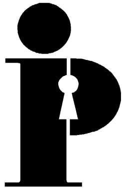

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2142

Appeal MA-060011-1

Halton Regional Police

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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Halton Regional Police Services Board (the Police) received a request for a copy of a forensic report prepared by an accounting firm, relating to a specific company and a named individual.

The Police identified one record as responsive to the request. In the decision letter issued to the requester, the Police claimed that the record was not in its custody or under its control, as required by section 4(1) of the *Act* in order to establish a right of access to it. The Police took the position, in the alternative, that access to the record would be denied through the application of the mandatory exemption in section 14(1) (unjustified invasion of personal privacy), in conjunction with the presumption at section 14(3)(b), and several of the factors in section 14(2) of the *Act*.

Through its representative, the requester (now the appellant) appealed this decision. Mediation was not possible and the appeal moved to adjudication where it was assigned to me to conduct an inquiry.

Initially, I sent a Notice of Inquiry to the Police seeking representations on the issues, which I received. I then sent a modified Notice of Inquiry to the appellant's representative, enclosing a copy of the non-confidential representations of the Police, to seek the appellant's submissions. The appellant's representative submitted representations in response.

For simplicity's sake, both the appellant and its representative will be referred to as the appellant in this order.

RECORD:

The sole record at issue is a 14-page forensic accounting report.

DISCUSSION:

CUSTODY OR CONTROL

As a preliminary matter, I must first determine whether the record is in the custody or under the control of the Police under section 4(1) since the *Act* only applies to records that are in the custody or under the control of an institution.

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 . . .

In other words, if I find that the Police do not exercise custody or control over the record, it is not necessary for me to proceed with an analysis of the exemptions claimed by the Police in the alternative, since the record is thereby excluded from the *Act* and from my review.

General Principles

The courts and this office have applied a broad and liberal approach to determination of 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.), *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.), Order MO-1251).

Based on that approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or under the control of an institution (Orders 120, MO-1251). The list is not intended to be exhaustive. The application of listed factors, and any unlisted ones, is dependent upon the circumstances of the individual appeal. A selection from the list of factors includes:

- Was the record created by an officer or employee of the institution? [Order P-120]

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What use did the creator intend to make of the record? [Orders P-120, P-239]

- Who owns the record? [Order M-315] Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- 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]

- 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]

- Does the institution have a right to possession of the record and/or the authority to regulate its use and disposal? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution? [Order M-165]

Representations

The Police submit that, in evaluating the appellant's request for the forensic accounting report, they concluded that although a copy of the report was in their possession, it was not under their control and they could not, in the circumstances, disclose it to the appellant.

The Police provided the following list of factors which they considered in deciding that they did not exert the requisite degree of custody or control over the record:

- The record was not created by an officer or employee of the Police; rather, it was prepared by a named accounting firm retained by a specific company to assist it in investigating the actions of a named employee of that company.
- The record is owned by the accounting firm and the specific company paid for its creation.
- A copy of the record was voluntarily shared with the Police "in strict confidence", with the expectation that the report would not be shared and pursuant to an express indication in the record that its contents are confidential and should not be used for any other purpose or provided to any third party without the accounting firm's prior written consent.
- The copy of the record was provided to the Police by the accounting firm to aid the Police in "properly investigating" the actions of the individual identified in the report, an investigation which relates to the law enforcement powers of the Police under the *Police Services Act*.
- While the Police may use the copy of the record to investigate the specific matter, the Police have no authority to regulate the retention, use or disposal of the original record.

The appellant only briefly addressed the factors outlined in the Notice of Inquiry regarding the issue of custody or control, asserting that who holds the original of the record (the accounting firm) and who paid for its creation (the specific company) are not relevant considerations. In response to the submission that the Police received the record from the accounting firm "in strict confidence", the appellant states that it is:

> … not aware of any written confidentiality agreement between the Police and [the accounting firm]. In any event, any such confidentiality was lost/forfeited once the document was entered into the public record, and cannot now be relied upon to justify withholding the document…

The reference to "the public record" stems from the appellant's central argument that his entitlement to access hinges on the fact that the record was "introduced into evidence in a criminal proceeding" and, as such, "formed part of the public record of that proceeding". The appellant submits that because there is no court order prohibiting the record's disclosure, it ought to be available as part of that public record.

In support of his position that the responsive record represents a "public record", the appellant's representations include excerpts from Supreme Court of Canada decisions that address "the public interest in open and accessible court proceedings" as regards the granting of publication bans and issuing of sealing orders. These cases include *Toronto Star Newspapers Ltd. v. Ontario* [2005] 2 S.C.R. 188 (*Toronto Star*), *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442. For the sake of brevity and for reasons explained in my findings, below, these excerpts will not be reproduced in the order.

Analysis and Findings

Appeals under the Act - Limitations

The appellant's representations canvas the state of the law in Canada relating to the "open courts principle", which seeks to further the goal of promoting transparency in the administration of justice. The cases cited by the appellant describe the balancing exercise necessarily undertaken by judges in responding to calls from the media and other members of the public to open up court processes and documents to greater scrutiny. Such situations frequently require a judge to engage in a *Charter* rights-based analysis to balance the oft-competing interests of the media and the public in obtaining access against the right of an accused person to privacy.

As pressing and important as these matters may be in Canada today, however, the principles for which the cited cases stand are not relevant or referable to the analysis of the particular issue before me, which is the determination of whether or not the responsive record is in the custody or under the control of the Police for the purposes of the *Act*. In stating this, I am hoping to assist the appellant in understanding that the boundaries of this inquiry and my authority are circumscribed by the *Act* and the established procedures of this office.

Is the Record in the Custody or Control of the Police

As noted previously, a list of the factors considered in previous orders to assist in determining the custody or control issue was provided to the parties to offer a framework for them in preparing their representations on this issue. Although representations based on these factors from the appellant were limited, I have reviewed the record and considered all of the

circumstances of this appeal. For the reasons that follow, I find that the Police exercise the requisite degree of custody or control over the record to bring it within the ambit of the *Act*.

In Order 120, former Commissioner Sidney Linden described a possible approach to determining whether specific records fall within the custody or under the control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the *Act*, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In this appeal, the record was prepared by an accounting firm upon the request – and payment – of a company interested in the firm's findings for its own separate investigation into the conduct of a former employee. I note that previous orders of this office have held that the *Act* may apply to information in the custody or under the control of an institution, notwithstanding that it was created by a third party (Orders P-239, P-1001 and MO-1225).

The Police came into possession of the record when a copy was voluntarily provided to the Police by its author on behalf of the accounting firm. The Police have argued that possession of a *copy* of the record does not amount to custody or control of the original record. However, the fact that the Police possess only a copy of the report is not determinative. In Order P-239, former Commissioner Tom Wright held that:

> … 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.

The factors described in the following paragraphs demonstrate that, apart from "mere possession", the Police have rights and responsibilities in relation to the record that operate to bring it within their custody or control.

Although the record was initially commissioned and paid for by the company for its own investigative purposes, it was voluntarily provided to the Police by the accounting firm. Furthermore, the Police acknowledge, and I accept, that even if the record had not been provided voluntarily by the accounting firm, it could have been obtained by court order, which suggests that the Police may exert an element of control over the record regardless of whether it had been provided to them voluntarily, so long as it is relevant to a criminal investigation.

The Police acknowledge that they have the right to use the record and I note that it was in fact used in the Police investigation into whether the employee of the company had committed a criminal offence.

The Police are charged under the *Police Services Act* with the authority to investigate possible violations of the *Criminal Code of Canada* and the Police investigation into circumstances which suggested the commission of an offence under the *Code* was clearly an activity central to the law enforcement function of the Police.

An important indicator of an institution's control over a record is an ability to dictate the manner in which the record is to be maintained (Order PO-1873). In this regard, I note that the officer responsible for the investigation of the *Criminal Code* matter not only has the record in his possession, but has integrated it into his "working file" for this matter. Similarly, the Police have confirmed not only the right to use the record in the investigation but have also stated that its disposal upon completion of the investigation will be in accordance with their own records retention policy.

The accounting firm provided the record to the Police with the understanding that it was not to be provided to any third party without the firm's prior written consent. While I accept that the provisions of any agreement setting out the relationship between the parties in question may be a relevant factor on the issue of control (*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner*), [1999] B.C.J. No. 198 (S.C.)), any understanding the Police and the accounting firm may have had about maintaining the confidentiality of the record does not necessarily establish a contractual relationship between them. Rather, as Adjudicator Laurel Cropley found in Order PO-1873, such an arrangement simply demonstrates "an atmosphere of co-operation between them, intended to serve the greater public interest". Furthermore, although such a consideration has value, it cannot be determinative of whether the record is *in the custody or under the control of* the Police or serve, in and of itself, to remove the record from my review under the *Act*.

My analysis of the relevant factors supports a finding of control over the record by the Police, in addition to mere custody. In light of my finding that the record is in the custody and under the control of the Police for the purposes of the *Act*, I must now turn to my analysis of the application of the invasion of privacy exemption claimed by the Police.

PERSONAL INFORMATION

The Police have claimed that the mandatory personal privacy exemption in section 14(1), which applies only to information that qualifies as personal information, applies to the record. In order to evaluate the application of the exemption, I must first determine whether the record sought by the appellant contains personal information, and if so, to whom does it relate.

Personal information is defined in section 2(1) of the *Act*, which states, in part:

> "personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

…

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information (Order 11). To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed (Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)).

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual (Orders P-257, P-427, P-1412, P-1621), but even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual (Orders P-1409, R-980015, PO-2225).

Representations

The Police state that the record contains the names and employment duties of certain identifiable individuals and submit that because this information was incorporated into a law enforcement investigation, it is personal information for the purposes of the definition in section 2(1) of the *Act*.

The appellant's representations do not directly address the issue of whether or not the information in the record constitutes personal information for the purposes of the *Act*. However, under the portion of the appellant's representations dealing with severance, the appellant appears

to concede that the names and other information about identifiable individuals other than the named employee contained in the record could constitute personal information. This is implicit in the appellant's statement to the effect that it "is not interested in information 'personal' to any person mentioned in the report."

Analysis and Findings

Having reviewed the record at issue in this appeal, I find that it contains information about an identifiable individual, namely the former employee of the company, which satisfies the definition of "personal information" in section 2(1) of the *Act*. Specifically, I find that there is personal information about this individual that falls within the ambit of the following paragraphs of the definition of personal information: (a) marital or family status, (b) employment history or financial transactions, (g) views and opinions held by other individuals about that individual, and (h) the individual's name along with other personal information relating to him.

I also find that the record contains the personal information of other identifiable individuals apart from the named employee which falls under paragraphs (a) marital or family status, (b) financial transactions, and (h) the individual's name along with other personal information relating to him or her.

PERSONAL PRIVACY

When a requester seeks the personal information of another individual, the mandatory exemption at section 14(1) of the *Act* prohibits an institution from disclosing it, except in the circumstances listed in section 14(1)(a) through (f). Of these, only section 14(1)(f) could apply in this appeal. It reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In evaluating the application of section 14(1)(f), sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the information relates.

Certain provisions of sections 14(2) and (3) were cited by the Police and read as follows:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive; …

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation; …

Section 14(2) provides some criteria for the head to consider in making the determination as to whether disclosure of the personal information at issue would result in an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

If none of the presumptions found at section 14(3) applies, the institution must consider the possible disclosure of the information by weighing and balancing out the factors in section 14(2), as well as other considerations that are relevant in the context of the individual request.

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767) though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in disclosure of the record in which the personal information is contained that clearly outweighs the purpose of the exemption (see Order PO-1764).

Representations

The representations provided by the Police address the application of section 14(3)(b) in the following manner:

> The personal information contained within this report … was created in order to assist with an investigation into the transactions of a named party. A copy of the report was provided [to the] Police in order for [the] Police to properly investigate the allegations. … Therefore since the personal information relates to records compiled as part of an investigation into the incident, the disclosure of this personal information is presumed to be an invasion of the individual's personal privacy…

The appellant submits that the Police representations imply that the investigation into this particular matter is ongoing and states in response that a conviction was entered against the named employee in the criminal proceeding. The appellant submits that because the requested record was entered into evidence at that proceeding and that proceeding has concluded, it should

not be withheld. The appellant cites from the *Toronto Star* case referred to on page 4, above, in support of the right of access, stating that because the Police have failed to "[support] by particularized grounds" that the investigation would be imperilled by disclosure of the record at issue, they must now release it.

Analysis and Findings

Based on my review of the record, I find that the personal information it contains was compiled and is identifiable as part of an investigation into a possible violation of law, namely an offence under the *Criminal Code*. Although the forensic accounting report may have been created by a third party, it was provided to the Police and I find that it was incorporated into their investigation.

Therefore, I find that disclosure of the record sought by the appellant would result in a presumed unjustified invasion of personal privacy under section 14(3)(b) of the *Act*. In the circumstances of this appeal, I find that the section 14(3)(b) presumption is not rebutted by section 14(4), and or the "public interest override" at section 16 which was not raised.

Accordingly, I find that the information contained in the record qualifies for exemption under section 14(1) as its disclosure is presumed to constitute an unjustified invasion of personal privacy.

Given my finding that the presumption in section 14(3)(b) of the *Act* applies to this record, it is not necessary for the me to review the factors in section 14(2) which were cited by the Police.

ORDER:

I uphold the decision of the Police to withhold the record.

Original signed by: January 15, 2007
Daphne Loukidelis
Adjudicator