



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2862

Appeal PA09-204

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 49 part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). This appeal relates to part 28 of that request. Specifically, that request was for the following information:

A copy of all Use of Force Reports submitted pursuant to section 14.5(1)(a) of O. Reg. 926 *Equipment and Use of Force* for “Project Culbertson” and/or during policing of the Tyendinaga protests on April 21-28, 2008 and June 28-29, 2007.

The Ministry issued a decision advising that “a search for the records was conducted and access to the record in full is granted.” The record provided was a Use of Force Report involving the use of a taser.

The requester (now the appellant) appealed the decision of the Ministry on the basis of their belief that additional records should exist.

During the course of mediation, the appellant narrowed the scope of the request to Use of Force Reports created when drawing hand guns only. In addition, the request was further narrowed to records relating to the time period of April 21 to April 28, 2008 only. As a result, the Ministry’s search for records relating to the time period of June 28 to June 29, 2007 is no longer in issue.

The Ministry conducted additional searches during the course of mediation however, no additional records were located. No further mediation was possible and the matter proceeded to adjudication.

On October 28, 2009, I conducted an oral inquiry by teleconference into the issue of whether the Ministry’s search for responsive records was reasonable. Participating in the inquiry were the appellant, the Ministry’s Freedom of Information and Privacy Co-ordinator, legal counsel for the Ministry, the Bureau Commander of Operational Policy and Strategic Planning of the Ontario Provincial Police (the OPP), the Deputy Director of the OPP Academy, the Manager and an Analyst of the Risk Management Section of the OPP.

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 24 of the *Act* [Orders P-85, P-221 and 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 [Orders P-624 and PO-2559].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

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 MO-2246].

The Appellant's Representations

In their letter of appeal, the appellant provided this office with a copy of the OPP Orders regarding Use of Force Reports. Specifically, the appellant refers to Form LE156 in Chapter 2, section 2.42.5 which states, in part:

A member/auxiliary member shall submit Form LE156 – Use of Force Report to the Commissioner, whenever they

- draw a handgun in the presence of a member of the public...
- point a firearm at a person
- ...

[original emphasis]

The appellant included with their letter of appeal a copy of a photograph which shows police officers with their weapons drawn. This photograph was subsequently sent to the Ministry as well. The appellant contends that this photograph was taken at the Tyendinaga protest site. In addition, the appellant advised that they have sworn copies of affidavits of individuals who allege to have witnessed OPP officers withdraw and point their guns at individuals during the Tyendinaga protests. One such affidavit was provided, in confidence, to this office with the letter of appeal. The appellant subsequently provided five additional affidavits to this office and to the Ministry.

In their submissions at the oral inquiry, the appellant stated that they rely upon the information set out in the affidavits which had been submitted to both this office and the Ministry. The appellant stated that these affidavits were sworn by individuals who were present during the protest at issue. Each affidavit refers to the incident which occurred on April 25, 2008 and each affidavit makes reference to officers withdrawing and pointing their guns at individuals during the protest.

The appellant concluded his submissions by saying that, in accordance with the filing requirements set out in section 14.5(1)(a) of Regulation 926 of the *Police Service Act*, there is a reasonable basis to believe that additional Use of Force Reports exist.

The Ministry's Representations

The submissions of the Ministry were made by the Superintendent and Commander of the Operational Policy and Strategic Planning Bureau of the OPP (the Superintendent). He explained that members of the OPP submit all Use of Force Reports to their respective Supervisor. The Supervisor then submits these reports to the Detachment Commander, who submits the reports to the Regional Commander. The Regional Commander would then submit the reports to the OPP Academy. He advised that part B of the Use of Force Report (which contains the name of the officer and the particulars) is removed and it is destroyed within 30 days of the submission of the report. The remainder of these reports are filed and maintained at the OPP Academy for two years plus current.

He advised that in response to the request at issue, the Deputy Director of the OPP Academy requested that the Acting Staff Sergeant review all Use of Force Reports submitted for the two time periods set out in the request. He indicated that a manual search was conducted and nineteen Use of Force Reports were located that fell within the time frames at issue. Only one of these reports was found to be responsive to the original request. The Ministry then issued a decision granting the requester access to that one Use of Force Report.

The Superintendent advised that he subsequently received a copy of the photograph which was provided by the appellant and which shows police officers with long guns drawn. Following receipt of that photograph, the Acting Staff Sergeant of the OPP Academy conducted another search and located the same nineteen records.

The Superintendent advised that, during the course of mediation, he received copies of affidavits which the appellant had sent to the Ministry. He indicated that following receipt of these affidavits, he contacted the Detachment Commander of the Nappanee Detachment, which is the detachment responsible for the area where the incident at issue occurred. He advised that a search was conducted at that detachment and no records were located.

The Superintendent advised that he asked the Nappanee Detachment Commander to arrange to have each officer involved in the incident interviewed. Specifically, they were to be asked if they drew a hand gun, and if so, if they submitted a Use of Force Report. If they did submit a Use of Force Report, they were to be asked to locate it. The Superintendent was subsequently advised that a Detective Constable of the Nappanee Detachment conducted interviews with all of the officers involved in the incident. He was further advised that seventeen OPP officers were involved in this incident. Of those, four officers indicated that they drew a hand gun however, three of these officers advised that they did not submit a Use of Force Report. One officer, who was stationed at the Stormont Dundas Glengary Detachment, advised that he did submit a Use of Force Report.

As the officer who had submitted a Use of Force Report was from the Stormont Dundas Glengary Detachment, and as the previous search was of the Nappanee detachment, the Superintendent ordered that a search be conducted at the Stormont Dundas Glengary Detachment. No records were located. The Superintendent advised that he later contacted the

Operations Manager of the Stormont Dundas Glengary Detachment requesting that he further search the detachment. The Operations Manager advised that another search was conducted and no records were located. He indicated that he also canvassed the clerical staff who advised that they had no recollection of seeing the report.

The Superintendent requested that the Operations Manager of the Stormont Dundas Glengary Detachment personally speak to the officer who submitted the Use of Force Report. This OPP officer was asked to confirm; the date that he submitted his Use of Force Report, to whom, if he has a copy of the report, and if he has any knowledge of where it would be. That officer confirmed that he submitted his Use of Force Report on May 2, 2008, and placed it in his Staff Sergeant's in tray. His Staff Sergeant was spoken to and he advised that any Use of Force Report in his in tray would be sent to the Long Sue Detachment. The Superintendent advises that the Long Sue Detachment was searched and no such report was found.

In addition, the Superintendent requested a search of the Regional Headquarters for East Region as any such reports would go there before being sent to the OPP Academy at the General Headquarters. As the Regional Headquarters for the East Region is in Smith Falls, a search of the Smith Falls Detachment was ordered. Following these searches, the Superintendent was advised that one member of the East Region Tactical Rescue Unit did attend on the date in question but arrived after the incident and did not draw a hand gun. The East Region Emergency Response Unit advised that they did not have an officer present at the incident.

The Superintendent advised that a Staff Sergeant and a civilian member of the OPP conducted another search of the OPP Academy for the entire month of April, 2008 and that no additional reports were found. In addition, the East Region Tactical Rescue Unit and the East Region Emergency Response Unit were asked to search for responsive records, in case they were involved in this incident. No records were found. A second search was also conducted at the Napanee Detachment and the Superintendent for the OPP was advised that no responsive Use of Force Reports were found.

The Superintendent advised that, following these search efforts, he held a meeting in his office and was advised that of the nineteen Use of Force Reports located at the OPP Academy in response to the original request, only twelve of these reports fell within the narrowed time period of the request. Of those, five were removed because they involved "empty hand techniques" (i.e. no guns were drawn). Of the remaining seven, only one report was found to be responsive to the original request. This is the record which was provided to the appellant. As set out above, this report involved the use of a taser.

In their submissions, the Ministry referred to manual searches conducted in the files of the OPP Academy. Following their submissions, I asked the Ministry to clarify whether Use of Force Reports would also be filed electronically, and if so, whether an electronic search had been conducted. The Ministry confirmed that these forms are filed manually by month, and in addition, each form is copied into an electronic database. The Ministry advised that the electronic copy of Use of Force Reports is identical to the hard copy except that there is no

narrative on the electronic version. The Ministry confirmed that the electronic database was searched on two occasions and that no additional responsive records were found.

In addition, I asked the Ministry whether the Staff Sergeant at the Stormont Dundas Glengary Detachment was asked if he recalls seeing a Use of Force Report in his in tray on May 2, 2008. The Ministry advised that he has never seen that report and that no one from that detachment could recall seeing that report.

Analysis and Findings

I have carefully considered the representations of both the appellant and the Ministry. In considering the submissions of the appellant, I have reviewed each of the affidavits provided to this office.

Based on my review of these affidavits, in conjunction with the requirements set out in Regulation 926 of the *Police Service Act* and the OPP Orders regarding Use of Force Reports, I find that the appellant has established a reasonable basis for concluding that additional records *should* exist. In fact, at the oral inquiry, the OPP acknowledged that, based on their interviews with all of the officers involved in the incident at issue, one additional Use of Force Report should in fact exist. As a result of this finding, a number of additional searches were conducted in an effort to locate that record however, it was not found.

As set out above, the *Act* does not require that an institution prove with absolute certainty that further records do not exist. My role is to determine whether the Ministry has provided sufficient evidence to show that it has made a reasonable effort to identify and locate the responsive records.

The submissions of the Ministry establish that, as new information came to light during the course of mediation, the search parameters were broadened and additional searches were conducted. While it appears that one additional record should exist, I find that the steps taken to locate that record were reasonable. The Ministry has provided detailed information regarding the nature, extent and results of its searches for responsive records. The searches included OPP detachments in the region where the incident in question took place, in addition to other detachments which could have been involved. In addition, each of the OPP officers involved in the incident were interviewed and specifically asked if they filed any such reports. As these reports are ultimately filed at the OPP Academy, those files were searched on several occasions.

Based on the evidence provided at the oral inquiry, I am satisfied that the Ministry canvassed the appropriate staff, and that many detailed searches were conducted by experienced employees who would have knowledge regarding the type of records sought in this appeal.

As a result, I am satisfied that the Ministry has conducted a reasonable search to locate the records responsive to the request.

ORDER:

I uphold the Ministry's search for responsive records and I dismiss the appeal.

Original Signed by: _____
Andrea Schwartz
Acting Adjudicator

_____ January 7, 2010