

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3331

Appeal MA14-504

Town of Niagara-on-the-Lake

June 30, 2016

Summary: In responding to an access request under the *Municipal Freedom of Information and Protection of Privacy Act*, the Town of Niagara-on-the-Lake disclosed an edited copy of a video surveillance record. The appellant claimed the record was incomplete, raising the issue of whether the town had conducted a reasonable search for the original video surveillance recording. The adjudicator finds that the town conducted a reasonable search under section 17 of the *Act*. The adjudicator also discusses shortcomings in the town's retention of the record responsive to the access request, and the steps taken to address this.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 30; *Municipal Freedom of Information and Protection of Privacy Regulation 823*, R.R.O. 1990, as amended.

Orders and Investigation Reports Considered: Order MO-1725, Order MO-2244-I.

OVERVIEW:

[1] The Town of Niagara-on-the-Lake (the town) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a visit by the requester to the town hall on a specific date.

[2] The town located several responsive records, including emails and a surveillance video with audio. The town disclosed the emails to the requester. The town denied access to the video, claiming the application of the discretionary exemption in section

13 (danger to safety and health) and the mandatory exemption in section 14 (invasion of personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision to this office.

[4] During mediation of the appeal, the town disclosed the video recording to the appellant. The town indicated during mediation that the responsive video was not the original video recording, but that it was created from the original by IT staff.

[5] On reviewing the disclosed video, the appellant observed the video recording did not contain footage of the entire period of his visit to the town hall. The town responded by explaining that the missing portion of the video was due to the video surveillance system being motion-activated. When the system detected motion within its frame, it started recording. When it no longer detected motion, it stopped recording. The town stated that the gaps represented periods of time when the system was not recording.

[6] The appellant did not accept the town's explanation regarding the video recording and asked to view the original video recording. The town advised that it had no objection to the appellant viewing the original video recording but that it no longer existed. While the appellant's initial request was made the day after the original video recording occurred, the town advised that surveillance videos are retained for 30 days and then automatically erased.

[7] The appeal moved to the adjudication stage, where an adjudicator conducts an inquiry. The adjudicator issued a Notice of Inquiry to the town, which provided it with the opportunity to make submissions about whether the town had conducted a reasonable search for the original video recording. The town provided a brief response to the Notice of Inquiry. The adjudicator then issued a Notice of Inquiry to the appellant, who provided submissions.

[8] The appeal was subsequently transferred to me for disposition. On reviewing the appellant's submissions, I determined that they raised issues which it was necessary for the town to reply to in order to be able to finally dispose of the appeal. I issued a Reply Notice of Inquiry, inviting the town to provide further submissions on the issue of whether it had conducted a reasonable search for records and to provide submissions on the issue of destruction and retention of records. I received submissions on both issues from the town.

RECORDS:

[9] The records at issue are:

1. the video recording disclosed to the appellant of his visit to the town hall on September 30, 2014, which the appellant says is incomplete; and

2. the original video recording of the appellant's visit to the town hall, which the appellant says ought to exist.

ISSUES:

[10] The issues in this appeal are:

1. Did the institution conduct a reasonable search for records under section 17 of the *Act*?
2. Did the institution destroy responsive records? If so, what were the circumstances surrounding the destruction? What, if any, is the appropriate remedy?

DISCUSSION:

Issue A: Did the institution conduct a reasonable search for records?

[11] 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.

[12] 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 To be responsive, a record must be "reasonably related" to the request.³

[13] 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.⁴

[14] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[15] Although a requester will rarely be in a position to indicate precisely which

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

Submissions of the parties

[16] The town's initial submissions on the issue of reasonable search were brief. They said that no original recording was available because the original was kept for 30 days, and that the gaps in the record were due to the motion-activated recording setup.

[17] The appellant's submissions raised several issues about whether there was a more complete recording of his visit to the town hall than the record provided to him by the town. The appellant's position was that the video recording made available to him, which did not contain footage of his entire visit to the town hall, must be an incomplete copy of an original recording of his visit and that the original recording should still be available.

[18] In order to determine whether the town had conducted a reasonable search for records of the appellant's visit to the town I sent the town a Reply Notice of Inquiry seeking more information about its search for records. The Reply Notice of Inquiry asked the town to provide a detailed written statement, in affidavit form, of all the steps it took in response to the appellant's request. This included providing details of any searches carried out in response to the request, including who conducted them, what places were searched, who was contacted in the course of conducting the search, what types of files were searched and what the results of the searches were.

[19] Because the town had advised that the original recording was no longer available, it was also asked to consider whether copies of the original record may exist elsewhere, including providing details of how many copies of the record were made by the town, either for responding to the request or for record retention purposes; whether copies of the record were sent to any other individuals or departments of the town; and whether copies of the record were sent to individuals or organizations outside the town. In addition, the town was asked to consider whether it was possible to reconstruct the original recording using information contained in other electronic files.

[20] The town was also asked to provide documents or other evidence to support its position.

[21] The town provided a written summary of all steps taken in response to the request. This included details of searches carried out, including who conducted them, the places searched, who was contacted in the course of the search, what types of files were searched and what the results of the searches were. It also provided details of its record retention practises. As requested, the town provided information about its

⁶ Order MO-2246.

searches in affidavit form.

[22] In light of the town's brief response to the original Notice of Inquiry and issues raised by the appellant's submissions in response to the Notice of Inquiry he received, the issue of destruction of records was added to the Reply Notice of Inquiry sent to the town. The town was asked to provide further details of when the original video recording was destroyed. It was asked for detailed submissions explaining all the circumstances surrounding the destruction of the video recording including, but not limited to, when and how the destruction occurred, who destroyed the records and who had any knowledge of the destruction. In addition, it was asked to provide copies of any documentation pertaining to the destruction, as well as copies of any relevant policies, procedures or guidelines pertaining to the destruction of records, including information about record maintenance policies and practices such as evidence of retention schedules. It was also asked to address in particular the issue of destruction of records subject to an access request.

Analysis

[23] From the town's evidence I am satisfied that it has conducted a reasonable search for additional responsive records, including a more complete video recording of the appellant's visit to the town hall.

[24] In its reply submissions the town provided detailed affidavit evidence to support its position that the video recording of the appellant's visit to the town hall previously disclosed to the appellant is the only available record. The town's manager of IT, who is responsible for the town's video surveillance system which recorded the appellant's visit, provided affidavit evidence that at the time of the appellant's visit to the town hall, the video surveillance system only recorded when it detected motion. The manager says this is why there is no recording for certain time periods during the appellant's visit.

[25] The appellant's submissions raise questions about the plausibility of there being no motion for periods of his visit. He points to evidence in the recording disclosed to him which suggests that motion did occur in some periods for which there is no recording. This includes objects and individuals in the recording moving location between the available images. He also points to the seeming incompatibility of the town's explanation that the gaps in the recording are because no motion was detected by the security system with its position that his visit involved a "heated discussion" with a town employee, which would have involved motion sufficient to activate recording. The issues raised by the appellant about the recording are legitimate questions, but unfortunately cannot be definitely answered because I conclude, based on the town's evidence, that it no longer has the original recording of the appellant's visit. I will explain the reason for reaching this conclusion below.

[26] In its reply submissions, the town's IT manager explained in an affidavit the

process he followed to create the record provided to the appellant. He states that the original recording made by the video surveillance system existed in a proprietary format that can be viewed only in the viewer for the security system that made the recording. He therefore copied the video recording made in the town's surveillance system into a more common file format that would be able to be viewed by others using Windows Media Player. He says that he copied all of the original recording from the proprietary system into the more readily viewable format. He then edited the recording to collate the various periods of motion recorded by the security system together into one recording.

[27] The town has always maintained the position that the original recording made in the surveillance system was only retained for 30 days. The affidavit evidence of the town's IT manager corroborates the town's position, explaining that recordings in the security camera system are automatically deleted by the system after 30 days of the recording being made. He further explains that as he had made a copy of the video recording of the appellant's visit to town hall as outlined above, and because he received no additional requests for footage for the date in issue, he did not see any need to interfere with the 30-day automatic deletion process.

Conclusion: reasonable search

[28] I am satisfied based on the town's submissions that it conducted a reasonable search for records. The town has provided an explanation in affidavit form explaining why and how the recording provided to the appellant was created and why there is no additional record available - because the original was automatically deleted after 30 days. I am satisfied that the institution has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Experienced town employee's knowledgeable in the subject matter of the request, expended a reasonable effort to locate records reasonably related to the request. For these reasons I am satisfied that the ministry has conducted a reasonable search for records.

Issue B: Did the institution destroy responsive records? If so, what were the circumstances surrounding the destruction and what is the appropriate remedy?

[29] As discussed above, the appellant made his request for records on the day after his visit. The town made a copy of the original record to assist its response to the request. The town's affidavit evidence is that it made the copy to transfer the record into a file format that would be more easily viewable. However, the town's affidavit evidence also says the town edited the copy "to collate the various periods of motion recorded by the security system." After this edited copy was created the town destroyed the original record, following its practice of recording over original video surveillance footage after 30 days.

[30] The IT Manager stated that as he had made a copy of the original video

recording in a format that was able to be viewed by others using Windows Media Player, and because he did not receive any additional requests for footage for the date in issue, he did not see any need to interfere with the 30-day automatic deletion process.

[31] The town states that at the date of the appellant's access request, the security system that made the recording in issue was new and that the town had never before received a request for a copy of a recording from that system. It says it did not have any policies on retention of security camera footage at the time.

[32] The IT Manager states that the town has changed the security system's recording method so that it records continuously between 8.30am and 4.30pm, rather than just when it detects motion. The 30-day retention period before automatic deletion of records remains.

Analysis

[33] To give effect to the access provisions in the *Act*, a request for records requires the institution receiving that request to ensure that any responsive records are retained and not destroyed until the request has been satisfied and any subsequent proceedings before the Commissioner or the courts is completed.⁷

[34] Institutions have an inherent responsibility to retain records containing information which is the subject of a request under the *Act*, regardless of the operation of any records retention schedule or practice which may result in their destruction.⁸

[35] It is clear from the town's evidence that the 30-day automatic deletion process for video surveillance footage meant that the original video surveillance recording was destroyed, though the recording was the subject of an access request, which the appellant lodged the day after his visit.

[36] I accept that the town's IT Manager genuinely believed that making a viewable copy of the original record was enough to preserve the record that was the subject of the request. However, the evidence is that the retained copy was edited. Therefore, the remaining record was no longer a copy of the original recording that was responsive to the appellant's request. Where a copy of an original record that is the subject of a request under the *Act* is edited and the original record destroyed, this can create mistrust that an institution is disclosing all of a responsive record. This hampers achieving the purpose of the *Act* to promote openness and transparency. In this instance it allowed for a suspicion of wrongdoing, though I accept that the town's IT Manager genuinely believed that he had adequately preserved the record that was the subject of the request.

⁷ See Orders MO-2244-I, MO-1725 and MO-2809.

⁸ Interim Order M-1121.

[37] The town says that it is in the process of creating a policy on the video surveillance system. I take this to mean that this will include a process for responding to access requests under the *Act*.⁹

[38] While the town's commitment to developing a policy does not address the appellant's desire for a complete record of his visit, I am satisfied that there is nothing more that can be done to that end. Once a policy is implemented, it should prevent a re-occurrence of complaints like the appellant's. It is the appropriate response to the issues arising in this appeal.

ORDER:

I find the town conducted a reasonable search for records and dismiss the appeal.

Original Signed by: _____
Hamish Flanagan
Adjudicator

June 30, 2016 _____

⁹ The town may wish to consult the *Guidelines for the Use of Video Surveillance* available on the IPC website at www.ipc.on.ca