



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2055-I**

**Appeal MA-050052-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

... copies of the complete records pertaining to police involvement with [the requester] on July 1, 2004, including the names of all police officers involved, copies of the relevant entries in their memorandum books and of all other documents, records and videotapes generated in connection with [the requester] on that date.

The Police located records responsive to the request, including the records of arrest and the memorandum books (i.e., handwritten notes) of seven police officers. They issued a decision letter that granted the requester partial access to the responsive records. Access to certain information in the records was denied pursuant to sections 8(1)(l), 14(1)(f), 14(3)(b), 38(a) and 38(b) of the *Act*. The Police also severed non-responsive information (i.e., information not reasonably related to the request) from some of the records.

After reviewing the severed records that were released to him, the requester's representative informed the Police that two additional records should exist: an injury report and a use of force report.

The Police then issued a second decision letter that granted the requester access to a one-page injury report. With respect to the use of force report, the letter cited section 52(3) of the *Act*, which excludes certain labour relations and employment-related records from the scope of the *Act*. The letter further stated that, "The Use of Force Report is prepared and used by the Service to assess training needs. Therefore, it has been determined, upon examination of the record described in your request, that it meets the criteria for exclusion ..."

The requester (now the appellant) appealed the Police's decision to this office. In his appeal letter, the appellant's representative stated that, "We know that the Use of Force Report is in existence as reference is made to it in the memorandum book notes of [a named police officer] on July 1, 2004."

The Police provided this office with a copy of the severed pages from the records disclosed to the appellant, including the records of arrest, the memorandum books of seven police officers, and the injury report.

During mediation, the appellant's representative stated that his client was not interested in pursuing access to the information in the records that was severed by the Police pursuant to sections 8(1)(l), 14(1)(f), 14(3)(b), 38(a) and 38(b) of the *Act*. He confirmed that the only record that remains at issue is the use of force report.

The Police then issued a third decision letter to the appellant's representative that informed him that no use of force report exists:

... an extensive search was conducted by the Professional Standards Unit in which all "Use of Force" Report records are housed. Upon completion of this search, it was determined that the "Use of Force" Report, although referred to in [a named police officer's] memo book, was not created. Therefore, access cannot be granted to a "Use of Force" Report regarding your client ... on July 1, 2004 as no such record exists.

The appellant's representative advised the mediator that he was not satisfied with the Police's explanation that the use of force report did not exist, and that he wished the appeal to proceed to adjudication on the issue of reasonable search. The Police advised the mediator that even if the use of force report existed, it would be excluded by section 52(3) of the *Act*.

No further mediation was possible, and this appeal was transferred to adjudication. This office started the inquiry by issuing a Notice of Inquiry to the Police. The Notice of Inquiry invited the Police to submit representations on the application of section 52(3) of the *Act* and the issue of reasonable search. On the issue of reasonable search, this office provided the Police with the option of providing an affidavit from the person or persons who conducted the search. The Police submitted representations in response to the Notice of Inquiry but asked that portions of their representations be withheld from the appellant. They did not provide an affidavit from the person or persons who conducted the search.

After reviewing the Police's representations, this office issued an order to the Police specifying which part of the Police's representations would be shared with the appellant. The order drew the Police's attention to sections 5 and 6 of *IPC Practice Direction 7*, which set out the criteria for withholding representations. The order concluded that only certain portions of the Police's representations that they asked be withheld fell within the confidentiality criteria:

In my view, it is important to share certain portions of your representations with the appellant to enable him to properly address the reasonable search issue. Accordingly, I have decided that I will be sharing certain portions of your representations with the appellant.

This office then issued a Notice of Inquiry to the appellant, along with a severed copy of the Police's representations. The Notice of Inquiry invited the appellant to submit representations on the issue of reasonable search and to respond to the Police's representations. The appellant did not submit any representations in response. This appeal has now been transferred to me to complete the inquiry.

## **DISCUSSION:**

The Police have made a two-pronged argument with respect to the use of force report sought by the appellant. First, they submit that no such record exists. Second, they submit that even if such a record did exist, it would be excluded from the scope of the *Act* under section 52(3).

In the circumstances of this appeal, I have decided to first assess whether the Police have conducted a reasonable search for the use of force report.

### **REASONABLE SEARCH**

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 [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.

### **The Police's Representations**

The Police submit that they conducted a reasonable search for the use of force report sought by the appellant. The following is a summary of non-confidential portions of the Police's representations on the issue of reasonable search that were shared with the appellant. Although I will not be summarizing the confidential portions of the Police's representations in this order, I have reviewed and considered these submissions and will be taking them into account in reaching my decision.

#### ***Searches – Professional Standards Unit***

The freedom of information (FOI) analyst assigned to the request contacted the detective sergeant at the unit to which all use of force reports are eventually submitted and stored in accordance with the Police's retention policy. The FOI analyst also contacted the Charles O. Bick College (a police training college), which advised her to contact the aforementioned unit within the Police, because it ships all use of force reports to that unit.

At a later date, a detective sergeant contacted the FOI analyst and informed her that if a use of force report had been submitted, it would be held at the Professional Standards Unit. Moreover, he told her that he would contact the police constable who apparently submitted the report. He later informed the analyst that after conducting "an extensive search," he determined that no use of force was submitted for the incident relating to the requester. An analyst at the Professional Standards Unit also informed the FOI analyst that no use of force report was submitted or stored on their internal database, which tracks all use of force reports.

### ***Searches – 14 Division***

The Police made the following submissions with respect to the inquiries it made to 14 Division:

No. 14 Division was also contacted by the analyst in which it was confirmed that no report was submitted and there is no UOF report in the file that was prepared for court ...

Further it was confirmed with that involved officers' Detective Sergeant tha tas (sic) force was used in relation to the appellant's client, no Use of Force Report was submitted.

As it has been determined repeatedly, the 14 Division officer did not submit a UOF report, however did submit an Injury Report, in which the appellant has been granted.

The Police submit, therefore, that they conducted a "thorough and in-depth" search for the use of force report. They claim that, "[t]he record never existed, was never created and this has been proved over and again."

### **The Appellant's Representations**

The appellant did not submit any representations in response to the Notice of Inquiry. However, as noted above, the appellant's representative stated in his appeal letter that, "We know that the Use of Force Report is in existence as reference is made to it in the memorandum book notes of [a named police officer] on July 1, 2004."

### **Analysis and Findings**

In assessing whether the Police have conducted a reasonable search for the use of force report, it is helpful to begin with a review of the following: (1) the statutory and regulatory provisions that require police officers to submit reports on the use of force, and (2) the severed records disclosed to the appellant that refer to the incident that apparently led to the appellant's injury.

### ***Use of Force Reports – Statutory and Regulatory Provisions***

Section 135(1)16 of the *Police Services Act* (the *PSA*) allows the Lieutenant Governor in Council to make regulations governing the use of force by members of police forces. Section 14.5(1) of Regulation 926 under the *PSA* requires police officers to submit reports on the use of force in specified circumstances, while section 14.5(2) prescribes the form on which such reports must be submitted:

- (1) A member of a police force shall submit a report to the chief of police or Commissioner whenever the member,

- (a) draws a handgun in the presence of a member of the public, excluding a member of the police force while on duty, or discharges a firearm;
  - (b) uses a weapon other than a firearm on another person; or
  - (c) uses physical force on another person that results in an injury requiring medical attention.
- (2) The report shall be in Form 1.

***The incident that led to the appellant's injury***

The severed records that the Police disclosed to the appellant contain information about a physical struggle that occurred between the appellant and several police officers. A supplementary record of arrest (page 8 of the records) states:

On Thursday, July 1<sup>st</sup>, 2004, the accused ... was at 14 Division, 150 Harrison St. in the City of Toronto. He was under arrest for several offences and was being processed in investigative room #3.

The accused was advised he was being held pending a show cause hearing for his charges and became very violent and refused to leave the room.

Several officers entered the room in order to handcuff the accused. The accused was resistant and tried to prevent the officers from handcuffing him. The accused was shouting demands and swearing at the officers.

[They] managed to get him to the ground and handcuff him ...

The injury report disclosed to the appellant, dated July 1, 2004, contains a similar description of the incident that apparently led to the appellant's injury. The police officer who prepared the injury report filled in a circle beside a notation that states, "Injury sustained as a result of Use of Force." The report also indicates that the appellant was subsequently brought to a hospital, where a physician examined him and concluded that he had sustained a fractured rib.

The Police also disclosed severed copies of the memorandum books of seven police officers to the appellant. As noted above, the appellant's representative submits that he knows the use of force report exists because reference is made to it in the memorandum book of [a named police officer]. I have reviewed this memorandum book, and the specific handwritten entry made by this police officer states (at page 37 of the records.): "Stand by re. Injury Report + Use of Force Report."

Moreover, the memorandum book of a different police officer, who was also present during the physical struggle with the appellant, contains a similar notation. The specific handwritten entry

made by this police officer states (at page 49 of the records): "STANDBY P/W INJURY + U. O. F REPORTS."

*The searches conducted by the Police*

The Police focused their search on two locations within the institution where the use of force report would likely be located: the Professional Standards Unit (where all use of force reports submitted by police officers are stored) and 14 Division (where the physical struggle between the appellant and several police officers occurred). Based on the representations of the Police, I accept that these are the most logical places to search for any use of force report that may have been prepared and submitted by the police officers involved in the physical struggle with the appellant.

It is clear that this struggle caused at least two of these officers to make entries in their memorandum books that refer to a use of force report. In my view, these entries demonstrate, at a minimum, that these officers were contemplating the possibility of creating and submitting such a report.

In their representations, the Police state that a detective sergeant told the FOI analyst that he would contact the police constable who apparently submitted the report. This detective sergeant later informed the analyst that after conducting "an extensive search," he determined that no use of force was submitted for the incident relating to the requester. However, the Police's representations do not provide any details about whether this detective sergeant successfully contacted the police constable, what questions he posed to this police constable, and what the police constable's responses were to these questions.

The FOI analyst also contacted 14 Division and was told that no use of force report was submitted or included in the file that was prepared for court. In an apparent attempt to explain why a use of force report was not submitted, the Police make the following enigmatic statement in their representations, "Further it was confirmed with that involved officers' Detective Sergeant tha tas (sic) force was used in relation to the appellant's client, no Use of Force Report was submitted."

In my view, the only individuals who can clearly answer whether they prepared and submitted a use of force report are the police officers who were involved in the physical struggle with the appellant, and, in particular, the two officers who made references in their memorandum books to such a report. Although the Police's representations suggest that the FOI analyst spoke to certain individuals at 14 Division, including "that involved officers' Detective Sergeant," I have no evidence before me that clearly states whether any of the police officers involved in the physical struggle with the appellant were specifically asked whether they prepared and submitted a use of force report, and what their responses were.

In short, the Police have failed to provide sufficient evidence to show that they have made a reasonable effort to identify and locate the use of force report. I find, therefore, that they have not conducted a reasonable search for this record, as required by section 17 of the *Act*.

In my view, it is appropriate to order the Police to conduct a further search for the use of force report. In particular, I will be ordering them to provide me with sworn affidavits from specified individuals, who will be asked to answer straightforward questions about the existence of the use of force report.

**ORDER:**

1. I order the Police to provide me with sworn affidavits from the two police officers who made entries in their memorandum books that refer to a use of force report. The first officer is the one whose memorandum book is found on pages 31 to 37 of the records. The second officer is the one whose memorandum book is found on pages 41 to 49 of the records.
2. These sworn affidavits should answer the following questions:
  - Did you create or fill out a use of force report in relation to the physical struggle with the appellant at 14 Division on July 1, 2004?
  - If you did create or fill out such a report, to whom did you submit it?
  - Are you aware if any other officers involved in the same physical struggle with the appellant created or filled out a use of force report?
3. I will accept a sworn affidavit from the Police's FOI Co-ordinator or FOI analyst on behalf of the two police officers, provided that the deponent of the affidavit gives his or her evidence based solely on first hand, direct conversations with the two officers.
4. The affidavits must be submitted to me by **June 21, 2006**.
5. The affidavits may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*.
6. I remain seized of these matters with respect to compliance with this interim order or any outstanding issues arising from this appeal.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ May 30, 2006