

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3021

Appeal MA12-590

Toronto Police Services Board

March 12, 2014

Summary: The appellant requested access to information relating to his arrest and detention at a specified police division for a specified time. During the adjudication stage of the appeal the appellant confirmed that the sole issue to be addressed is the reasonableness of the police's search for responsive records. The order upholds the reasonableness of the police's search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information pertaining to the requester in relation to his arrest and detention:

October 7, 2010 - October 8, 2010

Arrest and detention at [a specified police division]

All video surveillance, in all four (4) locations where I was physically present between 15:00hrs and 16:15hrs on [a specified date].

[2] As set out in their decision letter, the police granted partial access to records they identified as responsive to the request, relying on sections 38(a) (in conjunction with section 8(1)(l)) (facilitate commission of an unlawful act) and 38(b) (personal privacy) to deny access to the portion they withheld. The police further advised that certain information was withheld because it was not responsive to the request. In addition, the police referred to the requester's two earlier requests and took the position that he had received all available video in relation to his arrest.

[3] The police further explained that:

... A review of all responsive materials related to your request confirmed the only camera footage involving yourself between the times of 1500-1615 hrs would have been video from the in-car camera taken during your transportation to the Division. ...

Please be advised however that access is denied to a copy of the in-car camera footage as the video no longer exists. Video footage held by the Toronto Police Service is subject to a Record Retention period of one year. As such, the video requested from October 2010 has been purged and is not available.

[4] The requester, now the appellant, appealed the decision, also claiming that the police did not conduct a reasonable search for responsive records and that further information should be disclosed.

[5] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by sending the police a Notice of Inquiry setting out the facts and issues in the appeal. In the Notice of Inquiry the police were asked to specifically identify and explain the nature of the personal information in the records that they claim is exempt under section 38(b) of the *Act*. The police provided responding representations.

[7] I then sent a Notice of Inquiry to the appellant along with the non-confidential representations of the police. The appellant provided representations in response to the Notice. The appellant's representations included an annotated copy of the police's representations, along with additional materials and the appellant's affidavit. The appellant indicated in his representations that he only wished me to address the reasonableness of the police's search for responsive records. This was confirmed in a telephone call between the Adjudication Review Officer assigned to this file and the appellant. Accordingly, the sole issue to be addressed in this appeal is the reasonableness of the police's search for responsive records.

[8] As the appellant's representations on reasonable search raised issues to which I determined the police should be provided an opportunity to reply, I decided to invite reply representations from the police. I sent the police a letter inviting reply submissions along with portions of the annotated representations, and excerpts from the appellant's representations. The police decided not to provide reply representations.

DISCUSSION:

[9] 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 17.¹ 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.

[10] 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.²

[11] 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.³

The police's representations

[12] The police submit that in response to a previous request, the appellant was provided with video of the specified cell in which he was held for a specified time period. The police state that "[a]t that time he was advised that there are no recording devices in the rooms where level 3 Strip Searches are conducted". Subsequently, the appellant was provided with the Booking Hall video for two time periods on the date specified in his request. Then he received a copy of excerpts from a police officer's memorandum book notes "which identified that he was in-transit in a Police Scout car" for a specified time period on that date until he arrived at the specified police division. The police take the position that "[a]ll existing known video has been provided to the appellant".

[13] The police provided the following further detail in support of the reasonableness of their search for responsive records:

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order MO-2246.

The analyst reviewed all available records to determine where the appellant was during the time period between 15:00 hours and 16:15 hours on October 7, 2010. It was determined that [the appellant] arrived at [the specified police division] in a scout car at [a specified time] on October 7th 2010. As the time period [a specified time period] fell within the parameters of the request, the analyst determined that the appellant was being transported from the location of his arrest to [the specified police division]. Although not requested, the appellant was provided with the transporting officer's memorandum book notes which corroborates the timeline and the appellant's precise location during the time period requested.

Upon arrival at [the specified police division], the appellant remained in the Booking Hall until [a specified time] when he was transferred to a Level 3 Search room. Consultation with two independent sources at the division confirmed that [the police do] not operate any video recording in search rooms. At [a specified time], the appellant was returned to the Booking Hall where the booking process continued.

At [a specified time], the appellant was transferred to a holding room. Through contact with the division, it was also determined that [the police do] not operate any video recording in the holding room. In response to an e-mail query, the investigating officer further reported that the appellant declined to be interviewed. As such, at [a specified time] the appellant was transferred to a cell where he remained until [a specified time] on October 8, 2012, [at which time] he was then transferred to Court.

The analyst, however, continued to search for any additional video footage during the time period 15:00 hours to 16:15 hours. On November 28th, 2012 a request for the in-car camera video was placed with Video Services Unit. On November 29th, 2012 Video Services Unit (Evidence Section) advised that any video from the Scout Car had been purged in accordance with [the police] Record Retention Schedule. All avenues to locate any video, according to the parameters provided by the appellant, were searched and proved negative for any responsive video.

[14] The police included with their representations an affidavit of an analyst in its access and privacy section deposing that:

- After reviewing two earlier completed requests for video from the October 7, 2010 incident, a chronology was completed for the specified time period and a search was undertaken for any additional available video.

- In response to a request for a copy of the in-car camera video of the transporting police car, the Video Services Unit (Evidence Section) advised that the clip had been purged.
- During part of the time period in question the appellant was searched and held in a holding room and the officer-in-charge advised that it is the policy of the police that Level 3 searches not be videotaped. The holding room and the Level 3 strip search room have no video surveillance.
- All known existing video recordings for the time period 15:00 to 16:15 hours have been located and provide to the appellant.
- No other video exists

The appellant's representations

[15] The appellant provided a great deal of information regarding his concerns about his interactions with the police and their representations in the appeal.

[16] With respect to the reasonableness of the police's search for responsive records, the appellant deposed in an affidavit that:

On the occasion and location of my L3 strip search, despite [police] assertions to the contrary, I observed a small globe camera mounted in the upper corner to the right of the room's entry door. [Another division's] officers conducted the strip search at the [specified police division]: they were not in 'familiar territory'; they might not have observed the presence of the camera; and, they relied upon 'direction' from a superior officer to comply with known proclivities toward abuse of the law enforcement 'tool' by [the police].

[17] In a subsequent telephone conversation between the appellant and the Adjudication Review Officer, the appellant maintained his position that additional surveillance video should exist and wanted to know if there was a camera mounted in the strip search room, regardless of whether or not it was turned off or not "operating".

[18] Finally, in the appellant's annotations to the police's representations he indicates that that he did not request scout car footage, and that record, had it existed, would not have been responsive to his request.

Analysis and finding

[19] I have considered all the material and information provided by the appellant during the course of this appeal as well as the police's representations in making my determinations in his appeal. The issue before me is whether the search carried out by the police for records responsive to the appellant's request was reasonable in the circumstances.

[20] As set out above, the *Act* does not require the police to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. In my view, based on the evidence before me, the police have conducted a reasonable search for any responsive record pertaining to the appellant's request. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In this case the appellant deposed that he observed a camera mounted in the upper corner to the right of the strip search room's entry door. Even if such a camera existed the police consistently maintained throughout this appeal that their policy is not to record strip searches and that no video of the appellant's strip search exists. I accept the police's evidence in that regard.

[21] Accordingly, I am satisfied that the police's search for records that are responsive to the appellant's request is in compliance with its obligations under the *Act*.

ORDER:

I uphold the reasonableness of the police's search for responsive records.

Original Signed By: _____

Steven Faughnan

Adjudicator

_____ March 12, 2014