



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-472

Appeals M-9400622 and M-9400624

Ottawa-Carleton Regional Police Services Board



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NATURE OF THE APPEALS:

These are appeals under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Ottawa-Carleton Regional Police Services Board (formerly the Ottawa Police Services Board) (the Police) received two requests for information relating to a film crew which accompanied police officers in the Byward Market area of Ottawa on August 24, 1994. Specifically, the requesters sought access to the names and organizational affiliation of the entire film crew, the relationship of the film crew to the Police (including any contractual arrangements for their employment and the use of their film footage) and an unedited copy of the complete film footage shot on that day. The requesters each indicated that the film shot included substantial footage of themselves.

The Police provided the requesters with the name of the production company, and indicated that the company had asked to accompany police officers on duty in relation to a film on street people and alcoholics. The Police informed the requesters that they did not have a copy of the film and, therefore, access could not be provided because the record did not exist within their custody or control. The requesters appealed the decision of the Police indicating that the response to the request was inadequate and that the Police should obtain a copy of the film footage. The Police later clarified that they did not have a copy of the film footage, and that records responsive to the other parts of the requests did not exist.

A Notice of Inquiry was provided to the appellants and the Police. Representations were received from all of the parties.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that such records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

The Police submit that, on receiving the request, the officer named in the request was contacted. The officer confirmed that a film crew did accompany him on the specified day, but that the only written record created was a waiver of release which the officer signed and returned to the film company. He did not keep a copy. The officer advised that he did not know the names of the film crew members.

The Police also contacted the district inspector to ascertain whether there was any correspondence from the film company documenting its request to accompany officers. The inspector advised that such requests are not uncommon and would be received either in writing or by telephone. The inspector conducted a search for correspondence relating to such a request and advised that none existed. The Police have provided an affidavit which indicates the steps taken in conducting the search. Further, the Police indicate that they do not require a contract or agreement with a film crew or production company for this service or the use of the

film footage.

The appellants point out that a legal contract can exist without the parties signing a document, and that there may have been an implied contract. However, an individual's right of access under the Act is to information already recorded or retrievable in some physical form.

In the circumstances of this appeal, I find that the actions taken by the Police to locate responsive records were reasonable.

CUSTODY OR CONTROL

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 stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The Commissioner then proceeded to outline an approach for determining whether specific records fell within the custody or control of an institution, which involved a consideration of 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. I agree with Commissioner Linden's approach, and have used it to examine the facts of this particular appeal.

The appellants submit that the film footage is within the control of the Police, and that this control is through some form of legal contract between the Police and the production company. It is the appellants belief that it is standard procedure for police departments to "hire" people who work with them and, therefore, the film footage may have been created by employees of the Police. They indicate that the film footage records unconstitutional and illegal activities performed by the Police at the request of the film crew. They submit that it is beyond belief that the Police did not attempt to ensure their activities would be shielded from public view by maintaining control over the film footage.

The Police submit that the record was not created by an officer or employee of the Police but by an independent production company for the purposes of making a film on street people and alcoholics. The Police indicate that the production company did not supply them with the film or a copy of it, and there is no statutory or employment requirement to do so. The Police submit that the film pertains to people, their way of life and its effect on others. The Police indicate that they do not have a right to the film or a copy of the film as it does not pertain to law enforcement. The Police submit that the only situation in which they would request a copy of the film would be if it pertained to an investigation being conducted by the Police into a law enforcement matter.

In the circumstances of this appeal, I find that the film footage is not within the custody or control of the Police for the purposes of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ February 24, 1995