Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3923

Appeal MA18-00691

Toronto Police Services Board

April 30, 2020

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the Toronto Police Services Board's (the police's) investigation into her complaints that she was being cyberstalked. The police located responsive records and granted partial access to them. The appellant appealed the decision on the basis of her belief that additional records exist. The sole issue in this appeal is whether the police conducted a reasonable search for records responsive to the appellant's request. This order upholds the police's search for responsive records as reasonable and dismisses the appeal.

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 requester attended at 31 Division in 2014 to report that she was being cyberstalked. The police began an investigation during which the requester provided her electronic devices and other personal property to the police for inspection.

[2] The requester later made a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to her reports of cyberstalking, and specifically, to the following information:

> 31 Division – [named Detective] – investigated and sent my electronic devices to the tech crimes unit. I would like a copy of her entire file along

> with a copy of report from the tech crimes unit. All reports in their entirety please.
>
> On July 27, 2016, police officers were called and attended at [specified address] in regards to a continuation of the above matter – an issue of cyberstalking. I would like a full and complete copy of this report as well.

[3] The police identified responsive records and issued an initial decision granting partial access to those records. The records are a police occurrence report and the investigating officers' memorandum book notes about the requester's 2014 report of criminal harassment. The police also granted partial access to a 911 call report and to the investigating officers' memorandum book notes relating to a domestic incident reported by the requester in July 2016.

[4] The police withheld some information from the records pursuant to section 38(a), in conjunction with the law enforcement exemptions in sections 8(1)(c) (reveal investigative techniques and procedures) and 8(1)(l) (facilitate commission of an unlawful act) of the *Act*, and pursuant to the discretionary personal privacy exemption in section 38(b). The police also withheld some information on the basis that it was non-responsive to the request.

[5] The police issued a second decision by which they disclosed additional memorandum book notes and informed the requester that they now considered the request completed.[1] As with the first decision, the police withheld information that was non-responsive to the request, as well as information they claimed was exempt under the personal privacy exemption in section 38(b).

[6] The requester, now the appellant, appealed the police's decision to this office. A mediator was appointed to explore the possibility of resolution.

[7] During mediation, the police provided additional information to explain the nature of the severances they made to the records. As a result, the appellant confirmed that she no longer seeks access to the information in the records withheld on the basis of the law enforcement and personal privacy exemptions. The appellant also confirmed that she no longer takes issue with the information severed on the basis that it is non-responsive to her request. Accordingly, access to the information the police withheld from the records as exempt or not responsive to the appellant's request is not at issue in this appeal.

[8] Although she no longer disputed the exemptions claimed by the police to withhold portions of the records, the appellant maintained her belief that additional

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[1] The memorandum book noes of one involved officer were still outstanding when the first decision was issued.

records exist that the police did not disclose to her. The appellant stated that, of 11 bags of personal property she submitted to the police, the police only returned five. She stated that she believes further records should exist relating to her personal property and that contain the results of any analysis of the technological devices she gave to the police.

[9] Based on the appellant's concerns, the police conducted a further search for records but did not locate additional records. The appellant asked that the appeal move forward to adjudication on the issue of the reasonableness of the police's search for records.

[10] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, during which the parties participated in a written inquiry. As part of my inquiry, I received representations from the parties that were shared between them in accordance with the IPC's *Practice Direction Number 7* and *Code of Procedure*.

[11] For the reasons that follow, I uphold the police's search as reasonable and dismiss this appeal.

DISCUSSION:

Did the police conduct a reasonable search for records?

[12] The only issue for determination in this appeal is whether the police conducted a reasonable search for records that are responsive to the appellant's request. 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.[2] 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.

[13] 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.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[14] A reasonable search is one in which an experienced employee who is knowledgeable in the subject matter of the request expends a reasonable effort to

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[2] Orders P-85, P-221 and PO-1954-I.
[3] Orders P-624 and PO-2559.
[4] Order PO-2554.

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]

[15] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[7]

Representations

The police's representations

[16] The police submit that they conducted a reasonable search for records responsive to the appellant's request in accordance with the requirements of section 17 of the *Act*.

[17] In support of their position, the police provided an affidavit sworn by an analyst from their Access and Privacy Section (APS) with knowledge of privacy and access procedures and the appellant's request. The police state that although the lead investigator is no longer serving with the police, she was contacted as part of their search efforts.

[18] The affidavit sets out the steps the police took initially after receipt of the appellant's request to search for responsive records:

- when the request was made, the police conducted a search through their police records management system and located a police occurrence report for a complaint of criminal harassment made by the appellant in June 2014 that identified the detective named in the appellant's request as the lead investigator
- the police also searched their Integrated Computer Aided Dispatch System and located a 2016 report for a 911/non-emergency call the appellant made for a domestic event that matched the second paragraph of the appellant's request
- the police made a request for the memorandum book notes belonging to the officers involved in the incidents concerning the appellant.

[19] The police say they issued a decision letter indicating that they were granting partial access to information relating to the appellant's access request. Because the

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[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

memorandum book notes of one involved officer were still outstanding, the police informed the appellant that those would be forwarded to her once the APS received them. Approximately one month later, the police issued a supplementary decision with which they partially disclosed the remaining memorandum book notes.[8]

[20] The police submit that it became apparent during mediation that the appellant believes that a record should have been created by the Technological Crimes Unit (TCU) as a result of its analysis of her personal electronic devices. They say that, based on the appellant's concerns, the APS analyst emailed the assigned TCU officer to ask whether additional reports existed in relation to the examination of the appellant's personal electronic devices. When the officer responded that he was no longer assigned to the TCU, the APS emailed his successor to ask whether any additional reports or notes existed from the analysis conducted of the appellant's personal electronic devices. That officer responded that he would conduct a search through the TCU database.

[21] Three weeks later, the APS followed up with the officer, who advised that the Integrated Evidence Finder (IEF) reports had been purged due to "long-term lack of data storage space."

[22] The APS then contacted 31 Division (the police division originally assigned to investigate the matter) to make further inquiries as to whether they still had any material from their investigation in their possession.

[23] The APS also made inquiries to determine whether the domestic violence unit had retained any information received from the TCU relating to the examination of the appellant's personal electronic devices.

[24] As part of their search, the police say that they also reached out to the lead investigator who, although no longer serving with the police, responded to say that the results of the TCU's analysis of the appellant's personal electronic devices had been provided to the appellant on a USB key.

[25] The police submit that, because nothing was found through the examination conducted by the TCU to indicate that the appellant's devices had been hacked, the appellant's complaint was deemed unfounded and no further investigation was required. They say that the appellant was advised to contact a detective at 31 Division to make arrangements to retrieve her outstanding property.

[26] The police argue that the appellant is questioning the comprehensiveness of their investigation into her cyberstalking allegations and is alleging that the police were somehow neglectful in their documentation of the analysis of her property and in

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[8] At the appellant's request, the police later disclosed a darker, more legible, copy of these memorandum book notes.

concluding that her complaint of cyberstalking was unfounded. The police submit that the appellant's outstanding issue is not about access to records, but is more about the management of the police investigation.

The appellant's representations

[27] The appellant takes issue with the searches conducted by the police because they did not locate records containing the information or reports that the appellant believes they should contain. The appellant also takes issue with the police's investigation, arguing that, had the police taken her concerns seriously, the records would contain more information relating to her evidence and a report or analysis of her technological devices.

[28] The appellant submits that she has been the subject of ongoing cyberstalking by a former partner. She says she experiences data being deleted from her emails and electronic devices, constant password changes, has been locked out of her devices even after password resets, that her research has disappeared, files have been locked, links disabled and that documents she has sent have been altered. She reported this to the police at 31 Division in 2014.[9]

[29] The appellant says that she collected comprehensive evidence to support her claim, because her research showed that police do not take issues of cyberstalking seriously. She says she delivered 11 bags of evidence to the lead investigator (the detective identified in the request) that contained smart phones and laptops, USB keys containing images of her laptop screens, memory cards with video recordings from her phone, research about cyberstalking, as well as hundreds of pages of printed screenshots.

[30] According to the appellant, approximately three weeks after she delivered the evidence, the lead investigator came to her home with an officer from the TCU, who inspected her laptop from which she had been locked out.

[31] The appellant submits that the police made the decision not to investigate her 11 bags of evidence after this visit because they concluded that she was not being hacked but was instead visiting questionable video streaming sites, resetting passwords and locking herself out of her own devices. She says that two years later, the lead investigator contacted her to say that some of her property had been returned to 31 Division and could be picked up. She claims that, of the 11 bags of evidence she

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[9] The appellant submits that she first reported incidents of cyberstalking to police in another jurisdiction. The appellant's prior report(s) to different police services are not relevant to the Toronto Police Services Board's search for records responsive to the request that has given rise to this appeal. I have not considered the appellant's previous complaints to police except as part of the background she has provided.

submitted, only five, which included two laptops, were available for pick-up. She says that packing tape she had used to tape her devices shut was still in place, suggesting that they had not actually been inspected.

[32] The appellant submits that the cyberstalking continued and she contacted the police again in July 2016.

[33] According to the appellant, the responding officers were dismissive of her complaints at that time. She submits that they refused to look at her evidence, insisted that she was not being cyberstalked, and that, based on notes in their file, suggested she had a mental health issue. The appellant says that she filed her access request to see what in the police file could have influenced the officers against her in this way.

[34] The appellant submits that the records lack sufficient information regarding the investigation into her allegations and that she is especially interested in the TCU's documentation of any investigation of her devices. She also says that the police should have a "paper-trail as it relates to my 11 bags of evidence" that should include, among other things, information about the receipt of the evidence, reasons for the partial return of the evidence, information about the release of the last six bags of evidence, and reports or analyses generated from any inspection of her technological devices.

[35] The appellant also disputes some of the records' contents. For example, she disputes that the results of the TCU's analysis of her personal electronic devices was provided to her on a USB key, submitting that it was she who gave evidence to the lead investigator on a USB key.

[36] The appellant relies on excerpts from a paper on the laws of Canada pertaining to cybercrimes, and excerpts from books and web articles describing their pervasiveness. She says these materials confirm the reality and seriousness of cyberstalking and support her experiences with hacking because they describe the types of malware and other attacks she told the police she was experiencing. She also relies on excerpts from "A Handbook for Police and Crown Prosecutors on Criminal Harassment" to call into question the police's conduct, the completeness of their memorandum book notes and the thoroughness of their investigation.

[37] The appellant submits that "[r]edacted and other matters are no longer my focus. My focus is on what was actually investigated by TCU, if anything, and how would one know. As well as [the lead investigator's] memorandum book notes."

The police's reply representations

[38] In reply to the appellant's representations, the police submit that the records clearly set out the dates when the appellant submitted her electronic devices to 31 Division, when the lead investigator delivered those devices to the TCU for analysis, when some of her property was returned to her and when arrangements were made for the transfer of her remaining property from the TCU so that it could be returned to the

appellant.

[39] The police maintain that they took reasonable steps to search for responsive records and that the appellant's outstanding issue is with the comprehensiveness of their investigation and the conclusion that her allegations were unfounded.

The appellant's sur-reply representations

[40] In her sur-reply representations, the appellant maintains that she is seeking information from the TCU about its analysis of her devices and asks that the police follow up on substantive questions set out in her previous representations. She disputes that the police's investigation was closed as unfounded because she says there was no investigation in the first place.

Analysis and findings

[41] As I have noted above, although an appellant will rarely be in a position to indicate which records an institution has failed to identify, they must still provide a reasonable basis for concluding that such records exist.[10]

[42] Based on my review of the appellant's representations and the records, it appears that her primary concerns relate to the police investigation and to what she believes to be a failure to take her concerns seriously. The appellant's representations challenge both the comprehensiveness of the police's investigation and their conclusion that her allegations were unfounded.

[43] The issue before me, however, is the reasonableness of the police's search for responsive records, and not the adequacy of their investigation or the accuracy or sufficiency of the documentation in the records that they located.

[44] I am satisfied from the materials before me that the police conducted a reasonable search for responsive records. In making this finding, I am satisfied that the police provided sufficient evidence to demonstrate that experienced employees knowledgeable in the subject matter of the request, including an analyst in the position since 2006 as well as the officers involved in the investigation of the appellant's allegations, expended a reasonable effort to locate records that are reasonably related to the request. This effort included:

- searches of the police records management database and integrated computer aided dispatch system

[10] Order MO-2246.

- inquiries of the respective police units for memorandum book notes belonging to the involved officers

- inquiries of the assigned TCU officer and his successor regarding whether any additional reports or notes exist from the analysis conducted of the appellant's electronic devices

- follow-up inquiries of officers at 31 Division asking whether they had retained any information received from the TCU relating to the examination of the appellant's electronic devices

- inquiries of the lead investigator.

[45] In the circumstances of this appeal, I am satisfied that the reasonableness of the police's search is not undermined by the fact that the responsive records disclosed to the appellant might not answer her specific questions, or by the fact that the results of the police's search revealed that some records, such as the IEF reports, appear to no longer exist.

[46] For the reasons set out above, I find that the police have met their obligation to have an experienced employee knowledgeable in the subject matter of the request to expend a reasonable effort to locate records that are reasonably responsive to the request. I find that the appellant has not provided me with a reasonable basis to conclude that additional records responsive to her request might exist, but were not located by the police in their searches. As a result, I find that the police have conducted a reasonable search as required by section 17 of the *Act* and I dismiss this appeal.

ORDER:

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

April 30, 2020

Jessica Kowalski
Adjudicator