

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-2693-R

Appeal MA09-441

Order MO-2678

Waterloo Regional Police Services Board

February 15, 2012

Summary: This is a reconsideration of Order MO-2678 in which the adjudicator found that the original film used to lift a fingerprint is a "record" as defined in section 2(1) of the *Act*. In this reconsideration order, the adjudicator reverses the previous finding, but finds that a photograph, or copy of the original film is a "record" as defined in section 2(1) of the *Act*. After receiving Order MO-2678, the police conducted a search for fingerprint evidence, located the original film and photographs of it, and disclosed the photographs to the appellant. Therefore, the adjudicator also finds that the police have complied with the order provisions in Order MO-2678.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 2(1) (definition of "record").

OVERVIEW:

[1] The requester made an access request to the Waterloo Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records, documents and forensics, including fingerprint evidence, relating to a break-in at an identified school on a specified date.

[2] The police subsequently issued a decision letter, granting access in part to a number of records. The requester (now the appellant) appealed the police's decision to this office.

[3] During the mediation of the appeal, the police issued two further decision letters, granting access, in part, to more records. Upon reviewing the disclosed records, the appellant advised the mediator that he was not pursuing access to the remaining withheld information, but took issue with the adequacy of the police's search for responsive records and their position that the film used to lift a fingerprint was not a responsive record.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. After an inquiry was conducted into the appeal, I issued Order MO-2678, where I found that a film used to lift a fingerprint is a "record" as defined in the *Act* and that the police did not conduct a reasonable search in regard to fingerprint evidence. Consequently, I ordered the police to conduct a further search for fingerprint evidence, including fingerprint film(s) and to issue a decision letter to the appellant with respect to them.

[5] The police subsequently sought a reconsideration of one aspect of Order MO-2678 as follows:

Specifically on the issue of whether "the film that lifts a fingerprint film(s)" is a "record" under the *Act* and even if it is, whether the fingerprint film(s) fall under the exemption found in section 8(1)(h) . . .

[6] The police's request for a reconsideration included their representations on the issue identified, above. In their representations, the police advised that they had conducted a search for fingerprint evidence, and had located the original fingerprint lift card, as well as photographs of it.

[7] I subsequently sought and received representations from the appellant. Representations from the police on this issue were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] The police then issued a supplementary decision letter and granted access, in full, to copies of photographs of the fingerprint lift and notes made on the reverse of the lift card. The police reiterated their position that the actual lift card is seized evidence and subject to exemption under section 8(1)(h) of the *Act*.

[9] In this decision, for the reasons that follow, I reverse my finding in Order MO-2678 that an original film that lifts a fingerprint is a "record" as defined in the *Act*. I also find that the police are in compliance with the order provisions in MO-2678.

ISSUES:

- A. Are there grounds under section 18.01 of the Code of Procedure to reconsider Order MO-2678?
- B. Is the original film that lifts a fingerprint a "record" as defined in the *Act*?

DISCUSSION:

A. Are there grounds under Section 18.01 of the *Code of Procedure* to reconsider Order MO-2678?

The Reconsideration Process

[10] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Grounds for the Reconsideration Request

[11] As set out in paragraph (a) to section 18.01, this office may reconsider an order where it is established that there has been a fundamental defect in the adjudication process.

[12] The police submit that the grounds for reconsideration are the issues set out in the Notice of Inquiry. The police state:

. . . [T]he submissions of the parties did not deal with what a "fingerprint film(s)" is and whether it is a "record" pursuant to the *Act*. As a result, there was a fundamental defect in the adjudicative process, an error that goes to jurisdiction and/or an accidental error or omission or other similar error. Such is completely understandable given the progress of the file and developing issues. The issue of the "film," . . . was not anticipated nor were the minds of parties turned to it as a live issue and certainly not until a further search was completed following the Order. [emphasis added]

[13] During the inquiry into this appeal, the adjudicator originally assigned to this matter sought and received representations on the scope of the request and whether the police's search was reasonable. In Order MO-2678, I made a finding that the original film used to lift a fingerprint is a "record" as defined in the *Act*. However, I failed to seek representations from the police on that issue, which constitutes a fundamental defect in the adjudication process and is sufficient grounds to trigger a reconsideration of the order. Accordingly, I will reconsider my decision in Order MO-2678 on this basis and I will now proceed to reconsider whether the original film used to lift a fingerprint is a "record" as defined in the *Act*.

B. Is the original film that lifts a fingerprint a "record" as defined in the *Act*?

[14] Section 2 of the *Act* specifically defines a "record" as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[15] The definition of a "record" has been construed broadly by this office in past orders. For example, in Order M-893 Inquiry Officer Anita Fineberg held that the use of the word "includes" in the definition demonstrates that the types of documents described are not exhaustive, but provide examples of "records" for purposes of the *Act*. In addition, Inquiry Officer Fineberg also held that once information is "recorded information" it meets the definition of a "record" as set out in the *Act*.

[16] The police submit that the "lift tape" and "lift card" are not similar to a "film" as contemplated in the definition of a record in section 2 of the *Act* and that, in fact, the lift tape is actual evidence seized from a crime scene by the police pursuant to the *Police Services Act* and the *Criminal Code of Canada*. The police provided a detailed explanation of the process for lifting fingerprints as follows:

- An officer dusts for fingerprints at the crime scene. The dust adheres to oils produced by the skin. The pattern remaining is in the shape of the friction ridges on the finger that left the impression, that is, the fingerprint. The officer photographs the fingerprint and then applies the "lift tape" to the print. The fingerprint, consisting of dust and oil, sticks to the tape. The tape is then placed on a "lift card" and kept as evidence;
- The lift card is kept as evidence of the original fingerprint and nothing more. The photographs of the lift are what are used to conduct searches in databases for purposes of making comparisons with other identified fingerprints. Should a dispute arise as to the accuracy of the photographs, the original lift is available to compare it with the photographs; and
- The lift card is made of cardboard with tape adhered to it. The fingerprint is sandwiched between the tape and the card.

[17] The police submit that disclosing the original lift card itself would result in losing continuity of a key piece of evidence in a case. A determination that the actual "film" is a record and, therefore, potentially subject to disclosure under the *Act* is problematic, the police argue, as it may impact future requests and the continuity of seized evidence in this and other criminal matters.

[18] In the alternative, the police submit that the original film card would be subject to exemption from disclosure under section 8(1)(h) of the *Act*.

[19] As previously stated, after Order MO-2678 was issued, the police conducted a search for fingerprint evidence. They located the original lift card and photographs of it. The police then issued a supplementary decision letter to the appellant on January 24, 2012, disclosing the photographs of the fingerprint lift card and accompanying notes to him.

[20] The appellant's representations pre-date the supplementary decision letter issued by the police. In his representations, the appellant states that he is not seeking the fingerprint film card itself, but rather a copy of it.

[21] Based on the evidence provided to me by the police, I am satisfied that the original lift card, which contains the film used to lift a fingerprint, is not a "record" as defined in section 2 of the *Act*. Rather, it constitutes physical evidence collected by the police in an investigation. In addition, I agree with the police that photographs and/or copies of the lift card would constitute a "record" as defined in the *Act*.

[22] Furthermore, I am satisfied that the appellant has clarified that his request was not for the original fingerprint lift card, but for copies of it. I am also satisfied that, at the time of this order, he has received those copies from the police.

[23] Having found that the original fingerprint film card, containing the film used to lift a fingerprint, is not a "record" as defined in section 2 of the *Act*, it is not necessary for me to determine if any exemptions under the *Act* would be applicable.

ORDER:

1. I reverse my finding in Order MO-2678 that the original film used to lift a fingerprint is a "record" as defined in the *Act*.
2. I find that the police are in compliance with the order provisions in Order MO-2678.

Original signed by: _____
Cathy Hamilton
Adjudicator

February 15, 2012 _____