

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2758

Appeal MA11-392

Hamilton Police Services Board

June 28, 2012

Summary:

The appellant sought access to information relating to an incident with a police officer, captured by a CCTV camera. The police granted partial access to responsive information recorded in paper form, denying access to some information pursuant to various law enforcement exemptions. The police advised that they conducted a search for the CCTV camera footage of the incident and found that it does not exist. The appellant appealed the police's application of the law enforcement exemptions to the paper records and the adequacy of the search for records responsive to his request. The appellant then withdrew his appeal respecting the withheld information in the paper records and focused his attention on the search issue, particularly the whereabouts of the camera footage. An oral inquiry was conducted during which only the police attended and gave evidence. The adjudicator issued an order upholding the police's search for responsive records.

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

OVERVIEW:

[1] The appellant submitted the following access to information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Hamilton Police Services Board (the police) regarding an incident that occurred at a specified public location in the City of Hamilton (the city):

On April 5, 2011, I was assaulted by [an identified police constable] at a [specified location] and am requesting the CCTV footage from 12-3 pm. The crown withdrew all charges against me BEFORE it went to court. I would also like to see the surrounding CCTV cameras, in case they caught the assault.

[2] The police issued a decision, granting partial access to portions of the responsive paper records and denying access to some of the responsive information pursuant to the law enforcement exemptions in sections 8(1)(e) and (l), and the personal privacy exemption in section 38(b).

[3] The police also advised that they completed a search for the CCTV camera footage (the camera footage) on the date and at the times specified in the request and confirmed that it does not exist. The police reported that at the time of the incident the footage was "checked and documented" and found to be "static and focused on a different area."

[4] The appellant appealed the police's decision.

[5] During the mediation stage of the appeal process, the appellant focused his attention solely on the reasonableness of the police's search for records responsive to his request and, in particular, the whereabouts of the camera footage. Accordingly, the application of the exemptions in sections 8(1)(e) and (l) and 38(b) to the withheld information was withdrawn from the scope of the inquiry. The appellant believes that the camera footage should exist. The police have indicated that they followed up with appropriate personnel and reiterate that camera footage capturing the incident involving the appellant does not exist.

[6] The parties were unable to resolve the appeal during mediation and the file was transferred to the adjudication stage for an oral inquiry. The sole issue to be determined was whether the police have completed a reasonable search for the camera footage.

[7] On May 16, 2012, I conducted a hearing via teleconference into the reasonable search issue. The appellant, despite being properly notified of the hearing, did not attend. Attending and providing oral evidence on behalf of the police was their Freedom of Information Coordinator (the FOIC).

[8] Following the oral inquiry the police provided additional information in writing in response to questions I posed during the course of the inquiry.

[9] In this order, I uphold the police's search for records responsive to the appellant's request.

ISSUE:

[10] Did the police conduct a reasonable search for records responsive to the appellant's request?

DISCUSSION:

Reasonable search

[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 [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.

[12] 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.

[13] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

[14] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Orders M-909, PO-2469 and PO-2592].

Police representations

[15] The FOIC states that on July 19, 2011 she sent an email to the lead investigator of an incident that occurred at a specified location in the city and provided him with the details of the appellant's request. The FOIC states that she asked the lead investigator whether any footage of the incident had been retained. The FOIC submits that the lead investigator then checked with the Acting Sergeant responsible for the operation of the CCTV cameras, who indicated that the police did not have any footage of the incident because the cameras were "static" and pointed in the opposite direction of the incident. By "static" the FOIC clarified that the cameras were fixed in one direction and not panning the area.

[16] The FOIC also states that she obtained a copy of the lead investigator's witness statement that forms part of the incident file. The FOIC submits that the lead investigator's witness statement indicates that on April 5, 2011 at "17:40 hours [the Acting Sergeant] advised me that she had checked the [specified] street cameras with negative results. They are static and pointed in a different area." The FOIC states that the lead investigator's witness statement forms part of his final report on the incident.

[17] The FOIC states that the CCTV cameras used by the police are fixed on poles throughout the city. She believes that there was one camera in the vicinity of the incident, which was fixed on a pole.

[18] The FOIC states that pursuant to the police's Retention Schedule (November 2006) (the retention schedule), CCTV camera footage is generally retained for 72 hours. The FOIC provided a copy of page 2 of the retention schedule, which addresses the retention of "tapes/digital storage." Within this category, the section described as "CCTV – Public Streets" specifies a retention period of "72 hours (Easter and Christmas breaks – 120 hours)."

[19] The FOIC states that in circumstances where an incident occurs and it is recorded on camera, the Acting Sergeant would create a copy of the camera footage for use as evidence in any court proceeding that might arise as a result of the incident. In this case, the lead investigator would have informed the Acting Sergeant of the incident who then would have checked the footage to determine whether it contained footage of the incident. The FOIC states that, in this case, since the incident was not recorded on camera the footage that had been recorded was not copied. The FOIC submits that she was advised by the Acting Sergeant that the recorded footage would have been erased 72 hours after the incident.

[20] The FOIC states that the police officer involved in the incident was badly injured, has not returned to work and will likely not return to work. The FOIC states that the appellant was charged with assault as a result of the incident, but the charges were dropped because the police did not have video evidence to support the charges.

Analysis and findings

[21] Having reviewed the police's representations, including the FOIC's oral evidence and the relevant portions of the retention schedule, I am satisfied that the police have conducted a reasonable search for the camera footage.

[22] The issue for me to decide in this case is whether the police have taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. The key, therefore, is reasonableness.

An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

[23] In this case, the oral evidence presented by the FOIC demonstrates that the police undertook a systematic and comprehensive search for the camera footage of the incident.

[24] The FOIC indicates through her evidence that the police have CCTV cameras positioned throughout the city to monitor public activity. The FOIC states that the CCTV camera program is operated by a police employee, namely the Acting Sergeant.

[25] The FOIC states that in conducting her search, she consulted with the lead investigator of the incident who then consulted with the Acting Sergeant to determine whether a recording of the camera footage on the date and time in question exists.

[26] Based on the information that the FOIC received from the lead investigator and Acting Sergeant, she believes there was one camera mounted on a pole in the vicinity of the incident in question. However, the FOIC understands that this camera was positioned in a static or fixed position and aimed in a different direction, away from the area where the incident occurred.

[27] As a result, the evidence of the police is that the information recorded on the camera on the date and time in question was unrelated to the incident. Accordingly, the FOIC states that the Acting Sergeant did not retain a copy of the footage and erased it after 72 hours had elapsed in accordance with the police's retention schedule.

[28] While I have not heard directly from the lead investigator and the Acting Sergeant, I find the FOIC's representations credible and the information she has related from both the lead investigator and Acting Sergeant consistent with a finding that the record the appellant seeks does not exist. In my view, the police have provided me with sufficient evidence to show that they have made a reasonable effort to identify the camera footage of the incident. Unfortunately, based on the evidence presented, it appears that the information sought by the appellant capturing the incident never existed.

[29] To conclude, in the circumstances of this case, I find that the police have made a reasonable effort to respond in good faith to the appellant's request. Accordingly, I am satisfied that the police have conducted a reasonable search for records responsive to the appellant's request.

ORDER:

I uphold the police's search for records responsive to the appellant's request and dismiss the appeal.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ June 28, 2012