



Information and Privacy
Commissioner/Ontario

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

ORDER M-165

Appeal M-9300134

Regional Municipality of Halton Police Services Board



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ORDER

The Regional Municipality of Halton Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all rough notes, tests, and any other recorded information used by a psychologist (the affected person) to draft a psychological report about the requester. The report was submitted to the Police as part of the process to determine the requester's suitability for a promotion. The requester received a copy of the report.

The records consist of the psychological tests given to the appellant and his responses recorded on the test sheets. The records also include the handwritten notes of the affected person. Some of the notes are written on the tests themselves; others are recorded on a separate note-pad.

The Police denied access to the records claiming that they are not in their custody or under their control. The requester appealed the decision of the Police.

Mediation was not possible and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant, the Police, and the affected person. Representations were received from the Police and the affected person only.

The sole issue in this appeal is whether the records are in the custody or under the control of the Police.

Section 4(1) of the Act states:

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 the record or part falls within one of the exemptions under sections 6 to 15.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issues of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

A number of orders have dealt with the issue of custody and control by examining the particular circumstances of an appeal in relation to the types of factors listed by former Commissioner Linden in Order 120 (Orders P-271, P-326, P-396, M-59, and M-152). Similarly, this appeal must be decided on the basis of its particular facts.

The affected person was asked by the Police to conduct psychological assessments of all candidates, including the appellant, being considered for a promotion. The affected person is not an employee of the Police; he is an independent psychologist engaged occasionally by the Police on a fee-for-service basis. There is no formal contract which governs the relationship between the Police and the affected person. The affected person forwards his invoices for services rendered to the Police who remunerate him using a blanket purchase order.

Prior to the commencement of the assessments, the Police and the affected person had agreed that the affected person would furnish a brief summary report on each candidate to the promotion committee. It was also agreed that the candidate would receive a copy of the report about him or her. The affected person was to retain the original copy of the report, along with test results, notes and other protocols. The Police indicated these documents were not to be given to the Police because of the confidential nature of the information contained in them. The Police were concerned that the information might be misused or misunderstood by individuals other than those directly involved in the assessments.

As part of his assessments, the affected person administered a number of tests to the candidates. He also took some notes to serve as an "aide-memoire" to recollect the conversation and interaction that took place during the assessment. The affected person also used the notes to assist him in writing the report that was submitted to the Police.

The affected person has indicated that the records are located in his personal possession in his office files. Accordingly, they are not integrated with other Police records at all. The Police have confirmed that they never had possession of the records, nor do they have any legal or statutory right to possession of the records.

The records do not fall under the Police Records Retention Schedule. The Police have no legal obligation to be responsible for the creation, storage, maintenance, form or style of the records, nor do the Police have any legal control over the disposition of the records.

The Police state that they have not relied on the records at all. The records themselves have no bearing on the mandate or function of the Police. Nor is any member of the Police qualified to interpret or evaluate the information contained in the records. The Police indicate that the affected person himself responded to any questions that the candidates might have had about the report. It is only the information contained in the reports that was considered as one of several sources of information to be weighed in the decision process by the promotion committee.

Having reviewed the representations of both the Police and the affected person, I find that the records are neither in the custody nor under the control of the Police. Accordingly, they are not accessible under the Act in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ July 21, 1993