

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3598-I

Appeal MA16-54

Durham Regional Police Services Board

April 26, 2018

Summary: The Durham Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an incident involving the requester, as well as records relating to queries about the incident that were thereafter made by police personnel on the police's records management system. The police conducted a search and provided the requester with partial access to the records they located. The requester appealed the police's decision to this office, with the sole issue being the reasonableness of the police's search for records. The adjudicator does not uphold the police's search and orders the police to conduct a further search for responsive records.

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

BACKGROUND:

[1] The appellant, who had been a police officer with another force, was involved in an incident to which the Durham Regional Police Service responded. Following the incident, he submitted a request to the Durham Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for various records relating to him and the incident. Specifically, his request was for records including but not limited to reports, files, officer notes, civilian employee notes, telephone call logs, transcripts, briefing notes, meeting minutes, emails, email attachments, email draft messages, telephone audio recordings, voicemail messages,

Blackberry Messenger or PIN messages, cellular text messages, memoranda or bulletins produced by and/or received by the police that mention the appellant, his residential address or contain his personal information as defined in the *Act*, relating to the following:

- a. Durham Regional Police Service Occurrence [the incident in question];
- b. The dissemination of Durham Regional Police Service Occurrence [the incident in question], or information contained therein, in whole or in part, in written, verbal, electronic, or hardcopy formats, to any individual, any police officer, any entity, or any other law enforcement agency;
- c. The names, ranks (where applicable), and dates of any Durham Regional Police Service employee that accessed, or attempted to access [the incident in question]
- d. The names, ranks (where applicable), and dates of any Durham Regional Police Service employee that queried my name and date of birth on the Durham Regional Police Service Versadex or NICHE system;
- e. Durham Regional Police Service entries submitted to the Canadian Police Information Centre (as they pertain to me); and
- f. Any other Durham Regional Police Service occurrence, including street check files, that contain my name, or any other personal information – related to me, as defined by the *Municipal Freedom of Information and Protection of Privacy Act*.

[2] The time frame for the requested records was from March 25, 2015 to November 10, 2015.

[3] The police located records responsive to the request and issued a decision granting partial access to them, with some of the information in the records withheld in reliance on the discretionary personal privacy exemption at section 38(b) of the *Act*. The police's decision letter stated in part as follows:

I have identified the General Occurrence Hardcopy, Officer's notes, a copy of the 911 tape, a Versadex log of who accessed the incident report, with respect to incident number [the incident number in question], as well as a Versadex log of who queried your name, as records that are responsive to your request and following careful consideration, a decision has been made to grant partial access in accordance with the *Act*.

[4] In its decision letter, the police also advised that according to the manager of the Information Technology Unit, cellular data/audio, text message, Blackberry PIN Message/BBM, voicemail or audio data, and email data (also collectively referred to in

this Order as the electronic communications) are not stored and that therefore, these records do not exist.

[5] The appellant appealed the police's decision to this office, which appointed a mediator to attempt to narrow the issues and facilitate a resolution of the appeal. During mediation, the appellant explained to the mediator that he believed that further records responsive to his request exist. The mediator conveyed the appellant's position to the police and the police agreed to conduct a further search for responsive records.

[6] The police conducted a further search and subsequently issued a revised decision on May 31, 2016, disclosing a further record to the appellant, a chart that it had created for the appellant listing the names and ranks of all police employees who accessed the incident in question through the records management program, Versadex. The police reiterated that they do not store the electronic communications and that therefore, no such records exist.

[7] The appellant confirmed receipt of this information but advised the mediator of other responsive records that he believes exist. Specifically, the appellant raised the following concerns:

- The names and ranks of police employees who queried his name and date of birth on Versadex or other databases were not provided;
- Notes for any of the police employees who searched the occurrence, or the appellant's name and date of birth (who, according to the appellant, could have been required by policy to have a record in their notebook) are missing;
- The records retention policy should be provided rather than relying on a statement from the police's IT department;
- Other occurrences, including street check files, that contain his name or personal information were not disclosed.

[8] The mediator conveyed this information to the police and the police agreed to conduct a further search for the records specified by the appellant. On September 23, 2016, the police issued a revised decision disclosing one further record to the appellant, a chart it had created listing the badge number, name, rank, and existence of notebook entries of all employees of the police who had accessed the appellant's name or incident number through Versadex.

[9] The appellant advised that he was still of the view that the police hold further records responsive to his request, and requested that the appeal proceed to adjudication solely on the issue of the reasonableness of the police's search for records. Accordingly, the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting and receiving representations from the police, followed by the appellant. The police

filed representations in reply and I invited the appellant to make representations in sur-reply, but he did not do so. The parties' representations were shared with one another in accordance with this office's *Practice Direction 7* and section 7 of the *Code of Procedure*.

[10] In this order, I do not uphold the police's search for responsive records as reasonable and I order them to conduct another search.

DISCUSSION:

[11] The only issue in this appeal is whether the police's search for records responsive to the appellant's request was reasonable. 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 Where an adjudicator is satisfied that the search carried out was reasonable in the circumstances, the institution's decision will be upheld; otherwise, the adjudicator may order further searches.

Police's representations

[12] The police submit that the search was conducted by an experienced police employee who has been employed in the Records department since 2000 and has worked as an analyst in the Information and Privacy Unit since 2006, gathering records and responding to thousands of requests for information. The police submit that this employee is fully trained and is very knowledgeable in all of the present and past records management systems, as well as the role of all the various units contained within the police service, and as such is able to identify and locate records in response to all types of access requests.

[13] The police submit that they took the following steps in response to the access request:

1. The analyst working in the Information and Privacy Unit (the analyst) conducted three searches on the police's records management system, Versadex: one search inputting the appellant's name and date of birth; one inputting his home address; and another inputting the incident number. As a result of these three searches, one incident was found, being the incident referenced in the appellant's access request. The General Occurrence Hardcopy generated by Versadex, which included a narrative of the occurrence and any CPIC queries/entries generated by police employees, was released to the appellant.

¹ Orders P-85, P-221 and PO-1954-I.

2. Upon reviewing the occurrence report, the analyst sent emails to all involved officers listed on the report to request copies of their notebook notes. Those notes were then released to the appellant.
3. The analyst made a request for the 911 tape, and also asked the Video Disclosure Unit for any other video or audio relating to the incident. A tape of the 911 call was located and released to the appellant. The Video Disclosure Unit advised that they had no other records with respect to the appellant or the incident.
4. In order to determine which employees accessed the incident on Versadex, the analyst sent a request to the manager of the Information Technology Unit (IT) requesting a log of all queries using the appellant's name and date of birth, as well as any queries using the incident number. The IT department generated two logs, each of which included the date and time that a query was made about the incident on Versadex, and the badge number of the employee who made the query. One of the logs listed the details of any queries of the appellant's name, while the other listed details of any queries of the incident number. These logs were released to the appellant.
5. The analyst asked IT for all cellular data/audio, text message, Blackberry PIN Messages/BBM, voicemail or audio data, or email data relating to the appellant and the incident in question. The IT manager advised that the police do not store these electronic communications; therefore there were no records on file with respect to this portion of the appellant's request.

[14] The police explain in their representations that during the mediation stage of the appeal, they conducted another search and although they did not find more records, they created a chart listing all the badge numbers, names, and ranks of the police employees listed on the two Versadex logs previously provided to the appellant, and released the chart to the appellant. The IT department once again confirmed that the cellular data/audio, text messages, Blackberry PIN Messages/BBM, voicemail or audio data, or email data are not retained.

[15] The police submit that many police employees who were not directly involved in the incident were required to conduct queries on Versadex in the course of their employment in administrative roles; for example, the Firearms Unit, the Quality Control Unit, and the Records Unit. However, these positions do not require notebook entries to be completed for those queries. Nonetheless, the analyst emailed all of the police personnel listed on the logs to ask for any notebook entries they might have relating to the appellant or the incident. However, none of the civilian members of the police were asked for notes, as they do not keep notes and are not required to do so. None of the officers who had queried the appellant's name or the incident had any notebook entries in relation to those queries. The police created and released to the appellant another chart similar to the previous chart, but which also listed, for each query, whether or not

notebook notes existed in relation to that query.

Appellant's representations

[16] The appellant submits that IT's statement that it does not store cellular data/audio, text messages, Blackberry PIN Messages/BBM, voicemail or audio data, or email data is incongruent with the police's records retention policy, which states in part as follows:

a. A record is:

i. "Any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof."

b. Transitory records are:

i. "Records, including e-mail, voice mail, text messages that have temporary usefulness and are not required to meet statutory obligations, set policy, establish guidelines or procedures, certify a transaction, become a receipt or provide evidence of a legal, financial, or operational decision, do not need to be retained."

ii. Kept until "superseded or obsolete."

[17] The appellant submits that the records he sought had not become superseded or obsolete at the time of his request. He also submits that it is unacceptable that the police do not require civilian employees to make notes.

[18] The appellant submits, further, that the police should have searched physical files rather than limiting their search to electronic databases. Finally, he notes that the police did not provide him with copies of the analyst's emails asking employees for responsive records.²

² The appellant also submits that based on his experience as an investigator familiar with Versadex, he was alarmed to see the number of police service employees who had queried him or the incident number but had had no involvement in the investigation. He suggests that these employees had been made aware of the file by their co-workers and had accessed it without any professional purpose. In reply, the police submit that the appellant has no experience with the number of employees associated with an incident in an administrative capacity after an initial investigation. However, the appropriateness of the various Versadex queries is not an issue before me and I will not address that issue further in this Order.

Police's reply representations

[19] The police submit that the reason that no cellular data/audio, text messages, Blackberry PIN Messages/BBM, voicemail or audio data, or email records exist is that these are transitory records which, in accordance with the records retention policy, are not required to be stored. The police submit that any email, telephone recordings, voicemail message, Blackberry messages, cellular text messages, memoranda or bulletins that may or may not have been produced during the investigation into the incident would not have been retained as they only had a temporary usefulness. There were no charges laid and no court procedures to follow as a result of the incident; therefore, any such records, if they ever did exist, would have been temporary records used to facilitate the conclusion of an investigation and for no other purpose. The police submit that all available searches, electronic and otherwise, were fully exhausted by police employees before responding to the appellant.

[20] The police submit that they did not provide the appellant with copies of the emails between the Information and Privacy Unit employees and the police officers or civilian employees in regards to whether or not notes were available, because those records were not part of the request.

Analysis and findings

[21] The *Act* does not require an 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.³ To be responsive, a record must be "reasonably related" to the request.⁴

[22] 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.⁵ 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.⁶

[23] For the following reasons, I find that while the police's search was reasonable in relation to many of the requested records, they did not make a reasonable effort to search for other requested items. As a result, I do not uphold the police's overall search as reasonable and I order the police to conduct a further search.

[24] In my view, the analyst expended a reasonable effort in locating many records most directly relating to the incident and queries about the incident. As a result of this

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

search, the police have released a significant amount of information to the appellant, consisting of a 48-page General Occurrence Hardcopy, a tape of the 911 call, logs of the individuals who queried the incident on Versadex, and notebook entries of the police involved in the incident. The police also prepared and released two charts as described above. In my view, it was reasonable for the analyst to ask all of the police personnel listed on the logs for any notebook entries they may have relating to the appellant or the incident. I accept that the officers who were not directly involved in the incident did not find any notebook entries because they are not required to make such notebook entries.

[25] I also agree with the police's submission that the analyst's email records showing the details of her search are not responsive to the appellant's request.⁷

[26] In his request, and again during mediation, the appellant asked the police to search street check files. Neither party addressed this in their representations to me and I do not have information before me about whether street check information would be revealed in a Versadex search. However, the appellant has not provided any reasonable basis for believing that street check files would contain information about him. Therefore, I will not order the police to conduct any further searches relating to street check files.

[27] I find, however, that the police have not yet made sufficient efforts to locate additional records that may exist relating to the incident. For example, the police explain that civilian members of the police were not asked for notes, as they are not required to keep such notes. However, the fact that civilian employees may not be required to take notes does not necessarily mean that such notes do not exist. I also find that the police took too narrow a view of the request when they considered only whether their employees had notebook notes. The appellant's request includes "reports, files, officer notes, civilian employee notes, telephone call logs, transcripts, briefing notes, meeting minutes, emails, email attachments, email draft messages, telephone audio recordings, voicemail messages, Blackberry Messenger or PIN messages, cellular text messages, memoranda or bulletins produced by and/or received by the police" relating to him or the incident. Given this broad wording, it would be reasonable, in my view, for the police to have asked the officers directly involved in the incident, as well as all police personnel who queried the incident on Versadex, civilian or otherwise, whether they have any hard copy or electronic records (not limited to notebook notes) relating to the appellant or the incident.

[28] Similarly, I find that the police's IT Unit did not conduct a reasonable search for the electronic communications. The police explain that they are not required to keep these communications because they are considered transitory. Whether the police are

⁷ I note, however, that in many cases an institution will attach such emails to its representations on the issue of whether it has conducted a reasonable search for records.

permitted to delete these records under the retention policy is not an issue directly before me. However, even assuming such communications relating to the appellant are permitted to be deleted according to the policy, that does not necessarily mean that they were, in fact, deleted. Responsive records may exist, but based on the information before me, it does not appear that the police have searched for any.

[29] I am not satisfied, therefore, that the police have conducted a reasonable search in the circumstances, and as a result, I am ordering a further search.

ORDER:

1. I order the police to conduct a further search for responsive records. That search is to include the following:
 - a. All officers directly involved in the incident, and all employees listed on the logs are to be asked to search for any records relating to the incident, including emails, handwritten notes or any other hard copy or electronic communications about the incident or the appellant.
 - b. The Information Technology Unit is to be asked to conduct a search for the electronic communications listed in the appellant's request.
2. I order the police to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the further search, which are to include the following information:
 - The name(s) and position(s) of the individual(s) who conducted the search
 - The steps taken in conducting the search
 - The results of the search
3. I order the police to provide me with the affidavit(s) by May 17, 2018.
4. If the police locate records as a result of the search, I order the police to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1, 2 and 3 of this order.

Original Signed by: _____

Gillian Shaw
Adjudicator

April 26, 2018

