



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2051

Appeal MA-050290-1

Deep River Police Services Board



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NATURE OF THE APPEAL:

The Deep River Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "... a copy of each of the inspections conducted on the operations of the Deep River Police Service since 1990".

The Police identified two reports as responsive to the request and denied access to them on the basis that they qualify for exemption under section 9(1) (relations with other governments) of the *Act*.

The requester (now the appellant) appealed that decision.

Mediation did not resolve the issues in this appeal. At the conclusion of that stage of the appeal process, the mediator sent a draft Mediator's Report to the parties stating that the sole issue in the appeal is the application of the section 9(1) exemption to the records. In response to the Mediator's Report, the Police wrote to the mediator and stated:

The requested reports are documents generated by the department now known as the Ministry of Community Safety and Correctional Services. The authors as noted on each of the reports are employed by this Ministry. The reports are generated as an obligation of the Ministry and not that of the Deep River Police Service. The Deep River Police Service has no direct ownership of the reports, even though it is the subject matter of the reports.

Accordingly, the mediator added the question of whether the Police have the required custody or control of the records as an issue in this appeal.

The appeal was transferred to the inquiry stage of the process, and a Notice of Inquiry setting out the facts and issues in the appeal was initially sent to the Police, as well as to the Ministry of Community Safety and Correctional Services (the Ministry) as an affected party. The Ministry was invited to provide representations on whether the information should be disclosed and also on whether it consented to disclosure of the information. Both the Police and the Ministry provided representations in response to the Notice of Inquiry. The Ministry's representations simply stated, "Please be advised that the Ministry takes no position with respect to the issues raised on this particular appeal".

The Notice of Inquiry, together with the complete representations of the Police and the letter received from the Ministry, was sent to the appellant, and the appellant also provided representations in response.

RECORDS:

The records remaining at issue consist of the following two inspection reports:

- Inspection Report, Deep River Police Service, May 1997, Ministry of The Solicitor General and Correctional Services (now Ministry of Community Safety and Correctional Services)
- Report on the Inspection of the Deep River Police Service, January 2005, Ministry of Community Safety and Correctional Services.

DISCUSSION:

PRELIMINARY ISSUE

In his representations, the appellant identifies that he has worked in the past in a particular capacity with the Police and, based on that involvement, is aware that an additional earlier report existed. He states that he is unsure whether or not this earlier report was prepared prior to the time period covered by his request, but asks that access to this record be included as an issue in this appeal. In the circumstances, I have decided not to include access to this additional report as an issue in this appeal at this time because 1) the Notices of Inquiry sent to the parties only dealt with access and custody issues relating to the two identified inspection reports; 2) the appellant could have raised the issue of whether additional responsive records exist at any time during the course of this appeal, but chose not to until this final stage of the process and; 3) the appellant himself admits that the identified record may not fall within the parameters of the request.

Accordingly, the question of whether an additional responsive record exists is not an issue in this appeal. The appellant may, of course, pursue this further with the Police.

CUSTODY OR CONTROL

General principles

Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

In addition, based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution as follows [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the record relate to the institution’s mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record’s use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

Representations

Although the Police confirm that they were in possession of the records responsive to this request, they take the position that the custody and control of the records lies with the Ministry. The Police refer to the fact that the Ministry created these records, and simply distributed them on a voluntary basis to the Police. The Police also state that the inspections and resultant reports “were compellable processes conducted and completed on the [Police], by Ministry personnel”.

The Police also refer to the fact that they were advised by Ministry personnel that the reports would be subject to Freedom of Information requests, and the Police argue that this notification by the Ministry supports their position that the Ministry has control of the document, rather than the Police.

Finding

Previous orders of this office have reviewed the issue of whether possession of a record constitutes “custody or control” of the record for the purpose of section 4(1) of the *Act*. In Order P-120, former Commissioner Linden also stated that subsection 10(1) of the *Freedom of Information and Protection of Privacy Act* (the equivalent to section 4(1) of the *Act* in this appeal) gives a person:

... a right of access to records that are "in the custody or under the control of an institution". Accordingly, only one requirement must be satisfied in order for a record to be governed by the *Act*.

Regarding the issue of whether possession of a record was determinative of the issue of custody or control, former Commissioner Linden stated as follows in that order:

In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

Furthermore, in Order P-239, former Commissioner Wright stated:

... mere possession does not amount to custody for the purposes of the *Act*. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

In the circumstances of this appeal, I am satisfied that the Police had more than “mere possession” of the records at issue. Although the records were prepared by the Ministry, they relate specifically to the mandate and functions of the Deep River Police Service, and contain detailed information regarding the operations of the Police. Much of the information contained in the reports was obtained as a result of meetings with members of the Police force.

Furthermore, the reports contain detailed recommendations relating specifically to this Police Service. In addition, the Police confirm that they were provided with copies of the reports “directly as a result of the Ministry complying with their statutory requirements.”

With respect to the argument by the Police that the records were voluntarily provided to them by the Ministry, although there may not exist a legal obligation to provide the records to the Police, it is clearly Ministry policy to provide the reports to the Police in order for the Police to benefit from the recommendations contained in them. Furthermore, with respect to the position of the Police that the Police were advised by Ministry personnel that the report would be subject to Freedom of Information requests, in my view this equally supports the argument that the Police have the right to “deal with” the records and some responsibility for their care and protection.

In the circumstances, I find that the Police have more than mere possession of the records, and that they have custody of the records for the purposes of the *Act*. I will now address the application of section 9(1)(b) to the records.

RELATIONS WITH OTHER GOVERNMENTS

General principles

Section 9(1)(b) states:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

the Government of Ontario or the government of a province or territory in Canada;

Section 9(2) reads:

A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is “to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure” [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to “reveal” the information received [Order P-1552].

The representations of the Police focus on their position that the records are not in their custody or control. The Police do not provide representations on whether they received the information “in confidence” from the Ministry. The Ministry “takes no position” regarding the possible application of section 9(1)(b).

In the circumstances, I have not been provided with sufficient evidence to support a finding that the records at issue qualify for exemption under section 9(1)(b). Although I accept that the Police received the records from a Ministry of the Government of Ontario, there is insufficient evidence to support a finding that these records were received by the Police “in confidence”. Accordingly, I find that the records do not qualify for exemption under section 9(1)(b), and I will order that they be disclosed to the appellant.

ORDER:

1. I order the Police to disclose the records to the appellant by **May 19, 2006**.
2. I reserve the right to require the Police to provide me with a copy of the information which is disclosed in accordance with Provision 1.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ April 28, 2006