



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

INTERIM ORDER MO-2606-I

Appeal MA10-10

Halton Regional Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a specific Police incident at a bar where, according to the requester, his adult son was:

... knocked down by bar bouncer(s) suffering a concussion as he hit the ground, while in a[n] unconscious state (which may have lasted 15-20 seconds) he was punched in the head several times according to his friend [named individual]. I wish to view the video of the incident and review [a named constable's] report ...

In response, the Police located the responsive records related to the request. Before releasing these documents to the requester, the Police notified the requester's son and his son's friend whose personal information may be contained in the records. Both individuals consented to the disclosure of their personal information. The Police also notified the manager of security at the bar (the affected person) but the Police did not receive a response from him.

The Police then provided partial access to an occurrence report related to the incident. The Police denied access to a portion of this record in accordance with sections 14(1) (personal privacy) and 8 (law enforcement) of the *Act*.

The Police also advised the requester that a DVD of the incident was supplied to the Police for the purpose of the law enforcement investigation, but stated that it was the property of the bar and suggested that the requester contact the bar directly to obtain a copy.

The requester, now the appellant, appealed the Police's decision to this office.

During the mediation process, the appellant advised that he is not seeking access to the police codes that had been severed from the occurrence report. Therefore, access to these portions of this record is no longer at issue.

During mediation, the Police issued a follow-up decision stating that although the DVD is in their possession they do not have control of the DVD.

The Police's supplementary decision to the appellant stated as follows:

This [DVD] was supplied to the Halton Regional Police Service in order to investigate a law enforcement issue, refer occurrence [specific occurrence number]. Even though a copy of the [DVD] is in the possession of this institution, it is not under our 'control.' The [DVD] is still the property of [named bar]. While I attempted to third party [named bar] security, I was unable to obtain any consent for disclosure of information.

Since [named bar] is not an institution subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, I am unable to transfer the request. Therefore, you as

the requester must go to [named bar] directly and ask for a copy of their [DVD]. Alternatively, you may wish to seek a motion for the disclosure of the [DVD] via a court order.

The appellant advised the mediator his position that the Police have control of the DVD and should have provided him access. The file was then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The appeal was assigned to me as adjudicator. I began the inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police seeking their representations. I received representations from the Police, a copy of which was sent to the appellant, an affected person whose personal information may be contained in the records and the bar (the affected party) along with a Notice of Inquiry seeking their representations. Portions of the Police's representations were withheld from these parties due to confidentiality concerns.

I received representations from the appellant and the affected party. The affected party supported the Police's representations and did not consent to disclosure of the records in this appeal. I did not receive representations from the affected person.

Subsequently, following the release of two Divisional Court judgments (*City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal applied for, Doc. M39606 (C.A.) and *Ministry of Attorney General v. Information and Privacy Commissioner* 2011 ONSC 172), I sought further representations from the Police, the appellant and the affected party on the application of the findings in these cases to this appeal. I received representations on these Divisional Court cases from the Police. The affected party responded and indicated that it was not providing representations on these two cases.

RECORDS:

The information at issue in this appeal consists of:

- portions of page 2 of an occurrence report (titled Halton Regional Police Service Follow Up Report); and,
- a DVD.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the occurrence report contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), as follows:

"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,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where 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. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. 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, R-980015, MO-1550-F and PO-2225].

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 and MO-2344].

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.)].

The Police submit that the record contains recorded information about the appellant’s son, his friend and the affected person who is an employee of the bar where the incident occurred. This personal information consists of these parties’ names, addresses, dates of birth, telephone numbers and statements. They state that:

[The appellant’s son and his friend] did consent to release [of their personal information]; therefore their information was released. The employee [the affected person] did not respond. The *Act* is clear; without written consent, this institution has an obligation to protect the information from disclosure.

The appellant did not provide representations as to whether the occurrence report contains personal information.

Analysis/Findings

The occurrence report contains the information of the appellant’s son and his friend as provided to the Police by these two individuals and the affected person. The only information withheld is the name of the affected person and his statement to the Police, as the other individuals (the friend and the appellant’s son) consented to the release of their information in this record.

The affected person is the manager of security at the bar where the incident in the records took place. There is no evidence that the affected person was personally involved in the incident that gave rise to the Police’s attendance at the bar to investigate the incident described in the occurrence report. The occurrence report does not reveal anything of a personal nature about the affected person [Orders P-1409, R-980015, PO-2225 and MO-2344]. Accordingly, I find that the remaining information in this record is not the affected person’s personal information but is information about the affected person in his business capacity.

As the information remaining at issue in the occurrence report is not personal information, the personal privacy exemption at section 14 cannot apply to it. I will now consider whether the remaining exemption claimed by the Police, the law enforcement exemption at section 8(2)(a), applies to this information.

LAW ENFORCEMENT

The Police have claimed that the discretionary exemption at section 8(2)(a) applies to the occurrence report. This section reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The term “law enforcement” is used in several parts of section 8, and is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

The word “report” means “a formal statement or account of the results of the collation and consideration of information.” Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report although it may be relevant to the issue [Order MO-1337-I].

Section 8(2)(a) exempts “a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*” (emphasis added), rather than simply exempting a “law enforcement report.” This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

An overly broad interpretation of the word “report” could create an absurdity. If “report” means “a statement made by a person” or “something that gives information,” all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous [Order MO-1238].

The Police submit that:

The law enforcement record is comprised of a two page police occurrence report ... The record consists of the facts in the case and the way the officer concluded the investigation at the time, by making a report and submitting it as investigation concluded.

The Halton Regional Police Service is responsible for enforcing and regulating compliance with the *Criminal Code of Canada* as well as Provincial and Municipal Legislation; its powers governed by Bill 107 of the *Police Services Act*. Section 42 outlines the duties of a Police Officer which [includes]:

42 (9)(a) Preserving the peace;

42 (1)(b) Preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;

42 (1)(d) Apprehending criminals and other offenders and others who may lawfully be taken into custody;

42(2) A police officer has authority to act as such throughout Ontario;

42(3) A police officer has the powers and duties ascribed to a constable at common law.

The appellant did not provide representations directly as to whether the law enforcement exemption at section 8(2)(a) applies to the record.

Analysis/Findings

The record at issue was compiled as part of a police investigation into a possible violation of the Criminal Code. Accordingly, I am satisfied it was prepared in the course of law enforcement by an agency that has the function of enforcing and regulating compliance with a law as required by parts two and three of the test for the application of section 8(2)(a) (Orders M-202 and PO-2085).

The issue before me here is whether the record at issue, an occurrence report, qualifies as a “report” as required by part one of the test for the application of section 8(2)(a). Generally, and despite the appearance of the word “report” in document names, occurrence reports and similar records of other police agencies have been found not to meet the definition of “report” under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see Orders PO-1796, P-1618, MO-2361, MO-2290, M-1120, M-1141 and MO-2553.

In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a “report”.

I find that the record at issue in this appeal, the occurrence report, consists primarily of descriptive information provided by the affected person to a police officer about the incident, rather than a formal, evaluative account and, therefore, does not constitute a “report” under the *Act* (Orders M-1109 and MO-2553). In other words, the record is not “formal statements or accounts of the results of the collation and consideration of information.”

For these reasons, I find that section 8(2)(a) does not apply to the occurrence report. Therefore, it is not exempt under section 8(2)(a). In view of this finding, it is not necessary for me to review the Police’s exercise of discretion in relation to this section.

Having found that none of the withheld information in the occurrence report is exempt, I will order it disclosed to the appellant.

CUSTODY OR CONTROL

I will now determine whether the Police under section 4(1) of the *Act* have custody or control of the DVD. This section 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].

Based on the above approach, this office has developed a list of factors to consider in determining whether a record is in the custody or control of an institution [Orders 120, MO-1251, PO-2306 and PO-2683]. 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. This list of factors was provided to the parties in the Notice of Inquiry in the form of a list of questions, as follows:

- 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 and 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)*, cited 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 and 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 and 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 and P-239]
- Does the institution have a right to possession of the record? [Orders P-120 and P-239]

- Does the institution have the authority to regulate the record's content, use and disposal? [Orders P-120 and 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 and P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120 and 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]

The Police submit that:

In this case, the affected third party [the bar] was contacted but consent for disclosure was not received. This institution chose to withhold those portions of the report obtained from the employee, along with a copy of the [DVD], turned over to this institution by the employee.

While the [DVD] is in the custody of the Police, it is only a copy. The original remains with the owner. The Police requested a copy of the [DVD] taken from a security camera that faced the door of the bar in order to conduct their law enforcement investigation. Sometime between November 1 and November 5, 2009, a copy of the camera coverage was supplied by the employee of the bar.

In determining 'custody or control,' this institution noted the factors which arose out of Orders 120, MO-1251, PO-2306 and PO-2683 and noted the following:

The [DVD] was created by the bar;

The [DVD] was turned over to the Police in order to facilitate a law enforcement investigation;

If a copy of the [DVD] was not provided by the bar in the course of a law enforcement investigation, this institution would not have a right to it;

The [DVD] contains a number of unidentified individuals as it contains surveillance of a public location.

It is this institution's opinion that if the public were to become aware that any record supplied to them in the course of a law enforcement investigation could be disclosed to a third party, the public would be very wary supplying information or

records to police unless compelled by a warrant. In this case, the bar disclosed the [DVD] when asked, without a warrant. If the Police were to now disclose that [DVD] to the appellant, we may be placing the bar at risk of civil liability and lose the confidence of the public. Additionally, the bar would be reluctant to share [DVD] with police in future. While it is true that a copy of the [DVD] is in the custody of the Police, it is certainly not under its control. True control rests with the owner.

In response to the *City of Ottawa v. Ontario* and *Ministry of Attorney General v. Information and Privacy Commissioner* cases, the Police submit that:

While it is clear that the [the Police] has custody of a copy of the DVD, this institution does not believe that it has control over it. [the Police] does not have the right to copy it or distribute it, and may only use it for the purpose for which it was originally obtained ...

Order P-239 states that:

Bare possession does not amount to custody for the purposes of the Act... there must be some right to deal with the records and some responsibility for their care and protection.

While a video recording is in the custody of the Police, it is only a copy. The original remains with the owner. The Police requested a copy of the [DVD] taken from a security camera that faced the door of the bar in order to conduct their law enforcement investigation. Sometime between November 1 and November 5, 2009, a copy of the camera coverage was supplied by the employee of the bar to Police. The bar did not relinquish ownership of the DVD by turning over a copy; they were merely assisting the Police in performing their law enforcement function.

We looked at the factors identified in Orders 120, MO-1251, PO-2306 and PO-2683, and applying those factors to the facts of this appeal, we can comment as follows:

- The record was not created by an officer or employee of [the Police];
- [The Police do] not own the DVD;
- The bar owns the DVD;
- The bar paid to create the DVD;
- [The Police] obtained the DVD to use in a criminal investigation;
- The DVD was voluntarily turned over by the bar to police;
- [The Police] does not have the original DVD; we only have a copy;
- The DVD was in possession of the investigating officer, and was retained in his 'working file'. It was not integrated with other records held by [the Police];

- Ideally, the DVD should have been returned to the bar when the investigation was completed;
- The appellant clearly wants the DVD for a purpose other than the purpose the Police obtained it for;
- If a copy of the DVD had not been voluntarily provided by the bar to the Police for the purposes of its criminal investigation, this institution would not have had a right to obtain a copy without prior judicial authorization; and
- The DVD contains the images of a number of unidentified individuals, as it was a recording from a surveillance camera situated in a public location.

Upon receiving the initial request, this institution chose to notify the employee of the bar prior to making an access decision. When consent was not obtained, the DVD was not disclosed.

The bar was again notified by the IPC during Adjudication. The response was clear - no consent to disclose was given.

SUMMARY

Following a careful review of the records during mediation, during adjudication, and again after obtaining copies of the two recent Divisional Court cases with respect to the issue of 'custody and control' (*City of Ottawa v. Ontario*, 2010 ONSC 6835, and *Ministry of Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172) this institution reached the same decision as initially made. The decisions in *City of Ottawa* and *Ministry of the Attorney General* do not add anything further to the analysis. In the same circumstances, without consent, the [DVD] belonging to a third party would not be disclosed. While this institution has 'custody' of a copy of the DVD, true ownership and 'control' rests with the owner/creator, namely the bar.

The appellant did not provide representations as to whether the Police have custody or control of the DVD.

Analysis/Findings

In the case of the *City of Ottawa v. Ontario* (cited above), the Divisional Court determined that the intent of the legislature in enacting the *Act* was to enhance democratic values by providing its citizens with access to government information and also that the various factors established in Order P-120 are relevant in informing the interpretation of what constitutes "custody" or "control". I will list these factors, along with the Police's response as set out in their representations.

- (1) Was the record created by an officer or employee of the institution?

(The DVD was created by the bar.)

- (2) What use did the creator intend to make of the record?

(Not answered.)

- (3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

(The Police have possession of the DVD. The DVD was voluntarily turned over to the Police.)

- (4) 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?

(The Police have possession of the DVD.)

- (5) Does the institution have a right to possession of the record?

(If a copy of the DVD was not provided by the bar in the course of a law enforcement investigation, the Police would not have a right to it without prior judicial authorization.)

- (6) Does the content of the record relate to the institution's mandate and functions?

(Not answered.)

- (7) Does the institution have the authority to regulate the record's use?

(The Police do not have the right to copy it or distribute it, and may only use it for the purpose for which it was originally obtained.)

- (8) To what extent has the record been relied upon by the institution?

(The Police used the DVD in order to conduct their law enforcement investigation.)

- (9) How closely has the record been integrated with the other records held by the institution?

(The DVD was in possession of the investigating officer, and was retained in his 'working file'. It was not integrated with other records held by the Police.)

(10) Does the institution have the authority to dispose of the record?

(Not answered.)

In *City of Ottawa v. Ontario* (cited above), the records at issue were emails between a City employee and a Children's Aid Society (CAS), which related to the employee's volunteer work with the CAS, and not to his work with the City. They were located on the City's email server. The Court examined the content of the records and their relationship to the purposes of the *Act* and found that these records were not within the custody or control of the City. The Court determined that:

The Children's Aid Society is not an agency subject to freedom of information legislation. [The City employee], in his personal capacity, is also not subject to having his personal documents seized and passed over to any member of the public who requests them. The communications between CAS and [the employee] have no connection whatsoever to the functioning of government nor to the business affairs of the City of Ottawa. It follows that providing public access to such documents does nothing to enhance participation in municipal affairs and prohibiting access does nothing to impair democratic values. Quite simply, these documents have nothing to do with municipal government and are not remotely connected to anything the legislation was intended to encompass. Further, the seizure of such documents by the City and the delivery of them to a third party would be antithetical to the privacy rights of individuals, which is another goal the legislation seeks to protect.

More recently, in the case of *Ministry of Attorney General v. Information and Privacy Commissioner* (cited above), the Divisional Court was asked to review a decision of this office as to whether severed portions of a report prepared by the Ministry for judicial management purposes were in the custody or under the control of the Ministry. In finding that the record was in the custody of the Ministry, the Court stated as follows (at paras. 47, 48 and 50):

... Possession of the severed portions of the Reports was voluntarily provided to the Ministry with no distinct or special limitation from the Office of the Chief Justice. Its content relates to the Ministry's mandate and functions, and has been obviously relied upon by the institution. The severed portions of the Reports have also been integrated with other Ministry records, and it certainly appears that their use has been regulated by the Ministry. Having regard to the Ministry's ability to deal with the judicial information, and the responsibility for the care and protection it has been allowed, there have not been sufficient limits placed on the Ministry to preclude it from having custody.

In our view, the fact that the Ministry subsequently acquired an ability to use the judicial information from the Reports for purposes relating to its core, central and basic functions relevant to the Ministry's mandate, results in these Reports being placed "in the custody" of the Ministry for the purposes of the Act. We note the

integration of information from the Reports into the Ministry's intranet site for its core functions, not only in Court Services but also in its Criminal Law divisions.

...

Having reviewed all of the circumstances here, particularly the nature of the severed portions of the Reports at stake and the extent to which that judicial information has been shared with the Ministry by the judiciary, we are of the view that the Ministry has more than bare possession of the Reports. We are therefore satisfied, with respect to this very discrete issue involving the judicial information contained in the severed portions of the Reports, that for the purposes of s. 10(1) of the Act, this judicial information is "in the custody" of the Ministry.

In this appeal, following the analysis set out above of the Divisional Court in both cases, I find that the DVD is both within the custody and under the control of the Police. The Police acknowledge in their representations that they have custody of the DVD. In the particular circumstances of this appeal, the factors outlined above weigh in favour of the Police having both custody and control of the DVD.

The DVD is a security tape from the bar's security system, which was turned over to the Police voluntarily, with no distinct or special limitation, to assist in their investigation of a law enforcement matter. The content of the DVD, namely, the surveillance of a public area in which an unlawful activity may have taken place, has a connection to the Police's mandate and function to enforce the law, preserve the peace and protect the public (Orders P-120 and P-239). Law enforcement is a "core", "central" or "basic" function of the Police (Order P-912).

As stated by the Police in their representations, the Police could have obtained judicial authorization to compel the bar to turn the DVD over to them.

From the disclosed portions of the occurrence report, it is clear that the Police relied upon the DVD in their investigation of the incident and determination as to whether to pursue the matter further, and as already noted, this activity is part of the Police's core function (Orders P-120, P-239 and P-912).

Although the Police indicate that the DVD was retained in the investigating officer's 'working file' and not integrated with other records held by them, I find that the DVD was integrated with other records held by the Police (Orders P-120 and P-239). The disclosed portion of the occurrence report includes the statement:

The DVD has been lodged in 30 Div. property on Nov. 5, 2009, and the writer requests incident marked as RTF [Report to Follow] due to the DVD being in Police property.

In any event, its inclusion in the officer's working file is a sufficient basis to find that it is included in the record holdings of the Police that pertain to their law enforcement mandate.

Therefore, I find that the DVD does have a connection to the function and the mandate of the Police, and finding that the *Act* applies to this record is entirely consistent with the purposes of the legislation.

In addition, given its evident use in the Police investigation, the Police clearly have far more than “bare possession” of the DVD, and are in fact able to “deal with” it. (Order P-239; and *Ministry of Attorney General*, cited above). Moreover, in order for the *Act* to apply, it is only necessary that a record be in the Police’s custody *or* under their control. In addition, and unlike the situation in *Ministry of Attorney General* (cited above), where the Court found the records to be in the Ministry’s custody but not under its control because of the importance of judicial independence in that case, the evidence here does not support the existence of any relevant factor that would limit the Police’s ability to control their use or disposition of the DVD. In view of the Police’s obvious ability to consider, use and dispose of the DVD, I conclude that in the circumstances of this case, it is also under their control.

For all these reasons, I find that the Police have both custody and control of the DVD. Accordingly, I will order them to issue the appellant with an access decision concerning the DVD.

ORDER:

1. I order the Police to disclose the information remaining at issue in the occurrence report to the appellant by **April 28, 2011** but not before **April 23, 2011**.
2. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the information that they disclose to the appellant under order provision 1.
3. I order the Police to issue an access decision for the DVD in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.
4. I remain seized of any outstanding issues arising from this decision, including any appeal that may result from order provision 3.

Original signed by: _____
Diane Smith
Adjudicator

_____ March 24, 2011