

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4203

Appeal MA19-00690

Hamilton Police Services Board

May 25, 2022

Summary: The appellant submitted a request under the *Act* with the police for any and all investigative notes taken by officers who were present at a specific meeting. The police conducted a search and advised the appellant that no responsive records exist. The appellant appealed the police's decision, claiming that the officers in attendance ought to have taken notes at the meeting. During the inquiry, the appellant identified additional records the police ought to search for. The police took the position that these additional records are outside the scope of the appeal. In this order, the adjudicator upholds the police's search as reasonable and that the information identified by the appellant in his representations is outside the scope of his original request. The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, section 17.

OVERVIEW:

[1] The appellant filed a two-part access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Hamilton Police Services Board (the police). Relevant to this appeal, the appellant advised the police he seeks access to

An unabridged and unredacted copy of any and all investigative notes taken by the undercover (plainclothes) agent(s) working for the [police's] Hate Crime and Extremism Unit who was (were) present at the June 18

(2019) LGBTQ advisory committee meeting which took place in the Hamilton City Council's chamber.

The meeting that is the subject of the appellant's request relates to a number of incidents that took place during the 2019 Hamilton Pride events.

[2] The police conducted a search and issued an access decision to the appellant advising that no responsive records exist. The police advised the appellant that one officer attended the June 18, 2019 meeting in uniform but did not make any notes regarding the meeting. The police identified a second officer who attended the meeting, but stated the officer did so in a non-police capacity. The police confirmed both officers attended the meetings as spectators.

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) claiming responsive records ought to exist.

[4] During mediation, the appellant claimed that responsive records ought to exist due to the high-profile nature of the matter and the number of media articles regarding the meetings. The appellant claims the officers should have taken notes and ought to have attended in an official police capacity because one of the officers was tasked with dealing with the type of incidents that took place at the 2019 Hamilton Pride events and were discussed at the meeting in question.

[5] The police maintained their position that no records exist. The police provided the appellant with two affidavits sworn by the officers who attended the June 18, 2019 meeting. Both officers swore they did not take notes at the meeting.

[6] The appellant maintains that responsive records ought to exist.

[7] No further mediation was possible and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I am the adjudicator in this appeal and began my inquiry by inviting the appellant to submit representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. The appellant submitted representations and raised the possible issue of the scope of his request by identifying specific records that he believes should be within the scope of his request. I then invited the police to submit representations in response to the appellant's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The police submitted representations. I then sought and received reply representations from the appellant and further sur-reply representations from the police.

[8] In the discussion that follows, I uphold the police's decision and dismiss the appeal.

ISSUES:

- A. What is the scope of the request?
- B. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request?

[9] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

1. A person seeking access to a record shall,
 - a. make a request in writing to the institution that the person believes has custody or control of the record;
 - b. provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

2. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[10] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.

[11] To be considered responsive to the request, records must *reasonably relate* to the request.¹

[12] The appellant's request reads as follows:

An unabridged and unredacted copy of any and all investigative notes taken by the undercover (plainclothes) agent(s) working for the [police's] Hate Crime and Extremism Unit who was (were) present at the June 18 (2019) LGBTQ advisory committee meeting which took place in the Hamilton City Council's chamber.

[13] In his representations, the appellant takes the position that the police

¹ Orders P-880 and PO-2661.

should be instructed to perform a deeper, more comprehensive, and more transparent search – a search which should encompass more than just [the two officers'] notepads but also the physical and electronic archives of the *Hate Crimes Unit*... This might include emails, electronic databases where this service's documents are held, ancillary notepads or notepads of a more investigative nature.

[14] The police take the position that the information identified in the appellant's representations is outside the scope of his request. The police do not dispute that records may have been created after the meeting. However, they claim that records created at a later time are outside the scope of the appellant's request. The police submit the appellant's original request was clearly focused on any and all investigative notes taken by the members at the June 18th meeting.

[15] The appellant submits the police have narrowed his request without justification to only notes taken by the two officers on June 18, 2019. The appellant states that his request is for notes of the officers who were present at the June 18, 2019 meeting, not notes that were taken on that date. The appellant submits that any notes pertaining to the meeting created by the two officers should fall within the scope of his request.

[16] Based on my review of the appellant's original request, I find the appellant is now seeking access to information outside the scope of his original request, with one exception. I agree with the appellant that his original request is not restricted to only notes dated June 18, 2019 created by the two officers who attended the meeting in question. I agree with the appellant that the officers who attended the June 18, 2019 meeting may have made notes on a date after the meeting and these notes would be within the scope of his original requests. As the appellant states in his reply representations, any notes pertaining to the June 18, 2019 meeting are reasonably related to his request and are therefore within the scope of his request.

[17] Based on my review of the police's representations on search, it appears the police did not limit their search to only notes dated June 18, 2019.² As such, I find the police reasonably determined the scope of the appellant's request. I will address the police's search for records in Issue B, below.

[18] As noted above, the appellant submits that the police's search "should encompass more than just [the two officers'] notepads but also the physical and electronic archives of the *Hate Crimes Unit*" and emails, electronic databases where this service's documents are held, ancillary notepads or notepads of a more investigative nature. However, I find this information is outside the scope of his original request. The appellant's original request clearly identifies "an unabridged and unredacted copy of any and all investigative notes" of the officers that may have attended the June 18, 2019

² See paragraph 29, below, where the two officers confirm they searched their notes beyond June 18, 2019.

meeting. The appellant did not identify information that would exist in the physical and electronic archives of the *Hate Crimes Unit*, emails, information contained in an electronic database, or “notepads of a more investigative nature.” It is unclear what type of electronic databases or investigative notepads the appellant refers to; in any case, I find these types of records are outside the scope of the appellant’s request. As stated above, the appellant seeks access to the notes of the officers who attended the June 18, 2019 meeting and I find that these officers’ notes relating to the June 18, 2019 meeting (regardless of the date of the notes were created) are within the scope of his request. However, the additional types of records are not reasonably within the scope of his request.

[19] In conclusion, I find that the identified officers’ notes relating to the meeting on June 18, 2019 are within the scope of the appellant’s original request and I will consider whether the police conducted a reasonable search for all records responsive to his request below.

Issue B: Did the police conduct a reasonable search for records?

[20] If a requester claims that additional records exist beyond those found by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.³ If the IPC is satisfied the search carried out was reasonable in the circumstances, it will uphold the institution’s decision. Otherwise, it may order the institution to conduct another search for records.

[21] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they must still provide a reasonable basis for concluding that such records exist.⁴

[22] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide enough evidence to show it made a reasonable effort to identify and locate responsive records;⁵ that is, records that are *reasonably related* to the request.⁶

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁷ The IPC will order a further search if the institution does not provide enough evidence to show it has made a reasonable effort to identify

³ Orders P-85, P-221 and PO-1954-I. See paragraph 9, above, for the relevant portion of section 17.

⁴ Order MO-2246.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

and locate all of the responsive records within its custody or control.⁸

Representations

[24] The appellant claims there is a reasonable basis for his belief that responsive records ought to exist. In its decision letter, the police claimed that one of the officers attended the June 18, 2019 meeting while on duty but did not take any notes relating to the meeting. The police also advised the appellant the second officer attended off-duty in a non-police capacity. The appellant submits these claims are implausible. First, the appellant submits the police commissioned an independent audit in which the officers who attended the meeting did so to “further the [police’s] understanding of community concerns.”⁹ The appellant submits this contradicts the police’s claim that the officer’s attended off-duty in a non-police capacity.

[25] In addition, the appellant submits that one of the officers was noted by the media¹⁰ as having made comments about the meeting and was “probing” and “investigating” the events surrounding the 2019 Hamilton Pride events. Given these circumstances, the appellant submits it is not plausible that this officer attended the meeting off duty and in a non-police capacity and did not take any notes prior to, during or after the meeting.

[26] In addition, the appellant refers to a copy of an individual’s parole board decision.¹¹ The decision cites a “special parole report” which the appellant speculates is produced by the Hate Crimes Unit, of which one of the officers is a part, and contains a detailed account of the June 18, 2019 meeting. The appellant submits it is unlikely the officer who is a member of the Hate Crimes Unit and attended the meeting did not take any notes prior to, during, or after the meeting.

[27] Finally, the appellant provided copies of notes he obtained through a related FOI request to the police in which one of the officer’s explicitly mentions “Pride Hamilton” in his notes dated June 22, 2019. The appellant submits this confirms the officer was involved in the investigation and “was writing things down about it as well.” The appellant submits this note “renders implausible [the police’s claim] that [the officer] attended the June 18th LGBT meeting ‘off duty and in a non-police capacity’ and that he did not take any notes prior to, during or after said meeting.” The appellant submits that the second officer notes, in June 19, 2019 notes the appellant obtained in response to another request, that he “spoke with [the first officer] re event.” The appellant submits this confirms both officers attended the meeting in an official police capacity

⁸ Order MO-2185.

⁹ *Pride in Hamilton: An Independent Review into the Events Surrounding Hamilton Pride 2019*, online available at: <https://criminal-lawyers.ca/wp-content/uploads/2020/06/Pride-in-Hamilton-Report-June-8.pdf>.

¹⁰ The appellant refers to a CBC article, which is available online at: <https://www.cbc.ca/news/canada/hamilton/pride-community-conversation-1.5180950>

¹¹ Online available at: <https://www.scribd.com/document/416741271/Parole-decision-Cedar-Hopperton>

and "was writing things down about the Pride meeting, and was doing so on the day after the meeting in question took place."

[28] The police submit a search for records responsive to the appellant's request was conducted by an experienced and knowledgeable employee "following a set procedure for the search and retrieval of information." The police submit they conducted a search based on the appellant's request. The police state the appellant identified a specific Hate Crimes Unit officer in his request and, therefore, began their search with the Investigative Service Department (of which the Hate Crimes Unit is a part). The police submit they contacted the appropriate police officers and requested any and all investigative notes taken by those present at the meeting.

[29] To support their representations, the police provided an affidavit sworn by their Freedom of Information Coordinator (FOIC) and email correspondence between the FOIC and the relevant officers and staff members. The police also provided two affidavits sworn by the officers who attended the June 18, 2019 meeting. One of the officers stated that he attended the meeting as a spectator and listened to the presentations. He reviewed his notes for June 18 and 19, 2019 and did not locate any notes relating to the event at City Hall. The second officer submitted copies of his notes for June 18 and 19, 2019, but confirms he does not have any notes responsive to the appellant's request.

[30] The police submit that officers do not make notes about every single event they attend and can rely on their independent recollection of events. The police submit that both officers sat in the gallery during the meeting in question in a spectator capacity to listen to the information that was being presented.

[31] The police also addressed the appellant's reference to the parole board hearing report. The police submit that the information that formed the account of the June 18, 2019 hearing could reflect the officers' observations and recollection rather than notes that were taken by the officers. The police confirm that no responsive records exist and that they conducted a reasonable search.

[32] In his reply representations, the appellant submits the police did not address his request that they search electronic databases where notes could be stored electronically. The appellant also submits that the emails from the officers who attended the meeting in question did not identify where the searches were conducted nor the time period for which the searches were conducted. The appellant submits that it appears that only one type of physical notepad was searched for records. Given these circumstances, the appellant submits the police did not conduct a "proper, thorough search" by limiting themselves to one type of physical notepad. The appellant submits that the police should be required to perform a more thorough search that "includes electronic databases of any kind."

[33] In response to the appellant's reply representations, the police submit that they

requested any and all investigative notes taken by the officers who were present at the meeting. The police state that electronic notes are not a common practice within the institution. However, where an officer does use electronic notes, the police submit the officer would be required to provide them to the institution as they would form a part of the request for an officer's notes. The police state that they did not specifically request electronic notes, but officers are "well aware" of the requirements and practices when a request for their notes are made and would include electronic notes as part of their search should they use them.

Analysis and Findings

[34] As stated above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide enough evidence to show it made a reasonable effort to identify and locate responsive records;¹² that is, records that are *reasonably related* to the request.¹³ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.¹⁴

[35] For the reasons that follow, I find the police have conducted a reasonable search for records responsive to the appellant's request.

[36] I accept the FOIC is an experienced employee knowledgeable in the request and the police's records holdings. I also accept the FOIC contacted the appropriate officers who attended the meeting in question to search their notes. I find the FOIC provided the correct search parameters (i.e. any and all investigative notes relating to the June 18, 2019 meetings) to the officers. I accept the police's claim that officers' notes are not typically stored electronically but officers are aware that they are required to search electronic notes where they use them. I also accept the officers' affidavits as evidence that they did not create notes during or after the June 18, 2019 meeting.

[37] I have reviewed the appellant's representations regarding the reasons why he believes the officers ought to have created notes prior to, during or after the June 18, 2019 meeting. I acknowledge that the events from the 2019 Hamilton Pride were the subject of media attention and scrutiny; however, this does not necessarily mean that an officer attending a public meeting would take notes. I find the appellant's representations to be speculative and do not demonstrate there is a reasonable basis for his belief that responsive records ought to exist despite the evidence, which includes sworn affidavit evidence from the two attending officers, presented by the police. Given these circumstances, I find the appellant did not provide sufficient evidence to demonstrate there is a reasonable basis for his belief that responsive records ought to exist.

¹² Orders P-624 and PO-2559.

¹³ Order PO-2554.

¹⁴ Orders M-909, PO-2469 and PO-2592.

[38] On balance, I find the police provided me with sufficient evidence to show they made a reasonable effort to identify and locate records responsive to the appellant's request. The police's representations and affidavit evidence contain detailed information regarding the individuals tasked to conduct the searches, the locations searched and the results of the searches. Based on my review I am satisfied the police have conducted a reasonable search for records responsive to the appellant's request.

ORDER:

I uphold the police's search as reasonable and I dismiss the appeal.

Original Signed by: _____
Justine Wai
Adjudicator

_____ May 25, 2022