



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2141-F

Appeal MA-050052-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

This is a final order dealing with the remaining issues in this appeal which were not resolved by Interim Order MO-2055-I.

Background

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 sole record remaining at issue is a use of force report relating to the incident referred to in the request. The Police submit that the use of force report does not exist, but even if it did exist, the exclusionary provision in section 52(3) of the *Act* would apply to this record. Section 52(3) excludes certain labour relations and employment-related records from the scope of the *Act*.

The appellant's representative submits that the use of force report must exist because a police officer's notes contain a reference to it.

This office invited the parties to submit representations on the application of section 52(3) of the *Act* and the issue of reasonable search. I then issued Interim Order MO-2055-I, in which I decided to first assess whether the Police have conducted a reasonable search for the use of force report.

I began with a review of the sections of Regulation 926 of the *Police Services Act* (the *PSA*) that require police officers to submit reports on the use of force in prescribed circumstances. In addition, I reviewed the severed records disclosed to the appellant that refer to the incident which he alleges led to his injury.

I found that a supplementary record of arrest contains information about a physical struggle that occurred between the appellant and several police officers. Moreover, the police officer who prepared an injury report relating to the appellant filed in a circle beside a notation that states, "Injury sustained as a result of Use of Force." This injury 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.

I examined the memorandum books of several police officers and found that the notes of two police officers, who were apparently present during the physical struggle with the appellant, contain references to a use of force report. I concluded that these references demonstrate, at a minimum, that these officers were contemplating the possibility of creating and submitting such a report.

Furthermore, I found that 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. However, the Police did not submit any evidence that clearly indicated 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.

As a result, I concluded that the Police had failed to provide sufficient evidence to show that they had made a reasonable effort to identify and locate the use of force report. I found, therefore, that they had not yet conducted a reasonable search for this record, as required by section 17 of the *Act*.

Interim Order MO-2055-I contains a series of provisions that direct the Police to answer further questions on the issue of reasonable search. I will now assess whether the evidence submitted by the Police in response to this interim order demonstrates that they have conducted a reasonable search for the use of force report sought by the appellant.

DISCUSSION:

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.

Order Provisions

Interim Order MO-2055-I contains a series of provisions that direct the Police to provide further evidence on the issue of reasonable search:

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 coordinator 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.

The Police's representations

In response to the interim order, the Police submitted representations in the form of an affidavit from its Freedom of Information (FOI) coordinator (who was previously an FOI analyst). This brief affidavit did not answer any of the questions that were required to be posed to the two officers pursuant to Interim Order MO-2055-I. The affidavit stated, in part:

3. On August 4, 2005, I contacted 14 Division and was advised that [the two named police officers] were currently on midnight shift. I left messages for both officers to call regarding the incident in question, and the whereabouts of a possible Use of Force Report.
4. On August 9, 2005, I advised and updated the FOI coordinator ... [She] left a message for [a named detective sergeant] to retrieve this information.
5. On August 10, 2005, [a named detective sergeant] confirmed to [the FOI coordinator] that the arrested party received injuries prior to the contact with the police and he was concerned over heart pills and therefore taken to hospital. No force was used by police, there was no complaint from the arrested party of any injuries and therefore no Use of Force Report submitted.

I then issued a letter to the Police that advised them that the affidavit they submitted did not comply with the terms of the interim order. I directed them to provide me with a response that fully complied with the order.

In response, the Police submitted an affidavit from the same FOI coordinator that repeated some of the information from the initial affidavit but also contained the following new information:

7. On August 22, 2006, I spoke to [a named police officer] who stated that upon her recollection of the incident occurring on July [1], 2004, there was much discussion surrounding whether or not a Use of Force Report was to be used. [She] consulted with [another named police officer] and it was [their] mutual agreement that they composed a Use of Force Report however, do not know what happened to it as it was then forwarded to their superiors. I was advised to consult with [a named staff sergeant] who was in charge at that time.
8. On August 23, 2006, I spoke with [a named staff sergeant] who confirmed that due to the actions of the accused while in the interview room at No. 14 Division, it was unlikely that those injuries sustained by the accused were encountered by means of use of force by any Toronto Police Service member, and therefore the Use of Force Report created was not activated (submitted).

The appellant's representations

I sent a severed version of the Police's representations (the two affidavits from its FOI coordinator) to the appellant and invited him to submit reply representations.

In response, the appellant's representative submitted reply representations that pointed out that the affidavits submitted by the Police contain a number of flaws and omissions. For example, the first affidavit was commissioned by a Commissioner whose authority had expired two months earlier.

With respect to the substance of the Police's representations, the appellant's representative made the following submissions:

- a Use of Force Report must be completed whether or not there is a complaint from the arrested party of any injuries;
- a Use of Force Report must be completed whether or not there are injuries;
- how can the police say that there was no complaint by the arrested party when, in fact, they took him to the hospital?;
- how can the police say there were no injuries, when the arrested party was diagnosed with a broken rib?;
- how can [a named staff sergeant] state that it was unlikely that the injuries sustained by the person arrested when [the two named police officers] agreed that they composed a Use of Force Report; and

- there are undoubtedly other questions that should be asked, depending upon the answers to the three questions immediately above.

The Police's sur-reply representations

I then sent a copy of the appellant's representations to the Police and invited them to respond. In addition, I asked the Police to respond, in affidavit form, to the following question:

Does the use of force report submitted by [the two named police officers] still exist in the Police's record holdings or was it disposed of or otherwise destroyed after a decision was made not to "activate" or submit the report?

In response, the Police submitted an affidavit from its FOI coordinator that stated, in part:

6. On December 4, 2006, I received confirmation from [a named staff sergeant] that due to the fact the Use of Force Report was not submitted, it would have been shredded or recycled.
7. On December 7, 2006, I spoke directly with [a named detective sergeant] of Division No. 14 who advised that he destroyed the Use of Force Report.

Analysis and findings

I have carefully considered the representations of both the Police and the appellant. In my view, the Police have conducted a reasonable search for the use of force report for the following reasons.

At the outset of this appeal, the Police submitted that the use of force report does not exist, but provided minimal evidence to substantiate this assertion. However, in response to Interim Order MO-2055-I, the Police's FOI coordinator spoke to one of the involved police officers who confirmed that she and another officer mutually agreed to compose a use of force report after the physical struggle with the appellant at 14 Division on July 1, 2004, but did not know what happened to this report after they sent it to their superiors.

The Police's FOI coordinator then spoke to a staff sergeant, who stated that the use of force report created by the two officers was not "activated" or submitted. In a subsequent conversation with the coordinator, the same staff sergeant stated that because this report was not submitted, it would have been shredded or recycled. The coordinator then spoke to a detective sergeant, who confirmed that he destroyed the use of force report.

As noted above, 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]. In

my view, the Police have submitted sufficient evidence to show that although the use of force report existed at a point in time, it was subsequently destroyed and no longer exists.

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 his representations, the appellant's representative identified several procedural flaws and omissions in the affidavits submitted by the Police, such as the fact that the first affidavit was commissioned by a Commissioner whose authority had expired.

I agree with the appellant's representative that the affidavits submitted by the Police do not conform to certain basic requirements, such as ensuring that an affidavit is commissioned by an individual whose authority has not expired. I would urge the Police, in the future, to ensure that any affidavits that they submit to this office are in compliance with the fundamental legal requirements governing this form of evidence. However, the flaws in the Police's affidavits do not detract from the substance of their evidence, which demonstrates that the use of force report no longer exists.

The appellant's representative further submits that the Police had a legal duty to submit a use of force report. In his view, it is not credible for the Police to argue that the appellant did not suffer his injury as a result of the use of force, given that two police officers decided to create a use of force report.

It is not my role to determine whether a use of force report *should* have been submitted in accordance with the requirements of Regulation 926 of the *PSA*, based on the factual circumstances that led to the appellant's injury. If the appellant believes that the Police have not complied with the legal rules governing the submission of use of force reports, Part V of the *PSA* sets out the process for complaining about the policies or services provided by a police force or the conduct of a police officer.

My role is to determine whether the Police have conducted a reasonable search for records, as required by section 17 of the *Act*. I have concluded that the appellant's representative has not provided me with a reasonable basis for finding that the search for the use of force report was not reasonable.

In short, I am satisfied that the Police have made reasonable efforts to locate and identify the use of force report. I accept the evidence submitted by the Police showing that this record was destroyed and no longer exists. I find, therefore, that the Police have conducted a reasonable search for this record, as required by section 17 of the *Act*.

Given that I have found that the Police have conducted a reasonable search for the use of force report, it is not necessary to assess whether this record would also be excluded from the scope of the *Act* under section 52(3).

ORDER:

I uphold the decision of the Police and dismiss the appeal.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

January 9, 2007 _____