



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2342

Appeal PA-040012-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to records relating to an incident involving the requester and the Ontario Provincial Police (the OPP) that resulted in a number of criminal charges being brought against the requester under the *Criminal Code*. The request specifically stated:

I am requesting the Ontario Provincial Police file in regard to criminal charges laid against myself on [a specified date]. I would appreciate all information related to my file, included but not limited to:

- Statement from [a named witness]
- Statement from [a named witness]
- Statement from [a named witness]
- Copy of criminal record of [a named witness]
- List of evidence
- Any photos of evidence and any crime scene photos
- Hospital records
- Statement of any other persons interviewed

The Ministry located and granted access to portions of a number of responsive records. Access to the undisclosed portions of the records was denied under section 49(b), taken in conjunction with the presumption in section 21(3)(b) (information compiled as part of an investigation into a possible violation of law) and the factor listed in section 21(2)(f) (highly sensitive information) of the *Act*. In addition, the Ministry denied access to a further portion of the records as it contained information that was not responsive to the request.

The requester, now the appellant, appealed that decision.

In a supplementary decision issued on May 4, 2004, the Ministry granted partial access to additional records beyond those initially identified. The appellant confirmed that he was not disputing the application of the exemptions claimed for the undisclosed portions of the remaining records. However, the appellant continues to take the position that the following additional records exist:

- notes taken by police officers other than the seven officers whose notes have already been identified and disclosed, in whole or in part;
- a copy of or a transcript of a tape recorded conversation between the appellant and two officers;
- medical files from a named hospital;
- a list of evidence collected at the scene

I initially sought the representations of the appellant by sending him a Notice of Inquiry, setting out the facts and issues in the appeal. The appellant provided submissions in response, the relevant portions of which were shared with the Ministry, along with a copy of the Notice. The Ministry also provided me with representations that I then shared with the appellant, who made additional submissions by way of reply.

DISCUSSION:

REASONABLE SEARCH

The sole issue in this appeal is whether the Ministry conducted a reasonable search for records 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 24 [Orders P-85, P-221, PO-1954-I]. 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.

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 [Order P-624].

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. In the present appeal, the appellant provided me with specific arguments in support of his position on each of the items referred to above, which I will address individually.

Additional notebook entries from other officers

With respect to the existence of notebook entries by additional officers beyond the seven officers already identified, the appellant argues that he observed between 10 and 12 officers and that each of them ought to have taken notes relating to the incident. He has also provided me with evidence indicating that members of the Royal Canadian Mounted Police (the RCMP) may also have been present at the incident in which he was involved, and that no records relating to their involvement have been produced by the Ministry.

In response, the Ministry submits that the appellant has not produced the names or badge numbers of any other officers beyond the seven already identified. The Ministry's representations state that its Freedom of Information office contacted the primary investigating officer, the scene of the crime officer and another officer on May 28, 2004 and that each of these individuals indicated that they do not recall any additional officers being at the scene of the incident. In addition, the notes taken by the identified officers and disclosed to the appellant do not refer to any other law enforcement officials, either with the OPP or the RCMP, being present. Finally, the Ministry points out that it is unlikely that the local OPP detachment would have assigned 10 to 12 officers to a residential break-in, which was the crime under investigation.

In his reply representations, the appellant provided me with a copy of an e-mail from the primary investigating officer dated September 26, 2001 providing the appellant with an explanation as to why certain evidence was secured with a seal belonging to the RCMP. I do not agree with the

position taken by the appellant that this conclusively demonstrates the involvement of RCMP officers in the incident. In my view, the e-mail setting out the explanation of the primary investigating officer for the existence of this evidence supports the argument that the RCMP were not involved.

In my view, the Ministry has provided me with sufficient evidence to demonstrate that its search for notebook entries was reasonable in the circumstances. The Ministry has satisfied me that it has made a reasonable effort to locate any notes that may have been taken by other OPP officers at the scene of the incident involving the appellant beyond the seven officers already identified.

Tape recording or transcript

The appellant maintains that following his arrest, he was questioned by two OPP officers while seated in the back seat of a police cruiser. He also states that he saw the officers use a tape recorder to record this conversation and that a copy of the tape, or a transcript of its contents, ought to exist.

In response, the Ministry indicates that it contacted one of the arresting officers who advised that she did not tape record the conversation in question and that she “does not use a tape recorder in her duties as a police officer.” The Ministry goes on to add that the second officer is no longer with the OPP but that her notes, taken contemporaneously with the events, indicate only that “the appellant slept in the cruiser while he was transported to hospital . . .” No reference is made in these notes to the recording of a conversation with the appellant.

Based on the submissions of the Ministry, I am satisfied that it has conducted a reasonable search for either a tape recording or a transcript of the appellant’s conversation with the arresting officers. I am satisfied that the Ministry exercised a reasonable degree of diligence in attempting to locate any such records.

Medical records

The appellant argues that he has not been granted access to medical records relating to himself and his admittance to hospital on the night of his arrest. In support of this claim, the appellant has produced copies of two letters written by his counsel to the prosecuting Crown Attorney seeking access to any such records that the Crown may possess, prior to the appellant’s appearance in court. There is no indication as to any response received from the Crown, however, which might acknowledge the existence of such records.

The appellant also made a request under the *Act* for access to the Crown Brief maintained by the Ministry of the Attorney General and was advised that the complete Crown Brief had been returned by the Crown Attorney’s office to the investigating OPP detachment.

The Ministry responded to the appellant by asking the primary investigating officer whether she recalled the existence of any medical records in the file relating to the appellant. The officer indicated that she did not. The Ministry also requested that the Court Officer for the relevant

OPP Detachment conduct a search of the Crown Brief respecting the criminal charges against the appellant. That search was also unsuccessful in locating any medical records relating to the appellant. The Ministry also points out the records that have been located “do not contain any references to any medical files being obtained by the OPP.”

I accept the arguments put forward by the Ministry. In my view, the Ministry has conducted an adequate search for any medical records relating to the appellant that may have been included in its record holdings relating to the incident. I am satisfied that the searches conducted by the Ministry for such information were reasonable in their scope.

List of evidence collected at the scene

In his submissions, the appellant did not address specifically any alleged deficiencies in the searches conducted by the Ministry for a “list of evidence” described in his request, his letter of appeal and the Mediator’s Report.

The Ministry points out that:

. . . page 7 of the records disclosed to the appellant contains a section entitled Property Involved. This section lists items seized as evidence in respect to the criminal matter involving the appellant. On May 28, 2004, the Ministry contacted [the primary investigating officer] in respect to the possible existence of additional records regarding the evidence collected at the scene of the break and enter incident. [This officer] is not aware of the existence of additional records in this regard.

At the conclusion of its representations, the Ministry summarizes its efforts to identify and locate records responsive to the appellant’s request. Based on the representations of the Ministry and the lack of information from the appellant to the contrary, I am satisfied that its searches for “a list of evidence” collected at the scene were reasonable in the circumstances.

In conclusion, I am satisfied that the Ministry has responded to each of the concerns raised by the appellant with respect to the adequacy of the searches undertaken for responsive records. I find that the searches undertaken were reasonable, taking into account all of the circumstances of the appeal.

ORDER:

I dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

November 10, 2004