Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3958-I

Appeal MA19-00359

Shelburne Police Services Board

September 30, 2020

Summary: The police received an access request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to two specified complaints made to the OIPRD. The police initially denied access to the responsive records. During mediation, the appellant raised the issue of reasonable search. The police conducted another search and located a responsive record which they disclosed. In their revised decision, the police stated they were no longer denying access to previous records. As such, the sole issue in this appeal is whether the police conducted a reasonable search. In this order, the adjudicator finds that the police did not conduct a reasonable search and orders them to conduct further searches.

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

Orders Considered: Orders P-17, PO-1655, MO-2285 and MO-2957.

BACKGROUND:

[1] The Shelburne Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to two specified complaints made to the Office of the Independent Police Review Director (the OIPRD). The request states:

> I kindly request copies of any correspondence that you received or sent to the Shelburne Police or the Orangeville Crown Attorney's Office…regarding

> my complaints or the sharing of information about the criminal charges that [named police constable] laid against…on [specified date] for an alleged occurrence from [another specified date]. [Part 1]
>
> I am also requesting a copy of the "in camera session" from [specified date] where my case was discussed amongst the members of the Shelburne Police Services Board. Also confirmation of who exactly was present for that in camera session. [Part 2]

[2] The police issued a decision denying access to the responsive records relating to Part 2, relying on section 6(1)(b) (closed meeting) of the *Act*. With respect to Part 1, the police advised the requester that no records responsive to his request for correspondence between the OIPRD and the Crown Attorney's office exist with them.

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

[4] During mediation, the appellant advised the mediator that he was seeking access to the withheld information and believed that further responsive records exist with the police.

[5] The mediator conveyed the appellant's position to the police and requested that they conduct a further search for responsive records. The police conducted a further search, and located one responsive record.

[6] Following further discussions, the police issued a revised decision disclosing the responsive record. The police noted that they were no longer relying on section 6(1)(b). The police provided the appellant with a description of their search for records, identified responsive records that were disclosed to the appellant outside of this process, and advised the appellant that no further responsive records exist.

[7] After receipt of the revised decision, the appellant advised the mediator that he continues to believe that further responsive records exist with the police.

[8] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[9] I commenced my inquiry by seeking representations from the police and the appellant. Pursuant to section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*, the parties' representations (in their entirety) were shared.

[10] In this order, I find that the police did not conduct a reasonable search and order them to conduct further searches.

DISCUSSION:

[11] The sole issue in this appeal is whether the police conducted a reasonable search for responsive records.

[12] 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.

[13] 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]

[14] 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]

[15] 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]

[16] 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

[17] In their representations, the police assert that they conducted a reasonable search for responsive records. In support of their assertion, they attached an affidavit sworn by the chair of the Shelburne Police Services Board (board chair), who has been actively involved in responding to the appellant's access request.

[18] The affiant states that the police issued a decision denying access to responsive records based on the exemption at section 6(1)(b) of the *Act*. The decision also stated that there were no records pertaining to correspondence between the OIPRD and the Crown Attorney's office with the police.

[19] The affiant states that, during mediation, the police conducted a further search for responsive records, which resulted in one responsive record being located. The police issued a revised decision and disclosed this responsive record to the appellant.

[20] With regard to search, the affiant advised that between May 1, 2019 and July 2, 2019, he and the temporary secretary for the Shelburne Police Services Board (temporary

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

board secretary) searched the police's laptop. He also advised that on May 3, 2019 both he and the full-time secretary for the Shelburne Police Services Board (full time board secretary), physically inspected the police records including motions and minutes, which were filed at the town hall.

[21] The affiant finally advised that he made enquiries with the police chief, the former chair of the Shelburne Police Services Board (former board chair), the former full time board secretary, and two former members of the Shelburne Police Services Board (former board members) whom were present during the in-camera meeting in question. He advised that one of the former board members, the former mayor, confirmed to him that the in-camera motion was the only record available from the in-camera meeting held on that specified date. He advised that the former board chair also confirmed that the former board chair had provided everything to him and that no other records exist. The affiant advised that he was unable to reach the remaining former board member. He also advised that the former full time board secretary, who attended every meeting, also indicated that she was unaware of any other correspondence/notes/recording other than those located on the police's computer.

[22] In response, the appellant points out that a named Justice of the Peace at the Orangeville Courthouse told him that "in-camera" sessions held by the police should be recorded, but the police did not locate a recording of the in-camera session in question in their search.

[23] The appellant also questions how the police knew about the details of the conversation between the police chief and assistant crown attorney that occurred in March 2018. He submits that the affiant made enquiries with the police chief because he was present at the in-camera session, which would explain how the former board chair became aware of the details of the conversation between the police chief and the assistant crown attorney.

[24] In addition, the appellant questions why the former full time board secretary, who was present at all meetings, did not take any notes during the special in-camera meeting. Finally, he submits that the affiant stated he did not make contact with the remaining former board member who may have additional records.

[25] In response, the police submit that the *Police Services Act* does not require municipal police services boards to record in-camera meetings. They also confirmed that no audio record exists of that in-camera meeting.

[26] The police also submit that paragraph 10 of the affidavit does not imply that the police chief was present at the in-camera meeting. The police explain that they became aware of the conversation between the police chief and the assistant crown attorney due to the appellant's complaint to the OIPRD which was subsequently referred to the police. As such, the police submit they were aware of details of the conversation due to the direct information provided by the appellant in his complaint to the OIPRD.

[27] Finally, the police submit that the affiant spoke directly to three of the four former

board members whom were present at the in-camera meeting. They submit that all these board members confirmed that the in-camera motion was the only record of the in-camera meeting. The police acknowledges that if this office determines it is necessary for the board chair to make inquiries with the remaining former board member with respect to this matter, they will undertake to do so.

[28] In response, the appellant submits that the quoted portion in paragraph 23 of the police's reply representations did not reveal the details that the assistant crown attorney informed the police chief that a named individual's family member was present at the incident. Consequently, he submits that someone from the police had to have made contact via phone, in person or email with the police chief to obtain those details after they received the OIPRD request. The appellant points out that that contact would be in violation of the OIPRD's instructions given to the police in the OIPRD's request.

Analysis and findings

[29] It is clear from the appellant's representations that he is seeking a copy of the audio recording of the in-camera portion of the meeting in question. I note that the police have provided him with a copy of the meeting minutes for the in-camera portion of this meeting. However, the appellant believes that an audio recording must exist because a Justice of the Peace told him that the police is required to record their in-camera meetings.

[30] Section 35(3) of the *Police Services Act* (the *PSA*)[7] states that municipal police services board meetings are open to the public. However, section 35(4) of the *PSA* allows municipal police services board to exclude the public from all or part of a meeting or hearing if it is of the opinion that the matters involve public security; or intimate financial or personal matters or other matters may be disclosed of such a nature.

[31] I note that the *PSA* does not state that the meetings (all or part of) in which the public is excluded need to be recorded. As such, I accept the police's evidence they were not required to record the in-camera portion, and that no audio recording exists for it.

[32] As stated above, a further search will be ordered if the police 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.

[33] In this case, I find that a reasonable search by the police would include contacting the former board member who was not successfully contacted during the search for records. The police acknowledge that the affiant, the board chair, was unsuccessful at contacting one former board member who was present at the in-camera portion of the meeting in question. I acknowledge that there is no guarantee that this former board member will have responsive records, but she may. It is possible that she took notes during the meeting. As such, additional record(s) may exist with her, which would reasonably relate to the request.

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[7] R.S.O. 1990, c. P.15.

[34] Finally, in his sur-reply representations, the appellant focused on seeking an explanation for the former board chair's awareness of the details of the conversation between the police chief and the assistant crown attorney. It is unclear to me how this relates to the issue of the reasonableness of the police's search, and I will not address this issue any further in this order.

[35] I also note that the appellant requests that I order the police to ask all the former board members to explain how the former board chair was able to include what the assistant crown attorney told the police chief in the police's findings to the OIPRD. He has also asked that I order the police to contact the remaining former board member and have her respond to this question.

[36] In Order MO-2957, former Assistant Commissioner Brian Beamish reviewed Orders MO-2285 and MO-2096, and found the following:

> What can be distilled from the above quoted authorities is that a right to "information" does not embrace the right to require the institution to provide an answer to a specific question. However, an institution is obligated to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked in a request.

[37] I agree with and adopt the above reasoning for the purpose of this analysis. I find that the appellant does not have a right to require the police to provide an answer to his specific question on how did the former board chair know about the details of the conversation between the police chief and the assistant crown attorney. An answer to this question *may* be answered if there was an audio recording of the in-camera portion of the meeting or if there were other records containing information pertaining to the meeting. However, the police have provided evidence that the audio recording does not exist. The police also confirmed that no correspondence between the police and the Orangeville Crown Attorney office about the appellant's complaints exist in their record holdings. Moreover, there is no requirement for the police to ask this question to the former board members and provide those answers to the appellant.

[38] In sum, I find that the police's search was not reasonable and I will order them to conduct a further search, specifically for any records that may reside with the remaining former board member.

ORDER:

1. I order the police to conduct a further search for records responsive to the request with the remaining former board member. I order the police to provide me with an affidavit sworn by the individual who conducts the search by **October 30, 2020**. At a minimum, the affidavit should include information relating to the following:

    a. information about the employee swearing the affidavit describing his or her qualifications and responsibilities;

b. a statement describing the employee's knowledge and understanding of the subject matter of the request;

c. the date(s) the person conducted the search;

d. details of the search;

e. the results of the search;

f. if as a result of the further searches it appears that no responsive records exist, a reasonable explanation for why such records would not exist.

2. The affidavit referred to in the above provision should be forwarded to my attention, c/o Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*.

3. I remain seized of this matter.

Original signed by: September 30, 2020

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Adjudicator