

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3424-I

Appeal MA13-578

Regional Municipality of Waterloo

March 30, 2017

Summary: The region received a request for records pertaining to the requester and a named housing co-op. The region granted access to certain records, and denied access to other records on the basis of the exemptions in sections 12 (solicitor-client privilege) and 38(b) (personal privacy). The region also stated that co-op property management records, created while regional staff were performing the functions of the co-op's property manager, are not in the region's custody or control. This interim order determines that the co-op's property manager records are not in the custody or under the control of the region for the purposes of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1).

Orders and Investigation Reports Considered: Order P-239.

OVERVIEW:

[1] The Regional Municipality of Waterloo (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for "All records pertaining to [the appellant] and [an identified co-operative housing corporation (the co-op)]" The request indicated that it was for records in a certain format, and included records from 1987 to the date of the request.

[2] The region issued a decision letter in response to the request. In its decision the region identified the categories of responsive records covered by the request, and its decision regarding the records. In particular, its decision letter identified:

- Region's solicitor records relating to an identified legal action - access denied under section 12 (solicitor-client privilege);
- Records held by the region as a Service Manager under Part III of the *Housing Services Act* - access to the appellant's own information granted; access to other information in these files denied under sections 14(1) (personal privacy) and 12;
- Regional Chair's correspondence - access denied under section 12; and
- Property Manager's Records - responsive records belong to the co-op and are not in the custody or control of the region for the purposes of the *Act*.

[3] The appellant appealed the region's decision.

[4] During mediation, the appellant took the position that additional responsive records ought to exist, and identified the reasons for this belief. This information was provided to the region, which maintained that no additional responsive records exist. It also provided additional information relating to the records.

[5] Also during mediation, the region confirmed that, with respect to the records that contained the personal information of another identifiable individual, it was claiming the exemption in section 38(b) (personal privacy), and not 14(1).

[6] The region provided this office with the records for which it was claiming the exemption in section 38(b). The region did not provide this office with records which it claims qualify for exemption under section 12, nor records which it claims are not in its custody or control.

[7] Mediation did not resolve this file, and it was transferred to the inquiry stage of the process.

[8] I began my inquiry by inviting the region to provide representations on all of the issues, and inviting the co-op to provide representations on whether certain records are in the region's custody or control. Both the region and the co-op provided representations to me.

[9] After reviewing the representations of the region and the co-op, I decided to invite the appellant to submit representations on the custody or control issue only, as that issue may inform some of the other issues raised in this appeal. I provided the appellant with the non-confidential portions of the representations of the region and the co-op. The appellant provided lengthy representations, with numerous attachments, in response.

[10] For the reasons that follow, I find that the Property Manager's records are not in the custody or under the control of the region for the purposes of the *Act*.

PRELIMINARY ISSUE – SCOPE OF THE RECORDS ADDRESSED IN THIS INTERIM ORDER

[11] With respect to the scope of this appeal, I note that the Mediator's Report, prepared at the conclusion of the mediation process, confirms that the request in this appeal relates only to records relating to the appellant and/or records that relate to both the co-op and the appellant. The appellant has confirmed that her request does not include general records relating to the co-op that do not relate to her.

[12] In its decision letter and in its representations, the region refers to four broad categories of records responsive to the request, which are:

- region's solicitor records relating to an identified legal action;
- records held by the region as a service manager under Part III of the *Housing Services Act*, including communications between the region staff and their counsel (for which the solicitor-client privilege is claimed), and records relating to the appellant retained by the region for the purpose of continuing its role as administrator of identified programs;¹
- correspondence involving the Regional Chair;
- property management records for the co-op during the time that regional personnel were performing the functions of the co-op's property manager (from mid-April to July, 2013).

[13] The region issued an access decision denying access to records responsive to the first category of records, and granting partial access to records responsive to the second and third category of records. The region takes the position that the records responsive to the fourth category are not in its custody or control.

[14] The appellant provides extensive confidential representations and numerous attachments.² Large portions of the appellant's representations focus on her concerns regarding the propriety of the region's actions in becoming involved in the activities of the co-op. The appellant takes the position that all records referenced in her representations and relating to her concerns or allegations are in the custody or control of the region. In my view, however, many of her concerns relate more to the issue of whether various records exist, as opposed to whether they are in the region's custody or control. I also note that many of the issues raised by the appellant do not appear to directly relate to the request in this appeal, which is for records that relate to her.

¹ The region has indicated that it is prepared to grant the appellant access to records that relate to her, subject to further notification. The appellant has not directly addressed this position taken by the region.

² Because of the appellant's confidentiality concerns, I can only refer to her representations in a general way in this order.

[15] The region has indicated that it has custody or control of records responsive to the first three categories. In these circumstances, I will only be addressing the custody or control issue as it relates to the fourth category of records: property management records for the co-op created or used during the time that regional personnel were performing the functions of the co-op's property manager (from mid-April to July, 2013).³

RECORDS:

[16] The records addressed in this Interim Order, which the region claims are not in its custody or control, are any responsive co-op Property Manager's records created or used when regional personnel were performing the functions of the co-op's Property Manager. These records cover the period of time from mid-April to July, 2013.

DISCUSSION:

Are the records "in the custody" or "under the control" of the institution under section 4(1)?

[17] In its access decision relating to the Property Manager records for the period from mid-April to July, 2013, the region states that these records are not in its custody or control for the purposes of the *Act*. In its decision letter, the region stated as follows:

On [April of 2013], following its appointment, the new Board of Directors for [the co-op] passed a motion requesting [the region] to take interim responsibility for property management activities. The region accepted this request, and subsequently, staff acted as an agent for the Board in respect of those activities. Because of that, records held by staff in connection with property management activities belong to [the co-op], not the region, and therefore are not under the control of [the region] for the purpose of the *Act*.

[18] Throughout this appeal, the region has maintained that the records held by staff in connection with property management activities during this period of time belong to the co-op, not the region, and therefore are not in the region's custody or control for the purpose of the *Act*. The co-op agrees with the region's position. The appellant takes the position that all requested records are in the region's custody or control.

³ Although the appellant also seems to suggest that the region improperly has possession of other co-op records, this does not relate to the issue of whether the region has custody or control of the property management records for the co-op during the time that regional personnel were performing the functions of the co-op's property manager.

General principles

[19] Section 4(1) of the *Act* 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 . . .

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

[21] 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

[22] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.⁵ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[23] The courts and this office have applied a broad and liberal approach to the custody or control question.⁶ Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁷ The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?⁸
- What use did the creator intend to make of the record?⁹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁰
- Is the activity in question a "core", "central" or "basic" function of the institution?¹¹

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

⁵ Order PO-2836.

⁶ *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.

⁷ Orders 120, MO-1251, PO-2306 and PO-2683.

⁸ Order 120.

⁹ Orders 120 and P-239.

¹⁰ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

- Does the content of the record relate to the institution's mandate and functions?¹²
- 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?¹³
- If the institution does have possession of the record, is it more than "bare possession"?¹⁴
- 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?¹⁵
- Does the institution have a right to possession of the record?¹⁶
- Does the institution have the authority to regulate the record's content, use and disposal?¹⁷
- 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?¹⁸
- To what extent has the institution relied upon the record?¹⁹
- How closely is the record integrated with other records held by the institution?²⁰
- 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?²¹

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

¹¹ Order P-912.

¹² *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.) and Orders 120 and P-239.

¹³ Orders 120 and P-239.

¹⁴ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁵ Orders 120 and P-239.

¹⁶ Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

¹⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

²⁰ Orders 120 and P-239.

²¹ Order MO-1251.

- If the record is not in the physical possession of the institution, who has possession of the record, and why?²²
- 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?²³
- Who paid for the creation of the record?²⁴
- What are the circumstances surrounding the creation, use and retention of the record?²⁵
- 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?²⁶
- 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?²⁷ 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?²⁸
- 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?²⁹

²² PO-2683.

²³ Order M-315.

²⁴ Order M-506.

²⁵ PO-2386.

²⁶ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁷ Orders M-165 and MO-2586.

²⁸ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

²⁹ 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?³⁰

[25] 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.³¹

[26] In *Canada (Information Commissioner) v. Canada (National Defence)*,³² the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[27] According to the Supreme Court, control can only be established if both parts of this test are met.

Representations of the parties

The region’s representations

[28] With respect to the property manager records, the region provided detailed background information regarding how regional staff came to act as the property manager for the co-op for approximately 3½ months in 2013.

[29] The region states that the co-op in question is a “designated housing project” in accordance with Regulation 368/11 under the Ontario *Housing Services Act* [HSA]. It is also organized as a co-operative corporation in accordance with the *Co-operative Corporations Act* [CCA] of Ontario. The region is an upper-tier municipal corporation and, as such, performs the functions of “Service Manager” as that term is defined in the HSA.

[30] The region indicates that for some period of time prior to acting as property manager for the co-op, the region had been increasingly involved in corresponding with the co-op regarding the actions of its Board of Directors, pursuant to the region’s statutory authority under section 81 of the *Housing Services Act*. Subsequently, in April of 2013, the region exercised its statutory authority under the HSA to replace the board of directors and appoint five directors in their place (“the Appointee Board”). The region states that on the date of their appointment, as an interim measure to address the

³⁰ Order MO-1251.

³¹ *City of Ottawa v. Ontario*, cited above.

³² 2011 SCC 25, [2011] 2 SCR 306.

immediate needs of the co-op, the Appointee Board delegated authority to certain staff of the region to undertake the function of providing property management services to the co-op.³³

[31] The region states that the decision to appoint regional staff to undertake the function of providing property management services to the co-op was based upon the urgent need to reconcile the affairs of the co-op, and that the region ceased to act in this capacity in July of 2013. The region also states:

... during the period of time that Region employees [acted] in the capacity as provider of property management services for [the co-op], [they] performed this work at the administrative offices of the co-op ... under the supervision and direction of the Chair of the Appointee Board and any records that may have been created or reviewed during this time remained within the office of the co-op

[32] The region also states:

Correspondence, for example, created by region employees acting in the capacity as property managers during this period, was sent on the letterhead of [the co-op] with signature noting "On behalf of [the co-op] Board of Directors".

[33] The region provides an example of such a letter.

[34] The region also provides the following representations on the issue of custody or control of these records:

As noted above, [the co-op] is a co-operative corporation governed by the provisions of the *Co-operative Corporations Act*. This statute stipulates what records are to be maintained by the co-op and which of these records are available to members. It is the position of the Region that any records received by the Region while in its capacity as property manager for [the co-op] ... remain the property of [the co-op] and subject to the provisions of the *Co-operative Corporations Act*.

The co-op's representations

[35] The co-op's representations confirm that it is a co-op subject to the *Co-operative Corporations Act*, and that its primary purpose is to provide housing to its members. It states that the *CCA* sets out (1) what records are to be kept and maintained by the corporation and (2) what records are to be available to the members, and under what

³³ The region provides a copy of the resolution of the Appointee Board appointing regional staff in this capacity.

circumstances, as identified in sections 114, 115 and 119. It states that these sections are similar to those found in other corporate legislation, such as the *Corporations Act* and the *Business Corporations Act*, and that the intention in these statutes is to maintain confidential those records that are confidential to the corporation. The co-op also confirms that the *CCA* does provide a number of measures to ensure accountability and transparency to the members of the corporation, including the requirement of budgetary approvals and audited financial statements. The co-op also refers to its by-laws, which it states mirror the balanced approach found in the relevant sections of the *CCA*. It states that access by members is balanced by the need to protect confidentiality, including personal information and commercially-sensitive information.

[36] The co-op confirms that the Appointee Board determined at its first meeting that the most appropriate action was to retain the region to manage the property. It states:

The records created or used for carrying out this activity were and remain the property of [the co-op] and are subject to section 119 of the *CCA*. These records were not intended to be nor ... are they the property of the Regional Municipality. They were created and used solely for the management of the property of [the co-op] and were created pursuant to the *CCA*

[37] The co-op then refers to the legal principles articulated by the Divisional Court in *City of Ottawa v. Ontario (Information and Privacy Commissioner)*³⁴ and states that they should apply to this matter. In particular, the co-op identifies the following principles as relevant to the circumstances of this appeal:

- purposes of the legislation: one of the purposes of the *Act* is to make information in the control of institutions available to the public to “enhance accountability, public participation, fairness in decision-making and personal privacy.” The co-op states that its records are governed by the *CCA*, which includes provisions for access and protection of confidential information. The co-op confirms that records related to the region’s own decision-making processes are different, and are covered by the *Act*;
- with respect to the principle of “facilitating democracy”, this relates to the region’s records and not the co-op’s (which is a member-governed co-operative corporation covered by the *CCA* and its own by-laws); and
- the region’s involvement with the co-op’s property management records relate solely to its duties in carrying out the activities of a property manager for the co-op in “very unusual and difficult circumstances.” These activities are not part of the region’s “government function” as contemplated in the *Housing Services Act*.

³⁴ 2010 ONSC 6835.

The appellant's representations

[38] The appellant provided extensive representations, as well as many attachments.

[39] As noted above, large portions of the appellant's representations focus on her concerns regarding the propriety of the region's actions in becoming involved in the activities of the co-op. These include concerns that the region acted without jurisdiction, or proper authorization, and improperly involved itself in many of the co-op's activities. The appellant takes the position that all records referenced in her request and representations and relating to her concerns or allegations about the actions of the region are in the custody or control of the region.³⁵

[40] As I noted above, many of the appellant's concerns do not directly relate to whether the records at issue are in the region's custody or control.

[41] With respect to the specific issue of whether the region has custody or control of the property manager records for the period of time that regional staff were filling the role of property manager, the appellant submits that the property management documents were created by employees of the region and are retained on the region's computer network. She also submits that the region paid for the creation of some records (although she does not specify which records). In addition, the appellant takes the position that even if records are not in the possession of the region, the region has been able to obtain these records from the co-op.

[42] In response to the co-op's representations on custody and control, the appellant submits that *City of Ottawa* decision can be distinguished from this case because the files that were produced, controlled and in the custody of the region, were used in the daily operations of the co-op even prior to the region taking over.

Analysis and findings

[43] The issue in this interim order is whether the requested Property Manager records are "in the custody" or "under the control" of the region pursuant to section 4(1).

[44] With respect to the list of factors to consider in determining whether or not a record is in the custody or control of an institution, I accept the appellant's position that the records were created by employees of the region; however, I also accept the region's position that the regional staff who created the records were acting under the authority of the co-op's appointed Board of Directors.

³⁵ The appellant's suggestion that the region has custody and control of all of the co-op's records is not before me in this appeal, as the request relates only to records involving the appellant. I also note that, although it addresses a different context, section 170(2) of the *HSA*, referenced by the region in its representations, speaks to this issue to some extent.

[45] In addition, as confirmed by the region, during the time that its staff acted in the capacity of property manager for the co-op, they performed their work at the co-op's administrative offices under the supervision of the Chair of the appointed Board of Directors. The region states that any records created or reviewed during this time remained within the office of the co-op. I accept that these records were created and used solely for the management of the property, and remain the property of the co-op. Even if some of the records are emails or are otherwise available on the region's network, I find that such possession amounts to "bare possession", which does not constitute custody for the purposes of the *Act*. On this basis, I conclude that the Property Manager's records were not integrated with the records held by the region.

[46] Both the region and the co-op submit that the Property Manager records were created and used for carrying out property management functions for the co-op pursuant to the *Co-operative Corporations Act*. They submit that regional staff were delegated authority to carry out property management functions in "very unusual and difficult circumstances" and that the property management activities undertaken by these regional employees extended beyond the region's ordinary role as a Service Manager under the *Housing Services Act*. I accept this characterization of the regional employees' involvement in the role of the co-op's property management during the time in question. As a result, I find that the institution does not have a statutory power or duty to carry out the activity of property manager, and that these activities are not a "core", "central" or "basic" function of the region.

[47] I also accept that the Property Manager's records that the region's employees generated were created and used solely for the management of the co-op, and find that the content of the records relates to the co-op's mandate and functions, and not to "region business".

[48] The region has stated that any records received by its staff in the capacity as property manager for the co-op remained the property of the co-op and were at all times subject to the provisions of the *Co-operative Corporations Act*. The region also asserts that during this time, staff performed the work at the administrative offices of the co-op under the supervision and direction of the appointed Board. I accept the region's position regarding the authority under which regional staff were acting during the time they performed the role of property manager. I also agree that at all times the Property Manager's records remained the property of the co-op, under the control of the co-op's Board of Directors, and subject to the provisions of the *Co-operative Corporations Act*. On this basis, I am satisfied that region has no authority to regulate the co-op's use and disposal of those records.

[49] I have also reviewed the decision of the Supreme Court of Canada in *National Defence*,³⁶ referenced above, in which the court articulated the following two-part test

³⁶ *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 (CanLII)

for institutional control of a record:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[50] Applying this two-part test, I have found above that the property management records do not relate to a "region matter."

[51] I have also considered whether the region could reasonably be expected to obtain a copy of the property management records upon request. I have found that the region does not have the authority to regulate the co-op's use or disposal of such records, and am satisfied that, in the ordinary course, the region could not reasonably be expected to obtain a copy of records of this nature request. I also recognize, however, that the region, which performs the functions of a "Service Manager" under the *HSA*, has various statutory powers under that *Act*, including the power to audit or to require the housing provider to provide it with various documentation. However, as noted by the region, section 170(2) of the *HSA* reads:

(2) A person does not have control of a record for the purposes of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* just because the person is entitled under section 20 or 21, subsection 69 (4) or section 71, 80, 81 or 82 to obtain a copy of a record.

[52] As a result of the wording of that section and all the circumstances of this appeal, I find that the region does not have control of the property management records for the purpose of the *Act* simply because it may be able to require production of such records under its statutory authority in the *HSA*.³⁷

[53] As a result of the above, I find that any co-op Property Manager's records created or used when regional personnel were performing the functions of the co-op's Property Manager are not in the custody or under the control of the region, and are therefore not subject to the *Act*.

³⁷ See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, referenced above, where the court determined that the city's right to monitor and supervise the use of its email server to ensure compliance with its policies is a limited right of access, and does not mean that the records are subject to the *Act*. See also Order P-1069, referenced by the Divisional Court, which found that records held by an outside agency are not subject to the *Act* merely because an institution has a general supervisory and monitoring role over the agency (in that case, the institution's limited right of access to agency records to require financial accountability and periodic administrative reviews to ensure compliance the relevant statute).

ORDER:

1. I uphold the region's determination that the Property Manager's Records are not in the custody or under the control of the region for the purposes of the *Act*.
2. I remain seized of this appeal in order to deal with the remaining issues.

Original Signed by: _____
Frank DeVries
Senior Adjudicator

_____ March 30, 2017