the police about the subject of the call. This fact, together with the police's evidence that they provided all records in their holdings to the appellant, leads me to conclude that there is no reasonable basis to believe that any record of the 9-1-1 calls made in connection with the appellant's brother on the day of his death are, or have been, in the custody or control of the police.

[15] There was one aspect of the evidence initially provided by the police about their search efforts that was not clear to me, but as I will explain, it has now been satisfactorily addressed. In Interim Order MO-3666-I, I identified an unclear or apparent contradictory position regarding one aspect of the police affidavit, and found that I therefore had insufficient evidence to uphold the police's search as reasonable. In response, the police conducted another search and located a responsive record that

⁵ Order MO-2246.

they had not previously found, and disclosed it in full to the appellant. The police explained that this record was not initially located because of an inadvertent error in the month searched. I am satisfied by this explanation and find that this clears the ambiguity that resulted in an order for a further search.

[16] Before concluding, I note that, although not required to do so by Interim Order MO-3666-I, the police provided an affidavit from an experienced police sergeant explaining why video records of conversations with officers in the police lobby area could not be retrieved: they are overridden after 90 days. Had I ordered a further search for video records of conversations in the police lobby, I would have been satisfied with this explanation for the non-existence of those records upon a further search. However, I upheld this aspect of the police's search because the appellant did not provide a reasonable basis for her belief that those records continue to exist, and the police's affidavit indicated that they did not. In my view, any dispute about whether the police adhered to a 90-day retention schedule is not within the scope of the further search that was ordered in Interim Order MO-3666-I.

[17] The appellant's representations do not establish that there is a reasonable basis for the belief that additional telephone records exist in the custody or control of the police beyond those already disclosed to her, and I find that there is no other evidentiary basis for this belief. Therefore, I uphold the reasonableness of the police's further search and dismiss this appeal.

ORDER:

I uphold the reasonableness of the police's further search and dismiss this appeal.

Original Signed by: _____
Mariam Sami
Adjudicator

January 15, 2019