

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4456

Appeal MA22-00068

Durham Regional Police Services Board

November 2, 2023

Summary: The Durham Regional Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to the use of international mobile subscriber identity (IMSI) devices. The request was narrowed to judicial authorizations for use of IMSI devices. The police located three judicial authorizations, but the adjudicator removed them from the scope of the appeal because they have been sealed by a court order. Therefore, the only issue she considers at adjudication is whether the police conducted a reasonable search, under section 17 of the *Act*. In this order, the adjudicator upholds the police's search as reasonable in the circumstances 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.

Orders Considered: Order PO-2583.

OVERVIEW:

[1] The sole issue in this appeal is whether the Durham Regional Police Services Board (the police) conducted a reasonable search in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to judicial authorizations to permit the use of international mobile

subscriber identity (IMSI) devices.¹

[2] The request was as follows:

Further to your correspondence dated March 22, 2021 wherein you confirm that the DRPS “have utilized IMSI [international mobile subscriber identity] devices owned and operated by other police services under judicial authorization”, I am requesting that the DRPS confirm that they have thus never owned, rented, leased or borrowed said IMSI devices for their own exclusive use. I am further requesting that the DRPS confirm that they have never used exclusively or with other investigative services, an IMSI device without judicial authorization.

I am also requesting copies of all judicial authorizations (including Appendix C – Information to Obtain) that were relied on to permit the use of the IMSI device. To be clear on this request, I do not require the names of the individuals who were the subject of the investigation nor do I require addresses or cell phone numbers that were the subject of such authorizations. I am content that such details be redacted from the documents and if necessary, the incident numbers or other identifying file numbers may also be redacted so as to not disclose the identity of the subjects of the IMSI investigation. I would otherwise require the details of the investigation that would warrant the use of the IMSI device.

[3] The police issued a decision advising that, after conducting a search, no records exist in response to the request.

[4] The requester (now appellant) appealed the police’s decision to the IPC.

[5] The IPC appointed a mediator to explore resolution. During mediation, the police conducted another search and issued a supplementary decision that identified the existence of four judicial authorizations that were responsive to the appellant’s request. Access to three of the four authorizations was denied in full based on a number of discretionary exemptions at section 8 (law enforcement); with respect to the fourth authorization, the police indicated that it cannot be located. The appellant indicated that he believes the fourth authorization exists. The police later issued two revised decisions, but the issue of reasonable search could not be resolved. The appellant noted the scope of what he was seeking in the three judicial authorizations withheld, and disputed the application of exemptions to them.

[6] Since no further mediation was possible, the appeal moved to the adjudication

¹ The present appeal is related to two previous appeals with to the Information and Privacy Commissioner of Ontario (IPC), one of which led to Order MO-3887. The other appeal was resolved at the mediation stage with the requester’s decision to submit a new request to the police. That request is the subject of this appeal.

stage of the appeal process, where an adjudicator may conduct an inquiry.

[7] As the adjudicator of this appeal, I reviewed the file upon assignment and asked the police to provide the IPC with copies of the three judicial authorizations withheld under various exemptions. The police advised that they could not do so because these authorizations have all been sealed by a court order. In response, I asked the police for evidence supporting the police's position, in light of Order PO-2583. (In that order, the adjudicator concluded that, due to having notice of the sealing orders, she had to remove the record that was the subject of that sealing order from the scope of the appeal.²) The police provided information supporting their position that the records have been sealed by a court order. As I agree with the reasoning in Order PO-2583, I adopted it, and, as a result, I removed the three judicial authorizations under sealing orders from the scope of the appeal. Therefore, the only remaining issue at adjudication is that of reasonable search.

[8] The police provided representations regarding their search, and I shared the non-confidential portions of these representations with the appellant,³ inviting a response. The appellant provided brief representations.

[9] For the reasons that follow, I uphold the reasonableness of the police's search, and dismiss the appeal.

DISCUSSION:

[10] The only issue in this appeal is whether the police conducted a reasonable search for a fourth judicial authorization. If 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*.⁴ 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. For the reasons that follow, I find am satisfied that the

² The adjudicator's concluding paragraph on this issue in Order PO-2583 states the following:

As was the case in Order M-53, since I have notice of the Court order, I am bound by it and may do nothing in processing these appeals which would render the orders ineffectual. Moreover, disclosure of the nature of the record to the appellant in the course of conducting my inquiry cannot be made. I have no evidence before me to indicate that the Court order might be lifted or varied. Thus, I may never be in a position to deal unrestrictedly with the record at issue. For these reasons, it is my view that no practical purpose would be served in proceeding with these portions of Record 7 at this time. Accordingly, I have decided to remove these pages of Record 7 from the scope of the appeal on the basis that they are subject to the Court's sealing order.

See the discussion at pages 3-8 of Order PO-2583 for the entire context of her reasoning on this.

³ Portions of the police's representations were withheld due to confidentiality concerns, under *Practice Direction 7* of the IPC's *Code of Procedure*.

⁴ Orders P-85, P-221 and PO-1954-I.

police conducted a reasonable search.

[11] 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.⁵ 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.⁶

[12] 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;⁷ that is, records that are "reasonably related" to the request.⁸

[13] 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.⁹

The police's evidence

[14] The police identify the scope of the request, and describe the steps taken to respond to it.

[15] The police explain that in conducting a search, they found the three judicial authorizations that have been removed from the scope of this appeal. The police state that they confirmed the use of an IMSI four times, and could locate judicial authorizations for three of the four times. They further explain that they advised the appellant and the IPC (at mediation) that the lack of responsive records on the fourth matter leads the police to conclude that there was no judicial authorization in that one instance.

[16] The police submit that the appellant maintains (for reasons which have not been identified to the police) that a judicial authorization in the fourth matter does exist. The police submit that it would appear that the appellant simply does not believe the response from the police, and accordingly this appeal persists as a result.

[17] After describing some of the history of the appellant's requests, the police say that when the current request was narrowed to the judicial authorizations, the police's freedom of information unit, together with legal counsel for the police, spoke with leadership of a certain other police unit. That unit is the only unit within the police service that would have used the IMSI. (The name of this unit was not shared with the

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

⁷ Orders P-624 and PO-2559.

⁸ Order PO-2554.

⁹ Order MO-2246.

appellant, but was provided to the IPC.) The purpose of reaching out to that unit was to determine whether IMSI were used, and what steps were taken to obtain judicial authorizations.

[18] The police further explain that the inspector of the unit that would have used IMSI, in turn, personally reviewed all the relevant project files and determined that an IMSI device (owned and operated by other agencies) has been used on four separate projects.

[19] The police advise that three of those projects included judicial authorizations, and that no judicial authorizations could be located in respect of the fourth project.

[20] In addition, the police explain that the inspector of the unit that would have used IMSI spoke to other members of the unit to determine whether a judicial authorization for the fourth project was obtained but most of the members involved on the project have retired and those who remain had no information to provide. The police also state that a review of the file and notes available did not mention judicial authorization.

[21] The police explain that a judicial authorization would typically not be destroyed and would be expected to be found within the project file, so they explain that the lack of any such documentation led to the conclusion that no judicial authorization on that fourth project was obtained.

[22] The police maintain that they are not required to produce any records of any kind to the appellant in respect of this request (which I understand to be a reference to the narrowed scope of judicial authorizations).

The appellant's response

[23] In response to the police's representations, the appellant mainly expresses his views about what he sees as the police's opposition to disclosure regarding IMSI use over time, and the police's representations that an IMSI device was used once without judicial authorization. He makes other statements in this vein, which I find are not directly related to the issue of reasonable search.

[24] Regarding the police's questioning as to why he believes a fourth judicial authorization exists, the appellant sees this as the police acknowledging that he presumed that they acted lawfully when intercepting private citizen conversations, but he was "clearly. . . mistaken."

[25] The appellant notes that portions of the police's representations were withheld, and he has reasons to question how they responded to his request, based on his past experience seeking information about this issue.

[26] The appellant states that he will rely on the adjudication process to determine

this issue.¹⁰ I understand this to mean the issue of reasonable search, which is the only one before me in this appeal.

Analysis/findings

[27] Having considered the parties' representations, I am satisfied that the police provided sufficient evidence that the steps they took to search for a fourth judicial authorization were reasonable in the circumstances.

[28] As described above, the police properly interpreted the clear scope of the request. Having done so, their freedom of information unit engaged both their legal counsel and the inspector that heads the police unit that would have used the IMSI. Although the appellant was not provided with the name of that inspector's unit, the name was identified to the IPC in confidence. Having specified that the search was conducted by the only unit that would use IMSI devices leads me to conclude that involving that unit and its inspector was a reasonable step in conducting a search for responsive records. Furthermore, I accept that the inspector involved reviewed all relevant project files. In the circumstances, I find that the police have sufficiently established that they engaged an experienced employee knowledgeable in the subject matter of the request to conduct a search.

[29] The fact that a fourth judicial authorization was not found as a result of the search conducted is a separate matter from the issue of reasonable search. In other words, the police provided an explanation for why such a record was not found after a search was conducted, and I find that explanation to be reasonable, but this has nothing to do with the appellant's expressed concern regarding IMSI use without judicial authorization, in itself (which is outside the scope of this appeal).

[30] While I appreciate that the appellant has tried to access records about IMSI use for several years and has expressed that he does not necessarily trust the police's representations, this appeal extends only to evaluating whether the evidence provided by the police sufficiently establishes that they took reasonable steps to respond to the appellant's freedom of information request. I have found that it does. I am satisfied that ordering the police to conduct a further search would not yield a different search result, based on their explanation for why a fourth judicial authorization was not found.

[31] For these reasons, I uphold the police's search as reasonable in the circumstances, and dismiss the appeal.

ORDER:

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

¹⁰ He also says he "will reserve my right to continue to seek information on this issue through separate and redefined requests." I make no findings regarding any future requests in this order.

Original signed by: _____

Marian Sami
Adjudicator

November 2, 2023 _____