



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1095

Appeal M-9700293

Toronto Police Services Board



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NATURE OF THE APPEAL:

On August 5, 1997, the Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act for a videotape of a breathalyser test made by the Metropolitan Toronto Police on May 17, 1996. On August 6, 1997, the Ministry forwarded the request to the Metropolitan Toronto Police Services Board, now the Toronto Police Services Board (the Police). On September 12, 1997, the Police made a decision under the Municipal Freedom of Information and Protection of Privacy Act (the Act) advised the requester that the record no longer exists. The requester appealed this matter.

During mediation, the requester (now the appellant) indicated that the tape should still exist since he made his request immediately after his trial which was held on July 28, 1997.

This office provided a Notice of Inquiry to the Police and the appellant. Representations were received from the Police only. As part of their representations, the Police asked that I consider the information which they forwarded to the Appeals Officer during mediation. This information includes:

- notes detailing their Freedom of Information Analyst's search trail, and persons contacted (including the requester), to try to obtain information and locate the subject videotape;
- copies of internal Police memos and response notations generated during the search;
- and their Record Retention Schedule which is currently in use.

DISCUSSION:

REASONABLENESS OF SEARCH

The appellant indicates that the videotape was used as evidence at his trial on July 28, 1997. The Police do not dispute that the videotape existed at that time.

Where a requester provides sufficient details about the records he is seeking, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested records do not exist. However, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the appellant's request.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

The Police were asked to provide a written summary of all steps taken in response to the appellant's request.

The Police indicate that when a matter goes to trial, and a videotape forms part of the evidence to be relied on at the trial, a master videotape is held at the Division and a copy is sent to the Crown Attorney through the Court Services office. The Ministry confirmed during mediation that the Court Services office returned the copy of the videotape which had been provided to the Crown to the Police after the trial.

The Police indicate that they searched three locations for the videotape and contacted the following individuals:

1. the Freedom of Information liaison at 41 Division;
2. the Freedom of Information liaison at Court Services - Scarborough;
3. the Freedom of Information liaison at Video Services.

In responding to the Analyst's queries, the liaison at Court Services indicates that a box of videotapes was sent from Scarborough Court to the Police's video unit for erasing in August, 1997. This individual indicates that it is possible that the copy of the videotape was included in this box.

A search through these three locations was unsuccessful.

The retention schedule provided by the Police does not specifically refer to videotapes of breathalyser tests administered to individuals. However, the schedule indicates that in all other cases apart from those referred to in the schedule, the retention period is seven years for videotapes.

The Police confirm that there is no record that the videotape was destroyed in accordance with its retention schedule.

I am somewhat puzzled by the explanation provided by the Police. They have indicated that two copies of the tape are in existence when a matter goes to trial; a master copy and the trial copy. Although I accept that it is possible that the trial copy may have inadvertently been erased, that does not explain the missing master copy.

While I am satisfied that the locations searched by the Police are those which would reasonably be expected to produce the record, I am very disturbed by the record retention practices employed by the Police.

In Order M-1081, former Inquiry Officer Marianne Miller also addressed inexplicably missing records which should have been located in the custody of the Police. She noted that:

By the very nature of their work, the Police are frequently dealing with highly sensitive personal information.

Section 30 of the Act places a clear responsibility on the Police to ensure that personal information is retained and disposed of in accordance with section 5 of Regulation 823 (Order M-1053). This regulation reads as follows:

Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution on behalf of the institution, unless the individual to whom the information relates consents to its earlier disposal.

In Order M-1053, Assistant Commissioner Tom Mitchinson addressed the premature destruction of records by the Police. He found in that case, which concerned the destruction of records following receipt of the request, that the practices employed by the Police had compromised the integrity of the access process. In my view, the history of the current appeal demonstrates a carelessness with respect to the care and control of records containing personal information, and as such, similarly compromises the integrity of the access process.

In both Orders M-1053 and M-1081, the decision-makers indicated that our office will be in touch with the Police to ensure that the retention and disposal policies and procedures with respect to records containing personal information are in place to ensure compliance with section 30 of the Act and section 5 of Regulation 823. I strongly encourage the Police to co-operate with our office in developing acceptable practices with respect to records maintenance.

ORDER:

I find the search conducted by the Police to be reasonable and this appeal is dismissed.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ April 24, 1998