Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4541

Appeal MA22-00288

Thunder Bay Police Services Board

July 8, 2024

Summary: The appellant sought access to records related to investigations conducted by the Thunder Bay Police Services Board (the board). The board withheld some of the responsive records pursuant to the law enforcement and personal privacy exemptions, and the labour relations exclusion, in the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant appealed the access decision to this office, and also challenged the reasonableness of the board's search.

During the inquiry process, the board took the position that the ongoing prosecution exclusion at section 52(2.1) applied to all the records at issue. The adjudicator added this issue and sought representations from the appellant. In this decision, she upholds the board's application of section 52(2.1) and its search for responsive records and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17 and 52(2.1).

OVERVIEW:

[1] The Thunder Bay Police Services Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to all investigations conducted by "CIB & Intel, criminal or not," involving the requester during a specific timeframe. The requester clarified that he was not seeking access to any records he was already provided in relation to a previous access to information request he submitted.

[2] The board identified responsive records relating to eight different incident numbers and issued a decision to the requester denying access, in full or part, to records relating to seven incident numbers pursuant to the discretionary exemptions for law enforcement related records in section 8(1) of the *Act*, and the personal privacy exemptions at sections 14(3)(b) and 38(a) and (b) of the *Act*. The board denied access to the records relating to the eighth incident number pursuant to the employment and labour relations exclusion at section 52(3) of the *Act*.

[3] The requester, now the appellant, filed an appeal of the board's decision. An IPC mediator had discussions with the appellant and the board. The appellant advised the mediator that he was pursuing access to all the information the board withheld. Furthermore, the appellant said that there should be additional responsive records that the police had not identified.

[4] In response to the appellant's concerns, the board conducted an additional search for responsive records and then confirmed its position that its search was reasonable and that no additional records existed. The mediator relayed the board's position to the appellant. The appellant confirmed that he continued to believe additional records should exist and the mediator added the issue of whether the board conducted a reasonable search for responsive records to the appeal.

[5] Further mediation of the matters was not possible, and the appeal was moved to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry pursuant to the *Act*. I commenced an inquiry by seeking representations from the board on the matters set out in a Notice of Inquiry. The board indicated that the Ontario Provincial Police (the OPP) may also have an interest in the disclosure of the records at issue and so I provided the OPP with a copy of a Notice of Inquiry and invited them to make representations as well. The appellant was then invited to make representations in response to the board and the OPP's representations.[1]

[6] The board was then invited to reply to the appellant's representations. In its reply, the board submitted that all the records at issue had become part of the Crown Brief in various ongoing prosecutions, and/or that the records related to prosecutions in the Thunder Bay Ontario Court of Justice. As a result, the board claimed that the exclusion at section 52(2.1) of the *Act* for records related to an ongoing prosecution applies, such that the records are excluded from the operation of the *Act.* The appellant was provided with a copy of the board's reply and a Supplemental Notice of Inquiry setting out the new issue. The appellant made a sur-reply in response.

[7] In this decision, I find that section 52(2.1) applies to the records at issue and that as a result, the records are excluded from the *Act.* As a result, it is not necessary for me consider whether the exemptions or the labour relations exclusion originally claimed by

[1] Some portions of the board's representations were withheld from the appellant because those portions met the confidentiality criteria set out in *Practice Direction Number 7* of the IPC's *Code of Procedure.*

the board apply. I also uphold the board's search for responsive records and I dismiss the appeal.

ISSUES:

A. Does the section 52(2.1) exclusion for records relating to a prosecution apply to the records?

B. Did the board conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the section 52(2.1) exclusion for records relating to a prosecution apply to the records?

[8] The board raised the application of section 52(2.1) of the *Act* in its reply representations. It says that the exclusion applies to all the records at issue. Section 52(2.1) of the *Act* excludes records relating to an ongoing prosecution from the *Act*. As a result, if section 52(2.1) applies to the records at issue, the *Act*'s access scheme does not. The section states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[9] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the sharing and publication of records relating to an ongoing prosecution.[2]

[10] The term "prosecution" in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada. A "prosecution" may include prosecuting a regulatory offence that carries "true penal consequences" such as imprisonment or a significant fine.[3]

[11] For the exclusion to apply, there must be "some connection" between the records and the case to be made by the prosecuting authority.[4] However, the exclusion has not been limited to the Crown/prosecution brief and has been found to apply to records in

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[2] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).
[3] Order PO-2703.
[4] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25, and Order MO-3919-I.

the control of investigating authorities and third parties.

[12] The phrase "in respect of" requires some connection between "a proceeding" and "a prosecution."[5] All proceedings in respect of the prosecution have been completed only after any relevant appeal periods have expired. Whether a prosecution has been "completed" depends on the facts of each specific case.[6]

The board's representations

[13] The board submits that the records at issue form part of the Crown Brief and/or relate to, or are connected to, the prosecution of three individuals identified in its representations, one of whom is the appellant. The board submits that each of the prosecutions are in the preliminary stage and are expected to be ongoing for quite some time. As such, the board argues that the IPC no longer has jurisdiction to make orders relating to the records at issue.

[14] The board says that the Ontario Divisional Court has instructed that the requirement that a record relate to a prosecution should not be approached narrowly. It points to the Court's statement that the terms should be given the "broadest scope that conveys some link between the two subject matters" and should be sufficient that the records connect to the prosecution in some way. The board also notes that the Court rejected the argument that the section should only apply to the contents of Crown briefs, observing that Crown brief materials are not static, and it is not possible to determine with exactitude what is likely to become relevant and included in the actual prosecution.

[15] The board submits that all of the records at issue in this inquiry relate to the prosecutions it identifies in its representations. In support of its position, the board provided a letter from the Crown Counsel with the Crown Law Office who has carriage of the three prosecutions in the Thunder Bay Ontario Court of Justice. In the letter, the Crown Counsel says that he is familiar with the records in each of the files for the eight different incident numbers and confirms that they form part of the Crown Brief and/or relate to or are connected to the prosecutions he is responsible for advancing.

[16] The Crown Counsel confirms that the three prosecutions are still in the preliminary stages and will be ongoing for some time. The Crown Counsel notes that no trial dates have yet been set and he does not anticipate any of the prosecutions will conclude before 2025.

The appellant's representations

[17] The appellant denies that any of the records he seeks access to relate to the

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[5] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada* (*Information Commissioner*) *v. Canada* (*Commissioner, RCMP*), 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.
[6] Order PO-2703.

matters that are the subject of the prosecutions referred to by the board and the Crown Counsel. He submits that the board is taking an overly broad approach to the records that he requested and is attempting to exclude them by saying they relate to the prosecution he is facing.

[18] The appellant submits that there is no connection between the records he is requesting and the prosecutions. The appellant argues that the Ontario Provincial Police charged him and that they hold the records related to his prosecution, not the board. He says that he is not requesting any records relating to the prosecutions that the Ontario Provincial Police would hold. To be clear, he says that he is requesting other records in the possession of the board that relate to him.

[19] The appellant says that the Crown Counsel's letter is insufficient to meet the burden of proof to determine whether the records are excluded. He argues that the letter is not persuasive because there is no indication what conversation the board had with the Crown Counsel, and no explanation as to why the records, which are in no way related to the prosecutions, are excluded.

[20] Additionally, the appellant notes that he submitted his request in 2021. He says that if the board provided him the records in a timely manner the prosecution exclusion would not have been available to them. He argues that the board is now attempting to cover all records ever created about him and "cloak them under prosecution" many years after the fact. He asks that the IPC obtain and review all records and make a ruling as to whether they are excluded from the *Act.*[7]

Findings and analysis

[21] As set out above, the board must establish three things for the exclusion in section 52(2.1) of the *Act* to apply: first, that there is a prosecution; second, that there is "some connection" between the record and a prosecution; and third, that the proceedings with respect to the prosecution are not complete. Below are my reasons for finding that the board has met each of these three requirements.

[22] First, the board identified three prosecutions and provided a letter from the Crown Counsel with carriage of the matters in the Thunder Bay Ontario Court of Justice. The Crown Counsel's letter confirms that the three prosecutions identified by the board are active and that he is responsible for them. I am satisfied, based on the information provided, that the three prosecutions exist.

[23] Next, the board says that all of the records at issue relate to the prosecutions and/or form part of the Crown Brief. In his letter, the Crown Counsel assigned to the prosecutions confirms that he is aware that a request has been made for records associated with the eight specified Thunder Bay Police Services Board incident numbers.

[7] I note that the board provided the IPC with a copy of the records at issue prior to the commencement of this inquiry and I have reviewed them.

He says that he is familiar with the records associated with these incident numbers and confirms they form part of the Crown Brief and/or that they relate to the prosecutions he is advancing. I accept this evidence and find that the letter from Crown Counsel is satisfactory in this case to satisfy the second part of the test in section 52(2.1) of the *Act*.

[24] I have considered the appellant's assertions that not all the records relate to the prosecutions, including his arguments that the board is misrepresenting the scope of the prosecutions, and/or that additional information about the conversations between the board and Crown Counsel are necessary. I am not persuaded that any of these submissions negate the Crown Counsel's evidence that he is familiar with the records at issue and that they relate to the prosecutions.

[25] As a member of the Law Society of Ontario, the Crown Counsel has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.[8] It is in this specific context that I accept the Crown Counsel's assertions that he is familiar with the records at issue and that they do indeed relate to the prosecutions he listed and/or form part of the Crown Brief.

[26] In my view, the Crown Counsel is in the best position to understand the issues in each of the three prosecutions identified and to know what evidence relates to those prosecutions. While I appreciate that the appellant has opinions about what evidence may or may not relate to the prosecutions, the Crown Counsel is the individual with carriage of the prosecutions, specific knowledge of the facts and issues, the relevant evidence, and in turn, what records relate to the prosecutions. Regardless of what conversations took place between the board and the Crown Counsel, Crown Counsel identified the records at issue as relating to, or being connected to, the prosecutions he identified and I accept his statements in that regard.

[27] Finally, I find that the board has satisfied the third part of the test in section 52(2.1), that the proceedings with respect to the prosecution have not been completed. The Crown Counsel stated that the prosecutions are in the preliminary stages and he anticipates that they are unlikely to conclude until 2025. I accept this evidence. I find that all three parts of the test in section 52(2.1) have been established, and as a result, the records at issue are excluded from the *Act* at this time.

[28] As a final note, I understand the appellant's frustration that the board is raising the prosecution exclusion at this late stage in the inquiry process. However, this is not a circumstance where I can decide not to permit the board to raise the exclusion. As explained above, if section 52(2.1) applies to the information at issue, the *Act* does not, and I do not have the jurisdiction to decide not to hear the board's claim.

[29] That being said, the section 52(2.1) exclusion is time limited. It will cease to apply

[8] Law Society of Ontario *Rules of Professional Conduct – Chapter 2,* section 2.1-1, available at https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-2.

when all proceedings in respect of the prosecutions have been completed. The appellant may wish to submit a new request and pursue his access rights under the *Act* at that time.

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

[30] The appellant asserts that additional responsive records should exist that the board did not identify.

[31] When a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[9] If the IPC is satisfied that 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.

[32] 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.[10] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[11]

[33] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[12] that is, records that are "reasonably related" to the request.[13]

[34] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[14]

The board's representations

[35] The board submits that it conducted a reasonable search for responsive records. It says the appellant's request was clearly described and it was not necessary to clarify what specific information he was seeking. The board notes that because of the appellant's experience and background as a police officer he is in a position to know what type of documents would exist and where they would be located. The board says that the request was worded in a way that it would know exactly what he was looking for.

[36] With respect to the search, the board submits that it asked an inspector in charge

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[9] Orders P-85, P-221 and PO-1954-I.
[10] Orders M-909, PO-2469 and PO-2592.
[11] Order MO-2185.
[12] Orders P-624 and PO-2559.
[13] Order PO-2554.
[14] Order MO-2246.

of investigative services (the Inspector) to lead the search for responsive records. It explains that "investigative services" includes the Criminal Investigation Branch and the Intelligence Unit, which are the two areas the appellant sought records from.

[37] The board says that the Inspector directed an analyst (the Analyst) with the appropriate training, background, and knowledge of its record management system to perform an electronic search. The board says the Analyst was the appropriate person to conduct the search because they had access to restricted areas within the board's records management system. The board says that the databases searched by the Analyst contain all its investigative records, including the domains with sensitive reports and those covered by informant privilege. It says that the Analyst was tasked with conducting the search because they have access to these domains, while the majority of those employed within the board do not.

[38] The board submits that the search was conducted for the timeframe requested using variations of the appellant's surname, first name and initials, a nickname, and his badge number. The board provided specific details about the variations used for searching and the basis for using those terms in the confidential portions of its representations. The board submits that the records that it identified in its access decision represent all the information that is responsive to the appellant's request.

[39] The board says that although the appellant claims additional records exist, he did not provide a reasonable basis for that assertion. The board submits that it is not required to prove with certainty that further records do not exist, but rather that it has made a reasonable effort to identify and locate records which are reasonably related to the request. It maintains it has done so.

[40] In support of its position that it conducted a reasonable search for responsive records, the board provided affidavits from the Inspector and the Analyst. Both affidavits affirm and support the information provided in the board's representations.

[41] The Inspector attests that the Analyst had access to all levels of records, including those in restricted and privileged domains. He also specifies that all records are stored electronically, that no paper records are kept and as a result, no search of any other physical records was possible.

[42] The Analyst confirmed the information in the Board's representations and attested that they know of no other documents that exist that would be within the parameters of the appellant's request for information.

The appellant's representations

[43] The appellant disagrees with the board that it has conducted a reasonable search for responsive records. The appellant explains that this is his second request for information and says that after he submitted his first request it became clear that the board had not identified all the responsive records. The appellant asserts that this is

evidence that the board has not identified all the records in response to his second request.

[44] The appellant submits that given the issue with his first request, and because the Board has improperly redacted various information, his confidence in the board's ability to identify all the responsive records is low and he suggests that the board may be hiding some records.

[45] The appellant also raised concerns with some of the identifiers that the board used to search for records and suggests that these identifiers may not relate to him.

Analysis and findings

[46] For the reasons that follow, I find that the board has established that it conducted a reasonable search for records that would be responsive to the appellant's request, and I decline to order any additional searches.

[47] I am satisfied that the board understood the appellant's request and tasked the appropriate individuals to search for responsive records. I accept that the Analyst had the appropriate knowledge, qualifications, and clearances to conduct the search. Based on the evidence before me, it is reasonable to conclude that the Analyst would have been able to identify the responsive records in the board's records management system.

[48] I find that the search parameters the Analyst used were appropriate. I note the appellant's concern that a nickname was used in the search that should not have been attributed to him. In the event that the nickname is not connected to the appellant, this would mean that additional records were identified that are not responsive. It is not evidence, however, that the board did not conduct a reasonable search or that there may be additional records that have not yet been identified.

[49] I considered the issues the appellant raised about his lack of confidence in the board's ability to identify all the responsive records, and his suggestion that the board may be hiding some records. However, there is insufficient evidence before me to support an assertion that the board may be hiding records.

[50] Similarly, I am not persuaded that the board could not properly identify the records at issue. The appellant says that because the board did not locate some records that were responsive to his first request for information until after he made a second request for information (the request that is the subject of this inquiry), the board is unlikely to have identified all of the responsive records for this request. However, the appellant did not suggest any additional locations, or search terms, that may have resulted in additional records being identified. In the absence of any suggestions, arguments, or evidence about why specifically the appellant believes additional records should still exist, and where the board might search for them, I find that the search conducted by the board was reasonable. For these reasons, I decline to order any further searches for responsive records.

ORDER:

The appeal is dismissed.

Original signed by: July 8, 2023

Meganne Cameron
Adjudicator