

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4027-I

Appeal MA19-00840

Toronto Police Services Board

March 18, 2021

Summary: 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 all records relating to a specified break and enter investigation. The police issued an access decision granting partial access to the responsive records. On appeal, the only issue that the appellant pursued was the sufficiency of the police's search, under section 17 of the *Act*. In this order, the adjudicator does not uphold the reasonableness of the police's search, and orders the police to conduct a further search.

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

OVERVIEW:

[1] An individual went to the Toronto Police Services Board (the police) alleging that her jewellery had been stolen from her home. She showed the police photographs of jewellery posted on a website where individuals buy and sell items from each other, stating that it was her jewellery. The police investigated the allegation as a break and enter. The individual later submitted an access request to the police relating to that break and enter investigation, under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*). This appeal relates to the reasonableness of the police's search for records in response to that access request.

[2] The request itself was for the following information:

All records pertaining to #[specified number] (Break and Enter). Brought photos of items but case closed. Want any info on items listed in report as well.

[3] The police located responsive records and issued an access decision granting partial access to the responsive records, and withheld some information under the discretionary personal privacy exemption at section 38(b) of the *Act*. The access decision also stated that some information had been removed because it was not responsive to the request.

[4] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[5] During the mediation stage of the appeal, the appellant confirmed that she was not interested in any of the information contained in the partially withheld records (including a photograph) or the non-responsive information. Accordingly, the section 38(b) and responsiveness issues were removed from the scope of the appeal. However, the appellant stated that she believes that additional records should exist, including photos from the aforementioned website and certain affidavits. The mediator conveyed this information to the police. The police agreed to contact the investigating officer who was in charge of the break and enter investigation about additional records. They also contacted the officer who was later assigned to the investigation. After doing so, the police advised the mediator that they stood by their position that no additional records exist, explaining that both the officers stated that they did not have additional records.

[6] The appellant advised that she would like to pursue the appeal at adjudication on the basis that additional records should exist. As a result, the appeal was moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. I asked the police for written representations in response, and the police provided them. I then sought and received written representations from the appellant in response.

[8] For the reasons that follow, I do not uphold the reasonableness of the police's search, and I order the police to conduct a further search.

DISCUSSION:

[9] The only issue to be decided in this appeal is whether the police conducted a reasonable search for records responsive to the request. As I will explain below, there is sufficient evidence that the police made reasonable efforts to search for specified records, but not to support the reasonableness of the police's initial search efforts for all records related to the specified occurrence.

[10] 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.

[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

The police's evidence

[13] The police maintain that they conducted a reasonable search for records responsive to the request, as required by section 17 of the *Act*. They provided representations and an affidavit to explain their search efforts.

[14] By way of background, the police state that after they issued their access decision, the appellant asked them about the appeal process and indicated a belief that an appeal to the IPC would re-open the original police investigation. The police state that they advised the appellant that appealing an access decision under *MFIPPA* would not re-open the police investigation into the offence alleged by the appellant.

[15] The police characterize the records that the appellant is seeking as specific records that she tried to bring to them (photographs, two affidavits, and a long narrative in a specified language). The police say that these records are not records that were created by or for the police.

[16] An analyst in the police's Access & Privacy Section conducted the search and provided an affidavit about her search efforts. This employee has twenty-one years of experience working for the police, with eleven of those years being in the Access & Privacy Section. In her affidavit, she states that part of her role as an analyst is to search and provide records for requests for information made under the *Act*. Accordingly, she attests to having knowledge of the facts set out in her affidavit.

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.

[17] The analyst's affidavit provides some details about the police's initial search efforts, which resulted in the location of the records identified as responsive, and it describes some examples.

[18] According to the police's representations, the appellant stated that she provided "[specified website] photos, two affidavits and a long written account that was written in [a specified language] to a named officer who was the initial investigating officer."

[19] The analyst attests that after she was advised that the appellant had appealed the police's access decision to the IPC, she asked the original investigating officer to locate records as described by the appellant. In response, this officer advised that he did not have the records described by the appellant and that he had "refused delivery of [them]." Furthermore, the police explain that this officer also advised by email that he recalled the appellant coming in to the station and trying to give him documentation. The officer's description was as follows:

[The appellant was trying to give me] piles and piles of paperwork which I refused to accept because they had nothing to do with helping me solve the crime. Perhaps she thinks she left them with us but didn't. For example, [regarding] her affidavit I specifically remember at the front desk of the police station one day telling her to take that to a lawyer or her insurance company because as an investigating officer for a Break and Enter I didn't need them.

[20] According to the analyst's affidavit, the police also asked the investigating officer to whom the break and enter investigation had been transferred (and who had also met with the appellant) to search for the records. The officer advised by email on the same day that he had not received or accepted any records from the appellant. The police also state that they specifically asked this officer if the records described by the appellant could be stored or located at the division. The police say that the officer replied that if the appellant had dropped off any records pertaining to the break and enter investigation at the division, he would have been made aware of that and would have received the records.

The appellant's evidence

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

[22] In this case, the appellant's representations did not address the evidence

⁵ Order MO-2246.

provided by the police regarding their search efforts, but rather the substantive alleged incident and the police's investigation of it. However, as the appellant appears to already have been advised by the police, the legal authority of this office does not extend to the substance of the police's investigation and in this appeal, I can only address the reasonableness of their searches for records that relate to the break and enter investigation. Without representations addressing the police's search efforts, the appellant does not appear to have provided a reasonable basis for concluding that additional records exist.

Analysis and findings

[23] In understanding why I do not uphold the police's search as reasonable in the circumstances, it is useful to set out the wording of the request once again here:

All records pertaining to #[specified number] (Break and Enter). Brought photos of items but case closed. Want any info on items listed in report as well. [Emphasis added.]

[24] As mentioned, the police characterize the records that the appellant is seeking as specific records that she tried to bring to them (photographs, two affidavits, and a long narrative in a specified language). While I accept that these records were not records created by the police, according to the Mediator's Report, the basis for the appeal is the appellant's belief that additional records exist "including" those specified records. I find that it is clear from the wording of the request that the appellant was looking for all records related to the specific break and enter investigation mentioned in her request. Therefore, I will consider the sufficiency of the police's evidence regarding their search efforts for all records related to the break and enter, which includes the records specifically identified by the appellant.

[25] Although I accept that the police analyst who provided an affidavit was an experienced employee to direct the police's search efforts, that does not end the matter on the issue of whether experienced employees searched for responsive records.

[26] Here, I accept that the investigating officers were consulted during the mediation stage of the appeal to conduct a search for the specific records (or types of records) identified by the appellant. I find that it was reasonable for the police to ask these employees to search for those specific records. I accept that their direct involvement in the police matter that is the subject of the request, including their direct interactions with the appellant, means that they are experienced employees knowledgeable in the subject matter of the request. Given their direct involvement in the matter, I accept their written statements, described above, indicating that they did not receive or accept records from the appellant. I find that this is sufficient to explain why the police do not have the photographs, affidavits, and narrative that the appellant believes are in their record holdings.

[27] However, it is not clear from the evidence before me that these investigating

officers were initially asked to search for all records relating to the break and enter investigation, in accordance with the wording of the request. If the police did not initially ask these investigating officers to search for all records relating to the break and enter investigation, I would have expected their evidence to include an explanation as to why that was.

[28] In any event, it is not clear from the evidence before me which police employees were involved in the initial search effort to identify all records relating to the break and enter investigation and, specifically, whether the two investigating officers ever conducted such searches.

[29] Furthermore, the analyst's affidavit and the representations of the police do not specifically identify which locations were initially searched in response to the request and which search terms were used (if any) in order to conduct a search for all records relating to the break and enter investigation.

[30] For these reasons, I find that the police have not provided sufficient evidence to support the reasonableness of their search efforts for all records responsive to the request, apart from the specific records described by the appellant. Accordingly, I will order the police to conduct a further search.

ORDER:

1. I uphold the police's search for the photographs, affidavits, and narrative the appellant says she submitted to the police.
2. I do not uphold the police's search for all records responsive to the appellant's request, apart from those specified in Provision 1. I order the police to conduct further searches for responsive records within their record holdings. I order the police to provide me with affidavits sworn by the individuals who conduct the searches. At a minimum, the affidavit should include information relating to the following:
 - a. information about the employee(s) swearing the affidavit describing his or her qualifications, position 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 and the names and positions of any individuals who were consulted;
 - d. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - e. the results of the search;

- f. if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
3. If further responsive records are located as a result of the searches referred to in Provision 2, I order the police to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request. **The police must provide a copy of any new decision letter to me.**
4. The affidavit(s) referred to in Provision 2 should be sent to my attention, and may be shared with the appellant, unless there is an overriding confidentiality concern.
5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order, including any extension request the police seek in light of the current COVID-19 situation.

Original Signed by: _____

Marian Sami
Adjudicator

March 18, 2021 _____