Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3335

Appeal PA10-151-2

Ministry of Community Safety and Correctional Services

April 28, 2014

Summary: The appellants sought access to a video in the possession of the ministry. In response, the ministry issued a decision stating that it did not have custody or control of the video as required by section 10(1) in order for the *Act* to apply. The ministry's decision is not upheld. The video is found to be in the ministry's custody and the ministry is ordered to issue an access decision in respect of it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1).

Orders and Investigation Reports Considered: Order 120.

Cases Considered: *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

BACKGROUND:

[1] This appeal relates to Appeal PA10-151 in which the appellants[1] requested access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records created after their earlier request dated November 20, 2009. The record of interest in this appeal is a video dated August 6, 2009 (the video) which predates the November 20, 2009 date specified in the appellants' request to the Ministry of

[1] There are two appellants in this appeal. For simplicity, I will refer to the actions taken by either or both of the appellants as the actions of the appellants.

Community Safety and Correctional Services (the ministry) that resulted in Appeal PA10-151. Based on the wording of the appellants' request, the video was not included as a responsive record in Appeal PA10-151. However, during the mediation stage of Appeal PA10-151, the appellants sent a letter to this office dated October 4, 2010, specifically seeking access to the video. The appellants stated that the Ontario Provincial Police (OPP) acquired the video and showed it to them on November 28, 2009, during their attendance at a specified OPP detachment. The mediator advised the ministry of the appellants' request for access to the video and in response the ministry contacted the OPP and asked it to look for the video. The ministry then confirmed to the mediator in Appeal PA10-151 that the video in question had been located and was approximately 15 seconds long. In response to this information, the appellants indicated their belief that the video should be at least 10 minutes long. Because the appellants questioned whether the correct video had been located, the ministry did not issue a decision regarding access to the video it located. Rather, the reasonableness of the ministry's search was added as an issue in that appeal. The mediator did not ask the ministry for a copy of the video, nor was a copy of the video provided by the ministry to this office at any time during the processing and disposition of Appeal PA10-151.

[2] On October 29, 2013, I issued Interim Order PO-3271-I in respect of Appeal PA10-151. In that interim order, I addressed the reasonableness of the ministry's search for records, but I did not address the issue of access to the video as the video was not a record before me. After receiving Interim Order PO-3271-I, the appellants questioned why the video had not been addressed and again sought access to it from the ministry. At this point, it was clear that the 15-second video initially located by the ministry was in fact the video that the appellants were seeking. In response, the ministry issued a decision in which it took the position that the video is not in its custody or control as contemplated by section 10(1) of the *Act*. The appellants appealed the ministry's decision and this appeal file, PA10-151-2, was opened. This appeal was streamed directly to the adjudication stage of the appeal process for an inquiry under the *Act*. I sought and received representations from the ministry and the appellants and shared these in accordance with this office's *Code of Procedure* and *Practice Direction Number 7.*

[3] In this order, I find that the ministry has custody of the video and I order it to issue an access decision for it.

DISCUSSION:

[4] The sole issue I must determine in this appeal is whether the video is "in the custody" or "under the control" of the ministry as required under section 10(1) in order for the *Act* to apply. I stress that a finding that the video is in the custody or control of the ministry does not lead to a conclusion that it will be disclosed, but only obliges the ministry to make a decision about whether access to it should be granted. 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 . . .

[5] 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.[2] The courts and this office have applied a broad and liberal approach to the custody or control question.[3] 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.[4]

[6] Based on the above principles, 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.[5] Of those factors, some which are relevant to this appeal are:

- Was the record created by an officer or employee of the institution?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]
- 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?[10]
- If the institution does have possession of the record, is it more than "bare possession"?[11]

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[2] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] *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.), and Order MO-1251.
[4] Order P-239.
[5] Orders 120, MO-1251, PO-2306 and PO-2683.
[6] Order 120.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above.
[8] Order P-912.
[9] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) (*City of Ottawa*); Orders 120 and P-239.
[10] Orders 120 and P-239.
[11] Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- Does the institution have a right to possession of the record?[12]
- Does the institution have the authority to regulate the record's content, use and disposal?[13]
- 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?[14]
- To what extent has the institution relied upon the record?[15]
- 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?[16]

[7] 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.[17]

Representations

[8] Both parties provided extensive representations on the sole issue in this appeal. In this order, I refer to the representations of the parties that are relevant to my determination of whether the ministry has custody or control of the video.

[9] The ministry begins its representations by providing background information on the appeal and the video. It states that the video was created by surveillance equipment belonging to affected third parties (the third parties) and was taken from the vantage point of their property. It explains that the appellants have been involved in a longstanding property dispute with the third parties, and in August 2009, the third parties voluntarily provided the video to the OPP in relation to the dispute. The ministry asserts that the video was stored in the vault of the OPP until April 2011, when it was returned to the third parties at their request. The ministry further states that by April 2011, an appeal had been filed for a variety of records and the video was found to be potentially responsive to the request. Unbeknownst to the third parties, the ministry's Freedom of Information Office already had a copy of the video, and it is this copy of the video that is the subject of this appeal.

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[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.
[16] Order MO-1251.
[17] *City of Ottawa v. Ontario*, above.

[10] The ministry concedes that the facts do not point in a straightforward manner to whether the video is under its custody or control for the purpose of being subject to the *Act.* The ministry submits that based on the Divisional Court's decision in *City of Ottawa* it is more likely than not that the video is not in its custody or under its control. It states that in *City of Ottawa* the Divisional Court found that "enhanced participation in the democratic process is a primary focus of freedom of information legislation" [18] and the two part test that institutions must consider in relation to section 10(2) of the *Act* is:

> Would interpreting the term "custody or control" as including private communications of employees unrelated to government business do anything to advance the purpose of the legislation? Conversely, would interpreting the language of the *Act* as not applying to the private communications of employees interfere with a citizen's right to fully participate in democracy?

[11] The ministry submits that in this appeal, it is more likely that both of these questions can be answered in the negative, and as a result, the video is not in its custody or under its control. The ministry makes the following points in support of this submission:

- The video was not created by an officer or employee of the ministry, nor did the ministry pay for it.

- The video was not created for the OPP or for a "law enforcement" purpose as that term is defined in the *Act.*

- The video was provided voluntarily and was never surrendered to the OPP pursuant to a warrant. The OPP received the video in the course of its interest in preserving the peace during the dispute between the appellants and the third parties. Preserving the peace is one of the OPP's duties as a law enforcement agency.

- The video was never used by the OPP as evidence for the purpose of laying charges. The OPP showed the video to the appellants as a result of the ongoing property dispute and as part of its efforts to preserve the peace. The video was then stored in the OPP detachment's vault until it was returned to the third parties at their request because the OPP did not need it for any law enforcement purpose. In light of these facts, the ministry argues that at most, the OPP had bare possession of the video, and that the passage of time during which the video was not used by the OPP supports its contention.

[18] Paragraphs 26 and 28.

- The video is the property of the third parties. It is customary for individuals to voluntarily provide records to the OPP that may be part of the OPP's policing duties. These records are always considered to be the property of the individuals and not that of the OPP; and where there is no investigation or law enforcement purpose in support of the OPP keeping the records, they are returned to the individual owners at their request. The video must be treated like any other property that was voluntarily provided to the OPP by a member of the public.

- The OPP has no right to the video except to use it for a law enforcement purpose; since there was no law enforcement purpose use, the OPP returned the video to the third parties.

- Section 10(1) must be interpreted with regard to the fact that law enforcement agencies, perhaps uniquely among institutions that are subject to the *Act*, possess many goods which they do not own or have any legal entitlement to own. This ownership is often tangential and results from the breadth of the law enforcement agencies' law enforcement mandate.

- The third parties are not subject to the *Act* and would have an absolute right to withhold access to the video were it not for this appeal. The appellants are using the *Act* to obtain access to a record that belongs to private citizens who are entitled to their privacy and to the ownership of their property.

- Disclosure of the video does not enhance participation in the democratic process.

- The video has no connection whatsoever to the OPP's functioning or business affairs.

- The conclusion reached by the Divisional Court in *City of Ottawa* is equally valid in this appeal:

> 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.

[12] In their representations, the appellants assert that the ministry has custody and control of the video. They make the following submissions in support of their assertion:

- The third parties who created the video provided it to the OPP with the knowledge that the video could eventually be in the public domain and therefore, they had no expectation of privacy when the video was seized by the OPP. There was "an implied contract" that the OPP would use the video in open court and therefore, the third parties waived any right to keep sole possession of the video.

- Although the video was not created by the ministry, it was "seized" by an OPP officer as part of an investigation of an alleged breach of a peace bond and an allegation of public mischief. Therefore, the video was used for "law enforcement" as defined in section 2(1) of the *Act.* It was not voluntarily provided by the third parties if it was "seized" as noted in the OPP officer's notes and in an Occurrence Report dated January 3, 2010.

- The video was seized by the OPP at the request of the Crown Attorney during the OPP's investigation of allegations of the criminal activity noted above. Investigating allegations of criminal activity is one of the primary duties of the OPP as a law enforcement agency and within the definition of a "core", "central" or "basic" function of the institution.

- The ministry's possession of the video surpasses the test for "bare possession" because the video was seized by the OPP. The OPP had a mandated obligation to possess the video as part of its investigations into allegations of criminal activity.

- There were no limits placed on the use of the video by either the third parties or the appellants.

- The ministry was aware of their outstanding request for the video before it disposed of the video. The date of their appeal (PA10-151) is 2010, which predates the ministry's return of the video. Thus, the ministry acted purposefully and with malice when it returned the video to the third parties.

- The Divisional Court decision in *City of Ottawa* is not applicable since it concerned internal communication between employees unrelated to work activities. This is not the case in this appeal.

- The ministry should be sanctioned for returning the video to its owners because this action prejudices their ability to have their person and their property protected by the OPP and demonstrates the OPPs' continued discrimination against them.

- The ministry tries to deflect the issues by misleading references to a boundary dispute that was settled over four and a half years ago.

- The ministry is attempting to withhold the video in order to protect OPP personnel, as the video confirms that the notes of the OPP officers of November 2009 are incorrect.

[13] The appellants also include the following quotation in their representations from the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*[19] in which Justice LaForest wrote:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

Analysis and findings

[14] As stated above, a record will be subject to the *Act* if it is in the custody or under the control of an institution and it need not be both. The fact of the ministry's possession of the video in this appeal is significant evidence of custody. As noted by Former Commissioner Sidney Linden in Order 120, physical possession is the best evidence of custody and only in rare cases can it be successfully argued that an institution did not have custody of a record in its actual possession. Based on the evidence before me, I am not convinced that this appeal constitutes one of the rare cases contemplated by the Former Commissioner. It is not a case where the ministry's possession amounts only to "bare possession." A consideration of the factors relevant to the issue of custody or control, and regard for the purpose of the legislation, lead me to the conclusion that the video is in the custody of the ministry.

[15] There is no dispute that the OPP obtained the video from the third parties and had a right to possess the video after receiving it from the third parties. As well, the parties do not dispute that although the video was not created for the OPP or for a "law enforcement" purpose as that term is defined in the *Act*, it was received and reviewed by the OPP in connection with a law enforcement purpose relating to the appellants.

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[19] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 per LaForest J. at para. 61.

Most importantly, there is no dispute that the ministry currently has physical possession of a copy of the video.

[16] On the issue of whether the video relates to a central function of the OPP, the ministry states that the OPP was preserving the peace rather than investigating a possible violation of law, but it nonetheless acknowledges that preserving the peace is one of the OPP's basic functions and that the video was used in respect of this basic function. On this basis, I reject the ministry's submission that the video has no connection whatsoever to the OPP's "functioning or business affairs."

[17] I find that the OPP had the right to deal with the video at the time that it was provided to them and in fact used it, by showing it to the appellants. I further find that the OPP had some responsibility for the care and protection of the video once they agreed to accept it. The ministry acknowledges this in its representations where it states that the video was kept in the vault of the OPP detachment. The fact that no charges were ultimately laid by the OPP does not result in the OPP or the ministry losing any interest in the video that they had when they obtained the video. Furthermore, the fact that the OPP ultimately gave the original video back to the third parties, while keeping a copy, does not eliminate its interest in and responsibility for the copy. The circumstances under which the OPP came to receive, use and retain the video are very different from those in *City of Ottawa*, where the court found the City's possession of an employee's private emails to be "by happenstance." I find that the OPP's and by extension the ministry's possession of the video goes beyond bare possession.

[18] In considering the circumstances and representations of the parties I do not find it necessary to address in detail the appellants' submissions about the actions of the ministry, except to indicate that I have no basis to find any malice or malfeasance.

[19] I find that the ministry has custody of the video and I will order it to issue an access decision with respect to the video.

ORDER:

I order the ministry to issue an access decision for the video in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.

Original Signed By: April 28, 2014
Stella Ball
Adjudicator