

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3267

Appeal PA12-11

Ministry of Community Safety and Correctional Services

October 23, 2013

Summary: In June, 2010, the Chief of the Royal Newfoundland Constabulary (RNC) asked the Ontario Provincial Police (OPP) to investigate the circumstances that led to a fatal car accident in St. John's, including the conduct of the RNC officers involved. The OPP officers assigned to the investigation, who were temporarily sworn in as RNC special constables, investigated the accident and submitted a report to the RNC Chief. The appellant, who resides in Newfoundland and Labrador, submitted an access request under the *Freedom of Information and Protection of Privacy Act* to the Ontario Ministry of Community Safety and Correctional Services for records relating to this investigation. He had previously submitted a similar access request to the RNC under Newfoundland and Labrador's access-to-information legislation but was denied access to the records. The adjudicator finds that the requested records are not in the custody or under the control of the ministry within the meaning of section 10(1) of the *Act* and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 10(1); *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as amended.

Orders and Investigation Reports Considered: Order MO-2416.

Cases Considered: *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.); *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.

OVERVIEW:

[1] The appellant, who resides in Newfoundland and Labrador, submitted the following request for records to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I am requesting information on a fatal accident that happened June 14, 2010. It was [three individuals]. . . . The investigating officer was [name of officer], Cayuga, Ontario. I would like to have a copy of the officer's notes, reports, videos, [and] statements.

[2] By way of background, a car accident occurred in St. John's and the driver and passengers in the car were killed. Shortly before the accident, a patrol car from the Royal Newfoundland Constabulary (RNC) was following the car that crashed.

[3] Under an agreement between the RNC and the Ontario Provincial Police (OPP), the RNC can ask the OPP to conduct an investigation "where serious occurrences have taken place involving the actions of one or more members of the RNC, including instances of serious injury or death." Consequently, the Chief of the RNC asked the OPP to investigate the accident and the conduct of the RNC officers involved.

[4] In accordance with the agreement, the OPP officers who travelled to Newfoundland and Labrador to conduct the investigation were temporarily sworn in as special constables of the RNC. At the conclusion of their investigation in the fall of 2010, they submitted a report to the Chief of the RNC.

[5] The OPP officers' report included a binder and an external hard drive that contained all of the information that they had gathered and some information that the RNC had collected before the arrival of the OPP officers. Although the OPP officers submitted the original records relating to their investigation to the RNC, it appears that they retained a copy in their own record holdings in Ontario.

[6] In August, 2011, the appellant filed an access request with the RNC under Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* (*ATIPPA*)¹ for a copy of the OPP officers' report. The RNC denied access to the report, and it appears that the appellant filed a request for review with the Office of the Information and Privacy Commissioner of Newfoundland and Labrador (Newfoundland

¹ SNL 2002, c. A-1.1, as amended.

and Labrador IPC). The latter body conducted a review of the RNC's access decision and recently issued a report that made no recommendations.²

[7] In November, 2011, the appellant filed an access request in Ontario with the ministry,³ which is cited above. The ministry issued a decision letter to the appellant denying access to the records under the discretionary exemptions in sections 15(a) and (b) (relations with other governments) and 49(a) (discretion to refuse requester's own personal information) of the *Act*. The appellant appealed the ministry's decision to this office, the Information and Privacy Commissioner of Ontario (IPC).

[8] After this appeal was filed, the ministry issued a revised decision letter to the appellant stating that it does not have custody or control over the requested records within the meaning of section 10(1) of the *Act* and that, as such, the appellant's request is outside the scope and jurisdiction of the *Act*. In the alternative, if the ministry was found to have custody or control of the records, it would rely on the discretionary exemptions at sections 14(1)(a), (c), (i) and (l) and 14(2)(a) (law enforcement), 15(a) and (b), and 49(a) and (b), as well as the mandatory personal privacy exemption at section 21(1), to deny access to the records.

[9] During the mediation stage of the appeal process, the ministry advised that while it has physical possession of the requested records, it is of the view that the RNC, and not the ministry, has custody and control of the records. The ministry declined to provide a copy of the records to this office on that basis.

[10] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator assigned to the appeal sought representations from the ministry, the appellant and the RNC. The ministry and the RNC submitted representations but the appellant did not.

[11] This appeal was transferred to me to complete the adjudication process. In the decision that follows, I find that the records are not in the custody or under the control of the ministry within the meaning of section 10(1) of the *Act*. It is therefore unnecessary for me to consider the application of the exemptions claimed by the ministry in the alternative. This appeal is dismissed.

² Report A-2013-007, April 18, 2013. The Newfoundland and Labrador IPC found that the RNC was entitled to withhold the information under the discretionary law enforcement exemption in section 22(2)(b) of the *ATIPPA*. However, it pointed out that section 22 is not a mandatory exception and "it is within the discretion of the RNC to release the requested information to the Applicant or portions thereof especially in consideration of the nature of the Report, the time which has passed since the accident and the likelihood of the Report being disclosed in the legal proceedings."

³ The OPP is part of the ministry.

RECORDS:

[12] The records at issue in this appeal are copies of the original records containing evidence that OPP officers gathered during their investigation and a copy of the original report that they submitted to the Chief of the RNC at the conclusion of their investigation.

DISCUSSION:

CUSTODY OR CONTROL

Are the records in the custody or under the control of the ministry under section 10(1) of the *Act*?

[13] The sole issue in this appeal is whether the records are in the custody or under the control of the ministry within the meaning of section 10(1) of the *Act*.

[14] Section 10(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 . . .

[15] A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.⁴

[16] The courts and this office have applied a broad, liberal and purposive approach to the custody or control question.⁵ To that end, this office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution, including:⁶

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?

⁴ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁵ *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; and *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal by IPC denied, March 30, 2011.

⁶ See Orders 120, P-239, MO-1251, PO-2306 and PO-2683; Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 5; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 4; and *City of Ottawa v. Ontario*, cited above at note 5.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a “core”, “central” or “basic” function of the institution?
- Does the content of the record relate to the institution’s mandate and functions?
- 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?
- If the institution does have possession of the record, is it more than “bare possession”?
- 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?
- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record’s content, use and disposal?
- 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?
- How closely is the record integrated with other records held by the institution?
- 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?

[17] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?⁷

⁷ Order PO-2683.

- Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the *Act*?
- Who owns the record?⁸
- Who paid for the creation of the record?⁹
- What are the circumstances surrounding the creation, use and retention of the record?¹⁰
- 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?¹¹
- 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?¹² If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?¹³
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?¹⁴

⁸ Order M-315.

⁹ Order M-506.

¹⁰ Order PO-2386.

¹¹ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

¹² Orders M-165 and MO-2586.

¹³ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

¹⁴ Order MO-1251.

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?¹⁵

[18] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.¹⁶

Representations

[19] As noted above, the records at issue in this appeal were produced in the course of an investigation by OPP officers into the circumstances that led to a fatal car accident in St. John’s, including the conduct of the RNC officers involved. This investigation was conducted under an agreement between the OPP and the RNC. The ministry and the RNC each provided a copy of the agreement in support of their representations.

[20] The agreement, dated August 23, 2008 and effective September 1, 2008 to August 31, 2013, was in force on the date of the specified incident. According to the RNC, the Chief of the RNC wrote to the OPP the same day to ask that the OPP investigate the incident and the conduct of the RNC officers involved.

[21] The RNC submits that the OPP officers involved in investigating the incident were acting as special constables of the RNC when they gathered information. It states that, pursuant to the agreement, all material gathered by the OPP was to have been delivered to the RNC. It relies on section 9 of the agreement, which reads:

It is understood and agreed that all information (including documents, videos and other things) to which the OPP investigators become privy during the period of their investigation, will be kept entirely confidential by them except where there is a need to obtain legal advice from Crown Counsel or where disclosure is otherwise required by law.

All such information, including documents, videos and other things, along with the report of the investigating officers, will be delivered to the Chief of Police, RNC upon completion of the investigation.

[22] The RNC also provided copies of documents signed by OPP members involved in the investigation, which the RNC describes as containing their appointments as RNC special constables and their oaths of confidentiality. Among other things, these documents provide that the signees “will not directly, or indirectly without due authority, disclose to any person any information or other matters that may come to [them] in the performance of [their] employment as a Special Constable ...”

¹⁵ Order MO-1251.

¹⁶ *City of Ottawa v. Ontario*, cited above at note 5.

[23] On this basis, the RNC submits that the records sought by the appellant, comprising information gathered by the OPP and some information gathered by the RNC prior to the arrival of the OPP, are in the custody and control of the RNC, and not of the OPP, as OPP investigators were acting on behalf of the RNC when conducting the investigation of the incident. The RNC notes that the OPP should have delivered all information relating to the investigation to it, in accordance with the agreement, and asserts that "true" custody of the records is not transferred to the OPP simply because it has retained copies of RNC information.

[24] The ministry also takes the position that it does not have custody or control over the records within the meaning of section 10(1) of the *Act*. Although it acknowledges that the OPP has copies of the records at issue, "despite section 9" of the agreement, it submits that the OPP is limited by the agreement (and particularly by section 9) in how it may use this information. It considers the records to be the "property" of the RNC, and on this basis both refused the appellant's access request and declined to provide this office with a copy of the records at issue.

[25] Referring to some of the other factors for determining custody or control canvassed above, the ministry also notes that the OPP lacks statutory power or duty to conduct law enforcement activities in Newfoundland and Labrador, and that such investigations are not a "core," "central" or "basic" function of the ministry or the OPP, whose statutory mandate is confined to law enforcement activities in Ontario. It states that the OPP was only involved in the RNC investigation at the request of the RNC made pursuant to the agreement. For its part, the RNC submits that the investigation of motor vehicle collisions in Newfoundland and Labrador and the conduct of RNC officers fall squarely within its jurisdiction, as set out in the RNC's governing legislation.

[26] In addition, the ministry and the RNC both submit that an access request was made to the RNC under Newfoundland and Labrador's access legislation for records held in the RNC file of the investigation. The RNC issued a decision denying access under that province's legislation in September 2011, and it appears that the appellant filed a request for review of this decision with the Newfoundland and Labrador IPC.

[27] The access request and decision of the RNC pre-date the request giving rise to the present appeal, which the appellant made to the ministry in November, 2011. The ministry submits that by having filed an access request under Newfoundland and Labrador's access legislation, the appellant has acknowledged the jurisdiction of the RNC over the records at issue, and, by extension, the ministry's lack of jurisdiction and control over the same records. It further asserts that the appellant has already exercised his right of access under Newfoundland and Labrador's legislation, and has received a decision that disclosure would contravene the laws of that province.

[28] The ministry refers to the contextual approach endorsed in *City of Ottawa*¹⁷ in determining the question of custody or control. In that decision the Divisional Court found that applying the factors contextually in light of the purpose and intent of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* led to a finding that the city's bare possession of sought-after records did not constitute custody of the records for the purposes of *MFIPPA*. The ministry submits that finding that the records in the present appeal are within the ministry's custody or control would not serve the purposes of the *Act*, which are to enhance democratic values by providing its citizens with access to government information.

[29] The ministry suggests that Newfoundland and Labrador is the proper jurisdiction or forum for pursuing access to the records at issue in this appeal. It submits that permitting the appellant to file a request for the same information under the *Act* in Ontario would result in the ministry being made responsible for records that it does not in fact control nor have a right to control, by virtue of both jurisdictional and contractual considerations. It therefore asks that this appeal be dismissed.

Analysis

[30] This appeal involves a situation where an institution under the *Act*, purported to be acting as an agent of a body that is not an institution for the purposes of the *Act*, has physical possession of records sought under the *Act*. The question is whether, applying the contextual approach referred to by the ministry and applied in *City of Ottawa*, the appellant should have a right of access under the *Act* to records claimed to be in the custody and control of a body that is not subject to the *Act*.

[31] The records at issue in this appeal were created or otherwise compiled by OPP investigators in the course of investigating an incident in another jurisdiction. The ministry and the RNC both indicate that the OPP lacks statutory power or other authority, outside the agreement, to carry out the law enforcement activities in Newfoundland and Labrador that resulted in the creation of the records at issue.

[32] In Order MO-2416, I noted that, in addition to any statutory power or duty resulting in the creation of records, it is also important to consider whether the institution has any other legal duty resulting in its creation. The agreement establishes a contractual duty on the part of the OPP to provide investigative services to the RNC in certain circumstances. Section 9 of the agreement provides for the confidentiality of information to which the OPP becomes privy during the investigation. The agreement does not otherwise address responsibility for information created in the course of an investigation.

¹⁷ Cited above at note 5.

[33] Based on the information before me, I do not find that the agreement establishes a duty on the part of the OPP in respect of the creation (or retention) of the records at issue in this appeal. These factors weigh against a finding that the ministry has custody or control of the records; they also weigh in favour of a finding that the records are within the custody or control of the RNC, on whose behalf the OPP investigators were acting at the time of the records' creation.

[34] Both the ministry and the RNC acknowledge that the OPP has possession of the records at issue in this appeal. Physical possession may weigh in favour of a finding of control, but it may be rebutted by other factors, including the absence of a right to possession and limits to the uses to which an institution may put the records in its possession.

[35] I accept the parties' submissions that there is no statutory or other authority granting the OPP or the ministry a right to possession or control of the records. While the agreement requires that all information to which OPP investigators become privy during the investigation be delivered to the RNC upon completion of the investigation, it does not prohibit the OPP from making a copy of the information for its own use. The agreement does, however, require that all such information be kept confidential by the OPP except in certain specified circumstances, which may qualify as a limit to the uses to which the OPP may put the copy of the records that it retains in its possession.

[36] Given the specific nature of the OPP's involvement with the records at issue, as set out in the agreement, the absence of a specified right of the OPP or of the ministry to possession of the records, the agreement's clear direction on the ultimate disposition of the original records, and the absence of evidence that the OPP or the ministry has relied upon the records or otherwise used the records on their own account or for purposes relating to their own core, central and basic functions, I find that the OPP's possession of the records amounts to no more than "bare possession," and is thus not an indicator of custody or control.

[37] Other factors, typically considered in the reverse situation (namely, where a non-institution holds information being sought from an institution), can also be applied to the facts of this appeal. The parties submit that the OPP investigators were acting as agents of the RNC, a non-institution under the *Act*, for the purposes of the investigation resulting in the creation of the records at issue. The criteria concerning ownership of and payment for creation of the records support a finding that sole custody and control lies with the RNC, and not with the ministry.

[38] On the issue of payment, the agreement explicitly provides for reimbursement by the RNC of costs incurred by the OPP in the course of providing investigative services pursuant to the agreement, including for OPP investigators' salaries and other reasonable direct investigation costs. While the agreement provides that the reimbursement clause may be waived by the OPP Commissioner in specific

investigations, there is no indication that this was done in the circumstances here. As I previously found, in Order MO-2416, in respect of a situation where a non-institution third party held the requested records:

If a third party holds the requested record, a relevant factor in determining whether this record is under the control of an institution is determining who paid for its creation. If [the third party] used public money to create the model, either in whole or in part, this is a factor that would weigh in favour of finding that the model and input data are under the [institution's] control. If, however, no public money was used to create the model, this factor would weigh against finding that the model and input data are under the [institution's] control.

[39] In the present appeal, the creation of the records was not paid for through Ontario public money but rather through Newfoundland and Labrador public money. This factor both weighs against a finding that the records are controlled by the ministry, and suggests that control lies with the RNC. The agreement's requirements that the OPP maintain the confidentiality of the records and that it deliver them to the RNC upon completion of the investigation limit the ability of the OPP to deal with the records on its own account and also support a finding that it holds the records as an agent on behalf of its principal, the RNC.

[40] The only provision of the agreement that might support an alternate finding on custody and control is section 8, which reads:

The Commissioner of the OPP will retain supervisory, disciplinary and operational control of the OPP members assigned to conduct the investigation.

[41] Based on the information before me, I am not satisfied that this provision is intended to confer custody or control of records from the principal to the agent in this agreement. This provision does not specifically refer to control over information handled by the agent in the course of an investigation, whereas section 9 of the agreement does so explicitly. On a plain reading, this provision appears intended to clarify that supervisory authority over individual agents' conduct remains with the agents' employer, despite the agents' provision of services to the principal under the agreement. Absent other evidence I do not find that this contractual provision either expressly or by implication expands the scope of the agency relationship or otherwise overrides other, more explicit, provisions in the agreement to give the agent custody or control over records produced by the agent on behalf of the principal.

[42] In summary, having applied the factors and other relevant considerations in the context of the *Act's* legislative purpose and intent, I find the ministry does not have custody or control over the records within the meaning of section 10(1) of the *Act*.

[43] The ministry did not claim that the common-law doctrines of issue estoppel, collateral attack or abuse of process are applicable in the circumstances of this appeal. However, in *British Columbia (Workers' Compensation Board) v. Figliola*, the Supreme Court of Canada spoke strongly against allowing parties to re-litigate in a different forum matters which have been properly addressed in other proceedings. It emphasized that re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in the fairness and integrity of the justice system by creating inconsistent results and unnecessarily duplicative proceedings.¹⁸

[44] Consequently, although the common-law doctrines of issue estoppel, collateral attack or abuse of process were not raised in this appeal, I generally agree with the submissions of the ministry and the RNC that the RNC is the proper body to which a requester should direct a request for access to the records at issue, and that the scheme set out in Newfoundland and Labrador's access legislation, including a right to ask that province's IPC to review a public body's access decision, is the proper appeal or review avenue available to a requester. In my view, allowing requesters to supersede the access-to-information process available to them in the proper forum or jurisdiction in order to obtain a more favourable result elsewhere could lead to the risks identified by the Supreme Court in *Figliola*, including inconsistent results and unnecessarily duplicative proceedings.

ORDER:

I find that the records are not in the custody or under the control of the ministry within the meaning of section 10(1) of the *Act*, and I dismiss this appeal.

Original Signed By: _____
Colin Bhattacharjee
Adjudicator

October 23, 2013

¹⁸ 2011 SCC 52. But see also the Court's later decision in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 1, in which it emphasized that the doctrine of issue estoppel calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where the preconditions for its application have been met.