

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3832

Appeal MA17-295

City of Greater Sudbury

September 12, 2019

Summary: The City of Greater Sudbury (the city) received a request for information about statistics relating to dogs and cats that were housed in a shelter or pound by a named animal control service provider and the city. The city granted partial access to the responsive records and at the close of mediation, the only issues that remained to be addressed were whether additional information requested by the appellant fell within the scope of the request, the reasonableness of the city's search for responsive records and whether the city had control over responsive records that may be in the custody of the named animal control service provider. In this order, the adjudicator finds that the additional information requested by the appellant falls outside the scope of the request and that the city conducted a reasonable search for responsive records within its custody, but that the city has control over any responsive records in the custody of named animal control service provider. The adjudicator orders the city to request responsive records from the named animal control service provider and to issue an access decision on any records that are provided to it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 4(1) and 17; *Animals for Research Act*, R.S.O., c. A.22, section 1(1).

Case Considered: Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 SCR 306.

OVERVIEW:

[1] An individual submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the City of Greater Sudbury (the

city) for access to the following information:

Please provide the following statistics (separate information for each shelter or pound, separate information for dogs and cats) for the past 5 years:

([A named animal control service provider] and City Animal Services)

- Number of animals to enter each shelter
- Number of animals returned or claimed by owner
- Number of animals adopted
- Number of animals euthanized and the reason why - medical or behavioral
- Number of animals - if any - sold or gifted to a research facility or a similar program
- Number of animals gifted or sold to research facilities returned after to shelter for adoption vs. number euthanized

Please provide all requests from research facilities asking for animals from each shelter - including any emails and or any other correspondence relating to animals for research.

[2] The city issued a decision granting partial access to the records it identified as responsive to the request. The city denied access to the remaining records under section 15(a) (information published or available to the public) of the *Act* and directed the requester to its website. The city charged a fee of \$159.80 for search time and copying charges.

[3] The requester, now the appellant, appealed the city's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant expressed concerns about the accuracy of the information in some of the online reports. The appellant was advised that this office does not have the jurisdiction to review the accuracy of those reports.¹ The appellant challenged the reasonableness of the fee charged and was also concerned that she could not locate some of the records that the city said were publicly available. The appellant also stated that she believed more records should exist relating to animals being sent to research facilities,

¹ This office may review issues related to the accuracy of *personal* information pursuant to section 36(2) of the *Act*.

which she believes, would include animals that were neutered at a research facility.

[4] In response to learning of the appellant's concerns, the city reduced the fee from \$159.80 to \$78.40. Following further discussions and exchange of information, the appellant accepted the reduced fee and this removed the fee issue from the scope of the appeal. Additionally, the city provided links to certain online records, as well as a hard copy of some of the records for which it claimed section 15(a), which also removed the possible application of section 15(a) of the *Act* from the scope of the appeal. At this stage the following records had been disclosed to the appellant:

- Animal Control Reports of the named animal control service provider for the years 2012, 2013, 2014, 2015 and 2016;
- Two Intake Detail Reports for the time period of January 1, 2017 to April 6, 2017;
- Nine Outcome Summary Reports for the time period of January 1, 2017 to April 6, 2017;
- Four Euthanasia History Reports for the time periods of January 1, 2017 to April 6, 2017 and October 24, 2016 to December 31, 2016;
- A Report described in the city's decision letter as being "Animal Care and Control Next Steps: Trap/Neuter/Return (TRN) and Spay/Neuter Programs Report" [available online].

[5] Respecting the appellant's claim that there should be records related to animals that may have been sent to research facilities, the city took the position that no such records exist.

[6] After reviewing the disclosed records, the appellant questioned the apparent absence of Intake Detail Reports from 2012 to 2015 or Disposition Details for 2016, which had not been attached at the end of the 2016 Animal Control Report of the named animal control service provider. She further stated that more records about why animals were euthanized and the number of animals that were neutered in a research facility should exist.

[7] The city took the position that information regarding neutering of animals did not fall within the scope of the request. The city also maintained that no records exist relating to the Disposition Details for 2016, Intake Detail Reports dated 2012 to 2015 and records dated 2012 to 2015 that provide reasons why animals were euthanized. The city stated that since it took control over the operation of animal control and animal services from the named animal control service provider in 2016, it could not answer the appellant's questions about the named animal control service provider's reports prior to 2016. The city also stated that, except for the publicly available records, it did not have custody or control of the former animal control service provider's records and

that the appellant should speak directly to the former animal control service provider about their records.

[8] Since no further mediation of the appeal was possible, it was transferred to the adjudication stage for an inquiry. The originally assigned adjudicator commenced her inquiry and representations were shared between the city and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] The appeal was then transferred to me to complete the inquiry. In the course of adjudication, I decided to send a Supplementary Notice of Inquiry to the former animal control service provider, inviting its representations on the custody or control issue. The former animal control service provider did not respond to the Supplementary Notice of Inquiry.

[10] In this order, I find that the information requested by the appellant with respect to animals neutered or spayed at a research facility, or otherwise, falls outside the scope of the request and that the city conducted a reasonable search for responsive records within its custody, but that the city has control over any responsive records in the custody of the named animal control service provider. I order the city to request responsive records from the named animal control service provider and to issue an access decision on any records that are provided to it.

ISSUES:

Issue A: What is the scope of the request? What records are responsive to the request?

Issue B: Are the records "in the custody" or "under the control" of the city under section 4(1)?

Issue C: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.² To be considered responsive to the request, records must "reasonably relate" to the request.³

The city's representations

[13] The city takes the position that the appellant's request for any records pertaining to animals neutered in a research facility amounts to a new request because it does not fall within the scope of her original request. The city submits that there is a "stark" difference between the appellant's original request for information on animals being sold or gifted to research facilities by the city, or animals being requested from the city by research facilities, and information on any animals neutered in a research facility. The city submits that in the appellant's original request there is no reference to statistics in regards to neutering.

The appellant's representations

[14] The appellant refers to the definitions of "research" and "research facility" that are contained at section 1(1) of the *Animals for Research Act*⁴. Those definitions read as follows:

"research" means the use of animals in connection with studies, investigation and teaching in any field of knowledge, and, without limiting the generality of the foregoing, includes the use of animals for the performance of tests, and diagnosis of disease and the production and testing of preparations intended for use in the diagnosis, prevention and treatment of any disease or condition;

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

⁴ R.S.O. 1990, c. A.22.

“research facility” means premises on which animals are used in research and includes premises used for the collecting, assembling or maintaining of animals in connection with a research facility, but does not include a farm on which pregnant mares are kept for the collection of urine; ...

[15] The appellant submits that an expansive interpretation of those definitions and the practices at those facilities, would indicate to an experienced city employee that her original request includes a request for information on neutering.

[16] She objects to the city, in her view, “play[ing] with words, mak[ing] up definitions and us[ing] semantics to decide which information to release” when her “original request was clear and specific”. She then recounts her interactions with the city submitting that she never changed the parameters of her request and that she mentioned animals neutered or spayed at a research facility to everyone she spoke to as an example of the different types of research. She submits that she was not asked for any details or clarification of her request after she submitted it.

The city’s reply submissions

[17] The city submits that the *Animals for Research Act* was considered when the request was being processed and the employees who conducted the search for responsive records were educated in animal control and familiar with the legislation.

[18] The city submits that in her request the appellant asked for the number of animals sold or gifted to a research facility and also asked for all requests from research facilities asking for animals from each shelter. The city submits that:

These are the parameters that were used when performing the search, while taking into account the definitions of research and research facility found within the *Animals for Research Act*. The city maintains that the request was sufficiently clear, and as such it did not require clarification.

... To be a responsive record to the appellant’s original request, any records pertaining to neutering would need to fall within the scope of the appellant’s request, and would need to pertain to “animals sold or gifted to a research facility” or be related to “requests from research facilities asking for animals from each shelter”.

The city submits that the responsive records to the appellant’s request were correctly identified by the city in [its] decision. Should the appellant wish to now have a search done for records about neutering with different parameters than the ones in her initial request, then she would need to submit [a new request].

The appellant's sur-reply representations

[19] In sur-reply, the appellant submits that if the parties are using the same definitions, there is no need to submit a separate request for animals neutered or spayed at a research facility "as this is definitely considered research under provincial legislation for collection of statistics and for definition purposes". Referring to the legislation as well as interactions she had with the mediator, the appellant reiterates that her request included a request for this information.

Analysis and finding

[20] I have considered the lengthy submissions that the appellant provided on this issue, only some of which I reproduce in this order, as well as the explanation provided by the city. I find that the information sought by the appellant relating to animals neutered or spayed does not fall within the scope of the appellant's access request at issue before me. The access request is clearly worded, specific and unambiguous. There was no need for the city to request clarification from the appellant in the circumstances of this appeal. In my view, adopting a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* leads me to conclude that the city correctly interpreted the scope of the request. Accordingly, if the appellant wishes to obtain access to information relating to animals neutered or spayed at a research facility or otherwise, she should make a new request.

Issue B: Are the records "in the custody" or "under the control" of the city under section 4(1)?

[21] The appellant seeks information from the former animal control service provider's records; namely, Disposition Details for 2016, Intake Detail Summaries dated 2012 to 2015 and records dated 2012 to 2015 relating to the reasons why animals were euthanized. This raises the issue as to whether these records are within the custody or control of the city.

[22] Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[23] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. 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.⁵ The courts and this

⁵ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

office have applied a broad and liberal approach to the custody or control question.⁶

[24] 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.⁷ 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).

Factors relevant to determining "custody or control"

[25] 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.⁸ 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?⁹
- What use did the creator intend to make of the record?¹⁰
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹¹
- Is the activity in question a "core", "central" or "basic" function of the institution?¹²
- Does the content of the record relate to the institution's mandate and functions?¹³
- 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?¹⁴

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 Order PO-2836.

⁸ Orders 120, MO-1251, PO-2306 and PO-2683.

⁹ Order 120.

¹⁰ Orders 120 and P-239.

¹¹ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹² Order P-912.

¹³ *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.

- If the institution does have possession of the record, is it more than
- “bare possession”?¹⁵
- 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?¹⁶
- Does the institution have a right to possession of the record?¹⁷
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁸
- 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?¹⁹
- To what extent has the institution relied upon the record?²⁰
- How closely is the record integrated with other records held by the institution?²¹
- 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?²²

[26] 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?²³
- 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?²⁴

¹⁴ Orders 120 and P-239.

¹⁵ Order P-120 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁶ Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

¹⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Order 120.

²¹ Orders 120 and P-239.

²² Order MO-1251.

²³ PO-2683.

- Who paid for the creation of the record?
- What are the circumstances surrounding the creation, use and retention of the record?
- 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?²⁵
- 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?²⁶ 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?²⁷
- 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?²⁸
- 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?²⁹

[27] 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

²⁴ Order M-315.

²⁵ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁶ Orders M-165 and MO-2586.

²⁷ *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.).

²⁸ Order MO-1251.

²⁹ Order MO-1251.

legislation.³⁰

[28] In *Canada (Information Commissioner) v. Canada (Minister of National Defence) (National Defence)*³¹, 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?

The city's representations

[29] In its representations, the city clarified that at mediation it had indicated that it had provided all records that were responsive to the appellant's request that were within its custody or control.

[30] The city adds:

In regards to the Intake Details Reports from 2012 to 2015, the city explained that "Intake Detail Reports" refer to the name of the reports generated by the city once they have taken over control of animal control and animal services. The city submits that the reason why they do not have "Intake Detail Reports" from 2012 to 2015 in their custody or control is because these records simply do not exist. The "Intake Detail Reports" were only generated by the city once the city took over animal operations in 2016, and to the city's knowledge, [the former animal control service provider] never generated or provided any reports with that same name.

...

[31] With respect to the appellant's request for additional disposition details for 2016, the city submits that no further records of this nature exist and/or they were never in the custody or control of the city. The city refers to page 7 of the former animal control service provider's 2016 Animal Control Report, a copy of which was disclosed to the appellant, that references disposition rates for 2016 as being preliminary, and submits:

... This report was dated October 31, 2016, and [the city] took over animal control and services on October 26, 2016. This would indicate that this was the last report that the city received from [the former animal control service provider], and therefore there would be no other report

³⁰ *City of Ottawa v. Ontario*, cited above.

³¹ 2011 SCC 25, [2011] 2 SCR 306.

containing "Disposition Details" for 2016. The city maintains that the record that the appellant is requesting does not exist.

[32] With respect to the request for records dated 2012 to 2016, which provide reasons why animals were euthanized, it is the city's position that these records also do not exist and/or were never in the custody or control of the city. The city submits that:

... [The former animal control service provider] annual reports from 2012 to 2016, which were provided to the appellant as a courtesy, do contain the number of animals euthanized, although they do not have the reasons specified. This is consistent across all of the reports from [the former animal control service provider] which are in the city's possession. There was no contractual obligation for the [former animal control service provider] to provide a report which outlined reasons for why animals were being euthanized. The city has chosen to report on the reasons why it euthanizes animals now that it has taken over animal control and services, however, this was not required of [the former animal control service provider], and accordingly the city does not believe that these alleged records exist.

[33] With respect to the relationship between the city and the former animal control service provider, the city refers to some of the contract provisions governing their agreement that it reproduced in its representations, and submits that according to those provisions:

- no one in the former animal control service provider organization was an employee, agent of, or partner with the city;
- the reporting requirements in the contract were met by the former animal control service provider, and the required information can be found in the records provided;
- the reports were provided on an annual instead of a monthly basis in accordance with the manager's requirements and the annual reports broke the information down into monthly statistics;
- there is nothing in the contract provisions that obligates the former animal control service provider to prepare reports on the reasons why animals were euthanized. They were just obligated to report on the dispositions of any animals so impounded, which would include animals that had been euthanized, and the city has no reason to believe that records exist containing this information.

[34] Regarding the ability to inspect the records of the former animal control service provider, the city sets out section 23 of the contract as follows:

The Service Provider will maintain proper records and shall submit in a timely fashion the reports as described in the Scope of Services as schedule "A" to the Manager. All reports shall be as indicated in the Scope of Services or at the frequency required by the Manager. The Manager or his designate(s) may, at the City's expense, inspect the Service Provider's records relating to the Services described herein at any reasonable time.

[35] The city further submits that any records remaining with the former animal control service provider (which the city denies the existence of), would not be in the custody or control of the city for a number of reasons, including:

- the records were not created by an officer or employee of the city;
- the activity was not a core, central, or basic function of the institution, but rather a small aspect of the city's workings;
- the city does not have physical possession of any of the alleged records and the city does not believe they exist;
- while the agreement was in force with the former animal control service provider the city had the right to inspect the former animal control service provider's records at any time, but once the agreement ended the city no longer had that right;
- the records that the appellant alleges to exist are not integrated with other records held by the city.

[36] With respect to the two-part *National Defense* test, the city submits:

... if the documents existed, then the contents would indeed relate to a departmental matter. However, the city submits that this is not the case. The city has no reason to believe that [the former animal control service provider] withheld records from them during the time that they were a service provider. The city also believes that these alleged requested records do not exist [...]. Because the city does not believe the records are in existence, the city submits that it could not reasonably expect to obtain a copy of these alleged documents upon request.

... The city submits that it is not reasonable for it to be required to contact an old service provider whom they no longer have any contractual dealings with, and to ask the provider to conduct a search for records that the city does not believe to exist, and which there is no basis to support the belief that the records exist.

The appellant's representations

[37] The appellant takes the position that the scope of the contractual relationship

may not be accurately reflected by the excerpts that the city provided. The appellant further submits that a number of the former animal control service provider employees were appointed as Animal Control Officers and Municipal By-Law Enforcement officers. The appellant submits that, accordingly, they were acting on behalf of the city and may even be defined as the city's agents.

[38] The appellant also asserts that because the city was paying these individuals, there "should be a great deal of record keeping from the municipal by-law officers to the Manager of By-Law Compliance during the contract between the city and [the former animal control service provider]".

[39] The appellant disagrees with the city's position that the records were not created by an officer or employee of the city. She submits that since the city council appointed the owner of the former animal control service provider an Animal Control Officer and a Municipal Law Enforcement Officer "that is where the records were in fact created by an officer of the city without a doubt".

[40] The appellant therefore takes the position that:

- the records were created by an officer of the institution because the operator of the former animal control service provider was appointed a Municipal By-law/Animal Control Officer during the time frame of the request and while the provision of services was governed by an agreement;
- the city had the power to direct and command Rainbow District Animal Control as it was paying for their services and the animals were under the care of the Greater Sudbury Animal Control;
- an institution has the responsibility for the care and protection of its own records, especially records that it paid someone else to create for it;
- the city has demonstrated that it has some records, created in accordance with a mandatory statutory or employment requirement, that it looked for, but that there are more that it didn't look for;
- in keeping with its mandate of transparency and honesty it would be in the city's best interest to have a copy of detailed records relating to animal control services;
- animal services is a core, central and basic function of the city, whether it is contracted out to third parties or not;
- the city cannot claim that records do not exist if they have not properly searched for them in the first instance.

Analysis and finding

[41] As set out above, the city's animal control program was administered by the former animal control service provider until October 26, 2016, when the city over its administration. Therefore, the issue is whether responsive records that fall within the time-line of the request and that predate October 16, 2016 are in the custody or control of the city. When analyzing this issue, it must be kept in mind that responsive records are those records that would be responsive to the request for information and are not limited to a search for the same reports that were later prepared by the city. The issue of custody or control should therefore encompass records that contain the information that falls within the scope of the access to information request, and not be limited to the same reports later prepared by the city.

[42] It is important to consider the purpose, scope and intent of the legislation when determining the issue of whether records are within the custody or control of the public body.³² In all respects, a purposive approach should be adopted.³³ In determining whether records are in the custody or control of an institution, the relevant factors must be considered contextually in light of the purpose of the legislation³⁴

[43] The purposes of the *Act* are set out in section 1 as follows:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

³² *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 at paras. 84 to 85. *City of Ottawa v. Ontario*, 2010 ONSC 6835 at para. 21.

³³ *City of Ottawa v. Ontario*, 2010 ONSC 6835 at para. 28.

³⁴ *Children's Lawyer for Ontario v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 642 at 89.

[44] In its discussion of the concept of "control" for the purposes of freedom of information legislation, the majority in *National Defence* stated:

As "control" is not a defined term in the *Act*, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the *Act*.³⁵ ...

[45] The Court also stated:

Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* [...] The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be

³⁵ *National Defence* at para. 48.

disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word “could” is to be understood accordingly.³⁶

[46] The city concedes that if records existed, the contents would indeed relate to a departmental matter. The city has thereby conceded the first part of the *National Defence* test. This makes sense, because the city has assumed the administration of animal control and related services, including by-law enforcement relating to animals.

[47] Turning to the second part of the *National Defence* test, I accept that, other than those already in possession of the city, it does not have custody of the former animal control service provider’s records. However, if responsive records exist in the custody of the former animal control service provider, I am satisfied that although they may not be in the city’s custody, they would be responsive records in the city’s control. Even if the city characterizes it as a “small aspect of the city’s workings”, animal control services and by-law enforcement remain a city function and the former animal control service provider would only have created responsive records because this function appears to have been delegated to it under a contract, albeit for a discrete period of time. Hence, any responsive record would have been generated in the course of the performance of what was, essentially, a city function. In so delegating the function, the city was not, in my view, relieved of its responsibilities under the *Act*, and the responsive records generated by the former animal control service provider in that capacity, if in its custody, are therefore under the control of the city.

[48] I also do not read the contract provision set out section 23 of the former contract between the city and the former animal control service provider as restricting the ability of the city to request responsive records that may be in the custody of the former animal control service provider. I note in particular that the clause provides that “[t]he Manager or his designate(s) may, at the city’s expense, inspect the Service Provider’s records relating to the Services described herein at any reasonable time”. The clause does not appear to be limited by the contract term and there is no evidence of another contract provision limiting access post-termination.

[49] I conclude therefore, that notwithstanding the end of the contact term, in light of the nature of its prior contractual relationship, the city could reasonably expect to obtain a copy of any responsive records in the custody of the former animal control service provider on request. Therefore, the two-part test in *National Defence* is met.

[50] I also reach the same conclusion if I consider the list of factors developed by this office, outside of the two-part test articulated in *National Defence*. Weighing the above factors contextually in light of the purpose of the *Act* and for the above reasons, I find that responsive records, if they exist, are under the control of the city.

³⁶ *National Defence* at para 56.

[51] Accordingly, I will order the city to request any responsive records that may exist from the named former animal control service provider and to issue an access decision on any records that are provided to it.

Issue C: Did the institution conduct a reasonable search for records?

[52] Aside from any responsive records that may exist with the former animal control service provider, the appellant also submits that the city should have found more records in its own record holdings.

[53] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³⁷ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[54] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³⁸ To be responsive, a record must be "reasonably related" to the request.³⁹

[55] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴⁰

[56] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴¹

[57] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁴²

The city's representations

[58] The city submits that it made a "significant and reasonable" search for responsive records. It submits that it had the most appropriate and experienced employee who was knowledgeable in the relevant area perform the search. The city

³⁷ Orders P-85, P-221 and PO-1954-I.

³⁸ Orders P-624 and PO-2559.

³⁹ Order PO-2554.

⁴⁰ Orders M-909, PO-2469 and PO-2592.

⁴¹ Order MO-2185.

⁴² Order MO-2246.

provided an affidavit of its By-Law Coordinator – Animal Care & Control, the individual who conducted the search, in support of its position.

[59] She states that the city became responsible for managing pound and animal enforcement as of October 2016 and that prior to this date, the city contracted the former animal control service provider to perform these services.

[60] She states that:

[The former animal control service provider] reported statistics regarding the animals under their care and the services they provided to the city in the form of annual reports ([The former animal control service provider] Reports), which were then previously available on the city's website. The [former animal control service provider] Reports were removed when new content was added to the city's animal care and control webpage, sometime at the end of 2016.

I contacted the city's Communications Department to inquire if they maintained an electronic version of the [former animal control service provider] Reports, to which I was advised they did not. I also searched through the filing cabinets that contained records kept by [named individual], the previous Manager of By-Law Services, who would have overseen the city's involvement with [the former animal control service provider] and whose office space and records I assumed upon accepting the Coordinator position. I was unable to locate a hard copy of the [former animal control service provider] Reports.

I performed a search of electronic folders within the city's internal drive and found the [former third party service provider] Reports for the years 2012, 2013, 2014, 2015 and 2016 on the shared drive ...

...

The city uses an online application called PetPoint (Professional Version), to record and maintain information related to animal care. PetPoint, a reputable information management system used by a number of animal welfare organizations, has the capacity to filter information in the system to produce a number of various reports and statistics.

By-Law Enforcement Officers input information regarding each animal that enters the shelter, including a description of the animal among other things. Information regarding the outcome of the animal's stay at the shelter is also captured in PetPoint.

Using PetPoint, seventeen queries were performed to produce reports that best met the parameters of the request. The animal type (dog or cat), the

year (2016 or 2017) and the nature of the information as noted in the request were used to frame each query and produce a report. ...

In order to address the request for records pertaining to “[n]umber of animals gifted or sold to research facilities returned after to shelter for adoption vs. number euthanized. Please provide all requests from research facilities asking for animals from each shelter - including any emails and or any other correspondence relating to animals for research”, I performed a search of my email, and I also searched my electronic folders and the PetPoint system. [...] There were no responsive records that met this criteria in the request.

To the best of my knowledge, the city does not have any understandings or agreements with any animal research facilities to provide animals for research purposes. Also, to the best of my knowledge, the city has not gifted or sold any animals to a research facility.

The appellant’s representations

[61] The appellant submits that while the city’s By-Law Coordinator – Animal Care & Control states that she searched her emails for a six month period and found nothing, she does not indicate that a search was undertaken of the emails of other individuals, including those of the individual who held that post for the previous four years, whom I will refer to as the former Manager of By-laws. The appellant further submits that there is also no indication of a search of the emails or records of another individual, whom I will refer to as the current manager of By-Laws. The appellant also questions whether some of the records had been sent to a storage area.

[62] The appellant also submits that there was no search conducted for records on microfiche, or telephone records. Furthermore, the appellant submits that there is no explanation of the manner of record keeping prior to the use of the PetPoint software.

[63] The appellant asserts that, based on her work experience, on occasion sensitive information would be sent to the “Risk Management Department” or “Internal”. The appellant questions whether other city departments were consulted to determine if they have responsive information.

[64] The appellant further submits that there is no mention of any contact with the former animal control service provider:

No mention is made of the city contacting [named individual] from [the former animal control service provider] to see if there is an arrangement or had been in the past five years regarding email or correspondence for animals sent for research or if he could shed light on records prepared for the city as was their contractual arrangement. Although he is no longer a Municipal By-Law/Animal Control Officer appointed by the [city], I

understand that there is communication between their organizations (both organizations send their animals to [named adoption center] which is affiliated with [the former animal control service provider], for example which is listed as an organization that the city works closely with to adopt out animals on their website) ...

[65] The appellant asserts that since the city keeps records of a number of other types of transactions there should be some unlocated responsive information in the city's custody or control.

[66] In particular, with respect to records pertaining to euthanization, the appellant submits:

... I find it difficult to believe that there are no records at the [city] - even financial documents pertaining to why animals were being euthanized. Just with my basic understanding of how a shelter is run and their financial reporting to whoever is funding them - the cost of euthanizing an animal or deciding to keep it alive and pay for boarding, food, vet care, etc. would have to be recorded somewhere and funding justified to city staff. I would think it reasonable to expect that a municipality would have detailed and extensive records in their legal custody and control. Even if it's just from a municipality caring about their funding and how it's spent and not the caring about why the animals are euthanized ...

[67] Finally, with respect to the amount of time spent on the search, the appellant submits that:

... Only 50 minutes of time was spent searching for records related to animals for research, a subject which municipalities have a history of burying, hiding and attempting to deny access in Ontario, according to the other animal advocates experiences. I would submit that more time is necessary than less than an hour, in more places at the city to conduct a more thorough search, if nothing was found on such a complex and secretive subject when basic statistics took the majority of the search time. It sounds to me that many areas were completely left out of the search for "animal research". Are there any other areas this information could be stored at, at the city or one of its off-site storage facilities?

The city's reply representations

[68] The city submits that there is a records retention by-law that governs how long records are kept by the city. In that regard, the city notes that the retention period for general correspondence (including emails) is two years.

[69] The city advises that in addition to the searches undertaken by the city's By-Law Coordinator - Animal Care & Control, the current manager of By-Laws also did a search

of his emails and no responsive records were found. The city added that the current manager of By-Laws manages the city's By-Law Coordinator - Animal Care & Control.

[70] The city submits that the current manager of By-Laws was the one responsible for animal control in 2015 after he took over from the former manager of By-Laws who moved to an unrelated department and eventually left the organization.

[71] The city submits that the city's current By-Law Coordinator - Animal Care & Control occupies the office vacated by the former manager of By-Laws and only one drawer in that office's filing cabinets contained the former manager of By-Laws' records pertaining to animal control. The city states that that drawer was searched but no responsive records were found.

[72] The city further submits that:

... [the city's current By-Law Coordinator - Animal Care & Control] also searched her emails and the relevant folders on the internal drive for the city. [The former manager of By-Laws] had access to these internal folders, and [the current manager of By-Laws] still does have access to these folders. The responsive records which were found were noted in the city's notice of decision.

The appellant's sur-reply representations

[73] In sur-reply, the appellant questions how documents for a municipality of over 160,000 people, and all their pets for the last five years, could all fit into a single file cabinet drawer.

[74] The appellant also notes that there was no mention of the current manager of By-Laws' search efforts in the original affidavit the city provided which, the appellant asserts, "speaks to the city's credibility". In addition, the appellant points out that the city now takes the position in its reply representations that 45 minutes were spent searching for "research related" documents by the city's By-Law Coordinator - Animal Care & Control. The appellant questions whether the current manager of By-Laws' search time is included in the 45 minute time spent searching.

[75] With respect to the city's By-Law retention schedule, the appellant submits that:

... I doubt animals for research agreements, requests, standing order documentation, or animal research correspondence could be considered by a municipality to be "general correspondence" to be destroyed after two years, considering the legalities, the secrecy and the questionable ownership involved.

[76] Accordingly, the appellant's belief is that these types of records would be stored for much longer than two years and would be available.

[77] The appellant further states that the city did not respond to her queries regarding off-site storage, the search of other departments, or for possible records stored at the former animal control service provider “that actually were created for and belong to the city”.

Analysis and finding

[78] Any responsive records that are within the custody of the former animal control services provider should be identified when the city requests it to provide any responsive records and those records, if any, remain to be addressed. I also note that the appellant’s request for information relating to animals neutered or spayed does not fall within the scope of the appellant’s access request at issue before me. Accordingly, the city did not have to search for responsive records that contain this information.

[79] Turning to the reasonableness of the city’s search for responsive records in its own record holdings, I am satisfied that the city undertook a comprehensive and expansive electronic and physical search for responsive records including a review of the physical records that were located in the filing cabinet located in the office of the current city’s By-Law Coordinator – Animal Care & Control. There is simply no evidence before me that indicates that any records were actually sent off-site for storage.

[80] As set out above, the *Act* does not require the institution to prove with absolute certainty that further responsive records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Based on the evidence before me, I am satisfied that a search was conducted and managed by an experienced employee of the city knowledgeable in the subject matter of the request, and a reasonable effort was expended to locate records within the city’s custody, which are reasonably related to the request.

[81] In all the circumstances, I am satisfied that the city has demonstrated that its search for responsive records in its custody is in compliance with its obligations under the *Act*. Accordingly, I find that the city conducted a reasonable search for responsive records within its custody.

ORDER:

1. I uphold the reasonableness of the city’s search for responsive records within its custody.
2. I order the city to request responsive records from the former animal control service provider requiring it to provide the city with a copy of any records that are located.

3. I order the city to issue an access decision on any responsive records that are provided to it by the former animal control service provider, without claiming that the request is frivolous or vexatious and without recourse to a time extension, in accordance with the requirements of sections 19, 21, 22 and 45 of the *Act*, as applicable, and to send me a copy of the decision letter when it is sent to the appellant.

Original Signed By: _____

Steven Faughnan
Adjudicator

September 12, 2019