

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3963

Appeal MA18-00721

Halton Regional Police Service

October 21, 2020

Summary: The appellant sought the notebooks for a named police officer from the Halton Regional Police Service (the police). The police denied access to the notebooks on the basis that the notebooks did not exist and the appellant appealed the decision, concerned that the police officer's notebooks had been destroyed after the investigation into an occurrence had re-opened. The adjudicator accepts the police's explanation that the notebooks were destroyed or are now irrevocably lost and finds that the police conducted a reasonable search for the records.

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 appellant made a request to the Halton Regional Police Service (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records relating to a particular occurrence:

I understand that [named retired police sergeant] was asked to turn in his notebooks (probably around 2011).

I seek copies of any notes he may have made regarding this case. Most of them would be around 1980 – 81 although there may have been some notes made up to 1988.

[2] In its access decision, the police stated:

You have requested access to the notebook entries of [named officer] pertaining to [a specified occurrence].

Following a search of our records and consultation ... it has been determined that the notebooks of [named officer] have been destroyed pursuant to our Notebook retention policy OPS-004. Therefore, no records exist.

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

[4] During mediation, the appellant expressed concern to the mediator that the sergeant's notebooks were destroyed after the investigation had re-opened. The police provided information to the mediator about their search and notebook retention policy OPS-004 which was shared with the appellant.

[5] The police indicated that in addition to the named detective's search of physical records and the case management system and the police checking their retention and destruction logs, they also made inquiries with their Criminal Investigations Bureau and Homicide Unit. The police further explained that there was nothing in their logs indicating that the notebooks had been sent offsite for storage.

[6] Also during mediation, the police explained that under the notebook retention policy OPS-004, police officer notebooks are destroyed five years after the police officer's retirement or departure from the force. The police informed the mediator that the sergeant retired in 2008 and they believe his notebooks would have been destroyed in 2013 (five years after his retirement). The police could not confirm the date of destruction, as there was no notation regarding the sergeant's notebooks in their destruction logs. The police also indicated that under the notebook retention policy, notebooks may be removed from the given year destruction cycle if they contain particularly significant information. The police do not have any notations in their retention logs indicating that the sergeant's notebooks were removed from the five-year destruction cycle.

[7] Mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I sought representations from the police and the appellant. I received representations from the police. The non-confidential portions of the police's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. The appellant did not respond to the request for representations. She was asked to confirm that she would not be providing representations but she did not respond to communications from this office.

[8] In this order, I find the police's search to be reasonable and, further, that no useful purpose would be served by ordering an additional search.

DISCUSSION:

[9] The sole issue in this appeal is whether the police's search for responsive records was reasonable.

[10] Where an appellant claims that additional responsive 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.

[11] 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

[12] 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

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

Police's representations

[14] In support of its search, the police provided brief representations which referred to the more detailed affidavits also provided, and the police notebook directive OPS-004. The two affidavits provided by the police were from a Freedom of Information analyst (or Analyst) and its Freedom of Information coordinator (or FOIC).

[15] The FOIC affirms that once the police received the request, both she and the Analyst searched the Retirees Log of Officers and determined the retirement date for the sergeant named in the appellant's request. The coordinator notes that the log did not indicate that Major Crimes needed to be contacted prior to destroying any notebooks. The coordinator further notes that she and the analyst then proceeded to check the *destruction of notebooks* log and found that the named sergeant was not listed on the log. The coordinator then checked the two *notebook* logs and the *security* log, all with negative results.⁶

[16] The coordinator addressed the issue of whether it is possible the records relating to the named sergeant existed but no longer exist. The coordinator affirms that there is a high likelihood that the named sergeant kept a notebook during his employment but also a high likelihood that his notebooks were destroyed. Specifically the FOIC states:

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-2246.

⁶ The notebook log identifies notebooks being stored on site in the FOI unit and the Security log lists the officers whose notebooks are stored offsite.

At the time of the named sergeant's retirement, the FOI unit was not responsible for notebooks. Upon review of Policy OPS-004 that was in place at the time of his retirement (effective date September 8, 2006), the named sergeant's notebooks from the specified period should have been the responsibility of the HRPS⁷ Court Services Bureau until 2013, [when] they should have then been transferred to the Information Privacy Officer for an additional 10 years storage.

[17] The FOIC affirms that on July 29, 2011, Policy OPS-004 was updated and the notebooks of retired officers were to be destroyed five years after retirement. However, the FOIC states that the 2006 policy specified that where a notebook contains a reference to a major unsolved case it should have been forwarded to the commander of the investigating unit to be included in the case file. The FOIC states:

Regardless of [the named sergeant's] date of retirement, in accordance with the policy at the time, he would have been responsible for submitting his notebook to the appropriate investigating unit upon the notebook's completion. I do not know whether [the named sergeant] followed the policy, but the FOI analyst did contact the appropriate units in order to retrieve [the named sergeant's] notebooks; results were negative.

According to [another named staff sergeant's] conversation with [the named sergeant] in November 2018, [the named sergeant] advised he submitted his notebook to Stores (the HRPS materials management and distributions team) upon retirement in 2008. It is unknown whether the notebooks were then turned over to the Court Services Bureau or whether [the named sergeant] had submitted the notebooks containing cold cases to the appropriate investigating unit. Furthermore, it is unknown whether any of [the named sergeant's] notebooks were received by the FOI unit from the Court Services Bureau when the notebook storage responsibility switched hands in approximately 2009.

[18] Finally, the FOIC explains why it would be difficult to locate the notebooks if they still existed:

In 2010, due to the lack of physical space, the notebooks of retired and terminated members were sent offsite for storage, along with notebooks of current officers up to, and including, 2000. It is my understanding that when notebooks were being logged and packed into marked banker's boxes during a 2010-2011 Service-wide notebook collection and purge, there were challenges with the Excel spreadsheet. The box numbers and officers' names were being logged in the spreadsheet, however the actual box number ended up changing as more and more officers and boxes were added to the log. The gravity of this error was not noted until approximately 2013.

⁷ HRPS – Halton Regional Police Service

Although rare, there have been instances where we have recalled boxes from offsite storage; the officer's notebooks that we expect to be in the box were not actually there.

Stores moved to a new building in Fall 2018; had [the named sergeant's] notebooks been sitting in this Unit since his retirement in 2008, they would have been located at that time and sent to the FOI unit for storage. Furthermore, every notebook in the custody and control of the FOI unit and Stores [unit] onsite was sorted and re-logged in Summer 2018; [the named sergeant's] notebooks were not located.

[19] The FOIC affirms that the employee responsible for maintaining the retired and terminated officer logs, as well as the offsite storage logs and destruction of notebooks, is no longer with the police. The FOIC states:

Based on the information contained in the logs referenced above, the policy in place at the time of the [named sergeant's] retirement, the date the policies were updated, and the knowledge of when the former employee normally completed the annual destruction, I can only assume that [the named sergeant's] notebooks were destroyed in approximately January 2014.

[20] The FOIC affirms that Policy OPS-004 was updated in January 2018 and the destruction cycle of retired and terminated officers' notebooks was extended to 15 years. She notes that she is also currently working with management in order to put additional procedures in place to avoid the destruction of notebooks containing cold cases.

[21] The Analyst's affidavit confirms the details of the search both she and the FOIC initially conducted of the retirement and destruction logs. The Analyst's affidavit provides further details about the search of the Major Crime Unit for the named sergeant's notebooks. The Analyst affirms:

On August 14, 2018, I spoke with [named] police constable from the Major Crime Unit who directed me to the Child and Sexual Assault unit to locate the named sergeant's notebook. I subsequently spoke with a [named] detective constable who confirmed that she will try and find the notebook; she also confirmed that some investigations were filed in offsite storage. The [named] detective constable sent an email to [a different detective constable] to find out if the notes of the [named] sergeant were available in the Child and Sexual Assault unit.

[22] The Analyst also emailed the named detective constable with the Child and Sexual Assault unit to determine whether the named sergeant's notebooks could be located. The detective constable emailed a response to the Analyst noting that their electronic system did not contain the named sergeant's notes and confirmed that she had not received his notes during the course of her investigation.

[23] The Analyst further affirms that during the appeal, she contacted a named detective

sergeant in the Homicide Unit to verify whether he could locate the named sergeant's notebooks. The named detective sergeant confirmed that he was unable to locate the named sergeant's notebooks in that unit.

[24] The analyst affirms the following:

On October 31, 2018, [named] detective constable confirmed that she had the "blue box" of all investigative materials pertaining to this case and the named sergeant's notebooks were not in there. I then emailed [named] staff sergeant [the former officer dealing with the case] to confirm whether she knew anything about the [named] sergeant's notebooks. The staff sergeant confirmed that she does not know where the [named] sergeant's notebooks were.

[25] Finally, the Analyst confirms the FOIC's information that a staff sergeant offered to assist in locating the notebooks and liaising with the appellant. The Analyst affirms that the staff sergeant spoke to the named sergeant. The named sergeant confirmed that his notebooks were handed in to the Stores unit of the police prior to retiring.

Analysis and finding

[26] As noted above, the appellant did not provide representations and as such, she has not provided me with a reasonable basis for her belief that the named sergeant's notebooks exist. Nevertheless, I accept that the named sergeant's notebooks are records that should have been located by the police's search of its record holdings in response to the request.

[27] I accept the police's representations that they conducted a reasonable search for the notebooks. I also accept that it is most likely that the notebooks either were destroyed and no longer exist in the police's record holdings, or were irrevocably lost. I find the searches conducted by the FOIC and Analyst to be reasonable and their explanations of the places searched to be comprehensive.

[28] Based on the police's representations, I accept that the named sergeant's notebooks were turned over to the Stores unit of the police upon his retirement in 2008. The police's records management policy at the time designated the police's Court Services Bureau as responsible for the notebooks for a period and then the notebooks would have been transferred to the Information and Privacy Officer for an additional 10 years of storage. The police were unable to confirm if this was done for the named sergeant's notebooks. In the circumstances, I find the FOIC's theory that the notebooks were either destroyed (as per the updated records management policy) or irrevocably lost (due to the faulty Excel spreadsheet and storage of the notebooks) to be reasonable explanations as to why the notebooks cannot be found.

[29] The police's other avenues of search, the Major Crime Unit and the Child and Sexual Assault Unit did not result in the named sergeant's notebooks being located. I find the police's searches of these units to be reasonable and I accept that the search of the

investigative materials (blue box) relating to the case did not result in the named sergeant's notebooks being located.

[30] I find the police's search for the named sergeant's notebooks to be reasonable in the circumstances but I acknowledge that this finding will be frustrating to the appellant who is looking for the named sergeant's notebooks. I note that even if I were to accept the appellant's position that the police's search was not reasonable, I find that there would be no useful purpose in ordering a further search as I am of the view that the notebooks have been destroyed or irrevocably lost.

[31] While the FOIC states that the police's records management policy has changed to extend the storage of notebooks and that additional procedures are being put in place to avoid the destruction of notebooks containing references to cold cases, this does not help the appellant. I would remind the police of its responsibilities as an institution under the *Act* and in particular its responsibilities regarding the storage of personal information.

ORDER:

I find the police's search to be reasonable and dismiss the appeal.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ October 21, 2020