



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2315

Appeal MA-060203-2

Durham District School Board



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NATURE OF THE APPEAL:

The Durham District School Board (the Board) received a request, submitted pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for all records, reports and correspondence between the Board and a named third party (the affected party) regarding school bussing incidents (the bussing incidents) involving the requester's daughter that occurred in March 2005 (the March 2005 incident) and January 2006 (the January 2006 incident).

The Board responded by issuing a decision letter and releasing four records responsive to the request in their entirety, comprised of one email and three letters.

The requester (now the appellant) filed an appeal with this office, contending that further records exist in regard to both incidents.

The matter was first referred to mediation. During the mediation stage, the Board conducted another search for records and located additional responsive records, some of which were disclosed in full to the appellant. Other records were released in part. The appellant advised the mediator that she was satisfied with the Board's search efforts and did not want to pursue access to the undisclosed portions of the records. Accordingly, the reasonableness of the Board's search for responsive records and access to the undisclosed portions of these additional records are not at issue.

The sole remaining issue in this appeal is whether under the *Act*, the Board has "control" over records that are in the affected party's custody that pertain to the bussing incidents, subject to whether these records even exist.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations on the custody or control issue from the Board and the affected party. Both the Board and the affected party submitted representations in response.

I then issued a second Notice of Inquiry and sought representations from the appellant, including a complete copy of the Board's submissions and a severed copy of the affected party's representations. Portions of the affected party's representations were withheld due to confidentiality concerns. The appellant chose not to submit representations.

DISCUSSION:

CUSTODY OR CONTROL

General principles

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 . . .

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

The courts and this office have applied a broad and liberal approach to the custody or control question [*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.), Order MO-1251].

Factors relevant to determining “custody or control”

Based on the above 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 [Orders 120, MO-1251]. 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? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the record relate to the institution’s mandate and functions? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record’s use and disposal? [Orders P-120, P-239]

- 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?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]
- 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? [Order MO-1251]

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?
- 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? [Order M-315]
- Who paid for the creation of the record? [Order M-506]
- 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? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]
- 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? [Order M-165] 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? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]
- 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? [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? [Order MO-1251]

Contextual background

As indicated above, the issue to be determined in this appeal is whether the Board has “control” over records pertaining to the bussing incidents that may be in the affected party’s custody .

The Board has provided some contextual background, which in my view may be of some assistance in understanding its relationship with the affected party and, in turn, shed some light on the control issue.

The Board submits that it and the affected party are legally independent entities. The Board states that pursuant to section 190 of the *Education Act*, it has entered into a series of annual agreements with the affected party for the provision of bussing services. At the time of making its representations, the Board states that it and the affected party were in the midst of an agreement in which the affected party provided bussing services to the Board and also to the Durham Catholic District School Board through a joint-entity called Durham Student Transportation Services (DSTS) for the period September 1, 2006 to August 31, 2007. A previous agreement was with the Board alone and had a term that ran from September 1, 2005 to August 31, 2006.

The Board states that the affected party owns all of the busses and employs all bus drivers. The Board submits that the DSTS does not manage the affected party’s bus drivers and has “no say in who is hired, what bus drivers work on what routes and who is disciplined or fired.”

The Board submits that if it receives a complaint about a bussing incident from a parent, it will investigate. In such cases, this typically involves “gathering information from the parent and the student.” The Board states that “[s]ince [the affected party] employs the bus drivers, the DSTS will either ask [the affected party] to gather information from the bus driver or meet with a bus driver together with [the affected party].”

Chronology of events

Turning to the circumstances in this case, I have distilled the following pertinent information from the representations submitted by the Board and the affected party.

The January 2006 incident arose as a result of an attempted change in the after school drop-off location for the appellant's daughter. An arrangement was in place whereby the appellant's daughter was bussed by the affected party from her school and dropped off at a daycare. On January 4th the daycare's proprietor (the proprietor) had called a former Board trustee (the Board trustee) to advise him of a change in the drop-off location as a result of a change in the location of the daycare. The Board trustee responded that he could not process the change himself but gave the proprietor instructions on how to contact the Board's Transportation Department to make a written request to change the drop-off location. The Board's position is that it never received any follow-up from the proprietor and on January 9th the appellant's daughter was dropped off at the daycare's old location. The affected party also submits that it did not receive any instructions from the Board regarding a change to the drop-off location and, as a result, the bus driver dropped the appellant's daughter off at the daycare's old location.

The Board indicates that the appellant complained in writing the following day (January 10th), noting another incident in which the bus driver had dropped her daughter at an improper location, and asked that the driver be terminated.

Later on January 10th, the affected party wrote the Board to outline information it had gathered from the bus driver about the incident. The Board submits that it also gathered information itself, including information from the Board trustee about his telephone conversation with the proprietor and information from a number of children who were on the bus.

Representatives of the Board and the affected party met with the appellant on January 20th to discuss the incident and to resolve the appellant's complaint. Following this meeting the affected party wrote to the appellant, and copied the Board, stating that there was insufficient evidence to substantiate that the bus driver knew of the change in the daycare location.

The appellant has not provided me with any information that disputes this chronology of events.

Parties' representations on the issue of "control"

Since the issue before me is whether the Board has control over records that may be in the affected party's custody, the key issue for me to decide is whether the affected party has any records to which the Board would have "control" under the *Act*. Accordingly, I will first review the affected party's submissions on this issue.

Regarding the March 2005 incident, the affected party states that it cannot confirm or deny the existence of any records pertaining to this incident, since details including the date of the incident, whether and to whom it was reported, and how it was reported, have not been provided

to it by the appellant. However, the affected party adds that to the extent an incident occurred in March 2005, any records relating to that incident would be subject to the same treatment as records relating to the January 2006 incident.

The affected party has provided detailed representations regarding the “control” issue as it relates to records pertaining to the January 2006 incident. It states that it was provided with a copy of the appellant’s January 10th letter, which documents the details of the January 2006 incident. In response, the affected party submits that it retained the services of a private company (the private investigation company) to assist in conducting an investigation of the January 2006 incident and to explore the possible misconduct of the bus driver, an employee of the affected party. It states that, during the course of this investigation, employees of the affected party generated records, including notes and memoranda, as did an investigator employed by the private investigation company.

The affected party states that during the course of the investigation, the investigator took instructions from and reported his findings to the affected party and not to any member or employee of the Board. The affected party asserts that since the investigation any records created have either been in its possession or in the hands of the investigator and that at no time has the Board possessed or had any right to possess any records created during the course of the investigation.

The affected party submits that the contents of the records in question relate to an investigation of the conduct of one of its employees and not to the function of the Board as a body that governs the activities of schools. Accordingly, the affected party states that the Board has no authority to regulate the use of these records or to determine their disposal. It submits that the authority to use and dispose of the records rests exclusively with the affected party.

The affected party suggests that the fact that the Board has had to request these records, or information about them, from the affected party, which maintains the discretion to grant or deny this request, is determinative of the Board’s lack of control over them.

The Board presents two alternative arguments.

It argues that I “do not have jurisdiction to consider whether a record that has not been identified is under the control of the Board.” The Board submits that it has no power to force the affected party to respond to questions regarding whether it has custody of any records that pertain to the bussing incidents. It also submits that section 41(8) (Commissioner’s power to examine any person under oath) of the *Act* does not allow me to “embark on a ‘fishing expedition’ to determine whether [the affected party] has any records in its custody that might be responsive to the request and under the Board’s control.” The Board states that the search process has been exhausted and since no further records have been identified, I have no power to review whether a record is under the Board’s control.

Alternatively, the Board submits that it is not in control of records in the affected party's custody (if they exist) that pertain to the January 2006 bussing incident. The Board reiterates that it conducted its own independent investigation of the January 2006 bussing incident and disclosed the information in its custody and control that is not subject to one of the exemptions in the *Act*. Citing the application of the decision in *David v. Hale et al* (2006), 217 O.A.C. 112 (Div. Ct.), the Board states that it can order its affairs by contracting with an arms length body and that an institution that uses a contractor to undertake an independent task does not control records created in the course of the performance of that task. The Board states that it has chosen to provide bussing services through the affected party, an independent contractor, and that it has structured its relationship with the affected party to ensure that it manages its own employees. The Board states that while it has an interest in the steps the affected party takes to investigate bussing incidents, this interest does not provide it with any right of control over the affected party's employment-related records. The Board submits that it is satisfied with the information provided by the affected party about the January 2006 bussing incident and that it has provided this information to the appellant. The Board states that it does not have control over any additional records.

As indicated above, the appellant chose not to submit representations despite being invited to do so.

Analysis and findings

Dealing first with the March 2005 incident, I have no evidence before me that any records responsive to this matter exist. Accordingly, I am not in a position to find that the Board has control of records relating to the March 2005 incident.

Having carefully reviewed the representations submitted by the Board and the affected party regarding the January 2006 incident, I am satisfied that the affected party has custody of records that are responsive to this incident. However, for the reasons set out below, I conclude that the Board does not have control over these records.

With respect to the January 2006 incident, I am satisfied that the Board has discharged its responsibilities under the *Act* regarding the disclosure of responsive records to which it has custody or control. The affected party has provided helpful submissions that clearly indicate that it conducted an investigation of this incident, with the assistance of an outside investigator, but that its focus was on a private review of the conduct of its employee during the course of this incident.

On the strength of the evidence before me, I am satisfied that the affected party's investigation, including the work completed by the outside investigator, was related to a private employment matter between it and its employee. I find, therefore, that the records created during the course of this investigation were generated for the sole purpose of completing this private investigation. Accordingly, I must conclude that the Board does not have physical possession of the records, has no right to possess them and has no authority to regulate their use and disposal. Therefore, I

find that the Board does not have “control” over these records within the meaning of the term under the *Act*.

Having reached the above finding, I am not required to address the Board’s jurisdictional argument. However, the Board should be aware that section 41(8) grants the Commissioner broad powers to notify and seek evidence from affected parties on any issues within its jurisdiction for the purpose of deciding an issue. As “custody or control” of records is an issue within the Commissioner’s jurisdiction, I am entitled to seek evidence from any party that may have information that will assist me in making a determination on that issue. Accordingly, while the Board may have found my exercise speculative, had I reached the opposite conclusion on the custody issue in relation to the records held by the affected party, I may have arrived at a different conclusion on the control issue. Accordingly, I am satisfied that the process I followed in this case was within the Commissioner’s jurisdiction and appropriate in the circumstances.

ORDER:

The appellant’s appeal is dismissed.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ May 29, 2008