Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2381

Appeal MA07-273

Toronto District School Board

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NATURE OF THE APPEAL:

A journalist representing a media organization submitted a five-part request under the *Municipal Freedom of Information Act* (the *Act*) to the Toronto District School Board (the Board) for the following information:

1. All internal documents, reports, memos, and e-mails between TDSB central office and superintendants/principals regarding the implementation of the Ontario Human Rights Commission safe schools settlement;

2. All internal documents, reports, memos, and e-mails relating to the Safe Schools Transfers program, including, but not limited to, program budgets, data on staff and administrative support, legal opinions, communications with Ministry of Education officials, communications with Toronto Police Service officials, yearly statistics on schools of origin and receiving schools, number of escorts hired, reports to the board, board decisions regarding the Safe Schools Transfer program, and minutes of debates pertaining to Safe Schools transfer;

3. All TDSB memos and e-mails to superintendents, principals, and trustees pertaining to TDSB communication with the public and the media in the aftermath of the Jordan Manners shooting at C. W. Jeffreys Collegiate Institute;

4. All student questionnaires and interview transcripts compiled by the panel, chaired by Julian Falconer, that is investigating the circumstances surrounding the Manners shooting at C.W. Jeffreys;

5. TDSB reports on school security systems, including board-wide statistics on security systems, budgetary allocations for security for the past three academic years, feasibility/cost-benefit studies on security cameras, metal detectors, and other security systems.

The Board corresponded with the requester about clarifying the request. The Board subsequently issued a decision letter in which it claimed a time extension in relation to parts 1, 2, 3 and 5 of the request. The only part of the request that is under consideration in this appeal is part 4.

With respect to part 4 of the request, the Board's decision letter stated that "[r]ecords responsive to this request – to the extent that they may exist – are not within the custody or control of the [Board] and are therefore not subject to the provisions of [the *Act*]."

The requester (now the appellant) appealed the Board's decision with respect to part 4 of his request to this office. In his appeal letter, the appellant stated, in part:

> The School Community Safety Panel was created by a TDSB board decision; its funding comes from the TDSB and it will report to the director of education. I submit that it is therefore subject to an FOI request directed at the TDSB.

The appeal was assigned to a mediator in an attempt to resolve it. During mediation, the appellant confirmed that he was only appealing the Board's decision with respect to part 4 of his request. He also confirmed that he was not appealing the time extension claimed by the Board for responding to items 1, 2, 3, and 5 of his request.

During mediation, the appellant indicated that he does not seek the names, ages or addresses of persons interviewed or discussed in the student questionnaires or interview transcripts. He also raised the issue of the public interest in the records under section 16 of the *Act*. These issues would only be relevant if the records are in the Board's custody or control, and thus subject to the *Act*. Otherwise, they are outside the jurisdiction of this office and provide no basis for disclosure of the records under the *Act*.

The appeal was not settled in mediation, and therefore it was moved on to the adjudication stage of the process, in which an adjudicator conducts an inquiry under the *Act*. To begin the inquiry, this office sent a Notice of Inquiry to the Board, outlining the background and issues in the appeal and inviting the Board's representations, which it subsequently provided. The Notice of Inquiry was then sent to the appellant, along with a complete copy of the Board's representations. The appellant provided representations in response.

This appeal was then re-assigned to me to complete the inquiry. I sent the Notice of Inquiry to the panel chaired by Julian Falconer (the Panel), along with a complete copy of the representations of the Board and the appellant, inviting the Panel's representations. At the same time, I also sent a copy of the appellant's representations to the Board, inviting its reply. I received representations from the Board, and later also from the Panel. I then sent these further representations of the Board, and the Panel's representations, to the appellant for a reply, which he provided. Based on the appellant's representations, I sought and received clarification from the Board and the Panel as to whether there was a "contract" governing their relationship.

DISCUSSION:

CUSTODY OR CONTROL

Under section 4 (1), the *Act* applies only to records that are in the custody or under the control of an "institution". In this case, the Board is an institution within the meaning of that term found in section 2(1) of the *Act*, which includes "a school board." There is no suggestion that the Panel is an institution, and I find that it is not.

Section 4 (1) states that:

> 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 is subject to an exemption under the *Act* or the request is frivolous or vexatious].

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 [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]

Representations

In its initial representations, the Board submits that the Panel was independent. The Board indicates that the terms of reference for the Panel did not:

- establish the Panel's process;
- identify record keeping requirements;
- identify the board as having legal ownership of the records; or
- identify the Panel as agents of the Board.

The Board submits further that:

- the Panel maintained separate office space;
- Panel members were independent contractors, who charged fees for their services; and
- the Panel never agreed to provide the responsive records to the Board.

The Board relies on *David v. Ontario (Information and Privacy Commissioner),* [2006] O.J. No. 4351 (Div. Ct.), and argues that the situation considered in that decision is indistinguishable from the facts of this case. In *David*, the Divisional Court upheld Order MO-1892, issued by this office, which dealt with a request under the *Act* for information generated or received by the Hon. Coulter Osborne during his review of issues surrounding the Union Station redevelopment project. The records sought included Mr. Osborne's interview notes and other information he had obtained in the course of preparing his report. In the City's response to the request, it claimed that these records were not in the City's custody or under its control, and both this office and the Court upheld this decision.

The Board notes that, in *David*, the following factors were present:

- the City engaged a "contractor" to conduct this investigation;
- the "contractor" conducted 58 interviews and developed a report based on those interviews, and he maintained notes of those interviews;
- the investigation was on a fee for service basis;
- the investigator was not required by statute to turn over the notes to the City;

- the City never possessed the notes, nor were they ever integrated into its computer or other file management systems.

The Board submits that these facts are identical to the situation in this appeal.

With its representations, the Board included a copy of the Panel's terms of reference, which provide, among other things, that the Panel is "independent" and will make recommendations to the Board with respect to the practices and procedures at the C.W. Jefferys Collegiate Institute, and improving school safety in a more general sense. The terms of reference further indicate that the Panel is to give past and present students, and parents, an opportunity to describe their experiences. The Panel is also empowered to "make such other enquiries and consultations it deems necessary to achieve its objects…." There is no reference to providing access to the Board of the Panel's records or interview notes, nor of the Board having control over these or any other records of the Panel.

The appellant's representations seek to expand the scope of his request for records of the Panel. This would not usually be permitted at the adjudication stage of an appeal, and in light of my conclusion in this order about access to the Panel's records under the *Act*, it would serve no purpose in this case.

The appellant also seeks to demonstrate that records of the nature he has requested were, in fact, created by or for the panel during its investigation. In my view, however, this does not have any impact on the issue in this appeal, namely, whether these records, whose existence is not in question, are under the Board's custody or control. As well, the appellant repeats his suggestion that personal information could be redacted from any records disclosed to him. Again, this does not address the question of custody or control, and would only be relevant if the requested records are subject to the *Act*.

More substantively, the appellant seeks to distinguish *David* from this appeal on the basis that the issues in that case were "financial and procedural." The appellant argues that this appeal is different because the records relate to public safety; specifically, a high-profile shooting and the safety record of a school board with 300,000 students. The appellant submits that the stakes are far higher than in *David*, and therefore, there is a greater obligation on the part of the parties involved to provide transparency and accommodate public scrutiny. He also suggests that, given the importance of the issues, the Board must be able to do "due diligence" concerning the Panel's recommendations by looking at the raw material from which those recommendations derive. Further, the appellant disputes the Board's position that members of the Panel were independent contractors, given the Panel's work in a major policy issue such as school safety. He refers to the Panel as a "*de facto* commission of inquiry."

In reply, the Board submits that the issue of public policy cited by the appellant is not determinative of custody or control under the *Act*. It also states that "the Board has no contractual or statutory mechanism open to it to obtain the records in question." In response to the appellants' characterization of the Panel as a "*de facto* commission of inquiry," the Board submits that, unlike a commission of inquiry, the Panel was not a creature of legislation or regulation, nor was it an institution under the *Act*. Rather, it was a group of three private individuals who are not employed by the Board and who prepared a report pursuant to a "terms of reference" letter, and invoiced the Board for its services.

The Panel divided its representations into the related but somewhat different issues of "custody" and "control," both of which arise under section 4(1) of the *Act*. To place these issues in context, I note that "custody" relates more to the question of physical possession (which must be accompanied by some power to deal with records), whereas "control" may arise from the power to require their production and/or otherwise determine issues relating to their collection, use, disclosure and/or disposal.

On the issue of custody, the Panel submits that:

- it has exclusive custody of the requested records;
- it has physical custody of the records and the Board has no access to them;
- it has exclusive custody of any electronic copies of the records, which are maintained on a server to which the Board has no access;
- its offices were not owned by the Board and were vacated at the conclusion of the Panel's work, after which hard copy records were maintained in a manner giving the Board no access; and
- all files saved by the panel on the one desktop computer and three laptop computers loaned to the Panel by the Board were permanently removed by an IT firm retained by the Panel for that purpose before the computers were returned to the Board.

On the issue of control, the Panel refers to the *David* decision, and quotes the following passage, which it argues also applies in the circumstances of this appeal:

> In determining 'control', there is some limited relevance in the fact that the records are in Mr. Osborne's control because of his role as investigator and their contents relate to the task that he was engaged to do for the City. *More important factors include that Mr. Osborne was neither an employee nor an officer of the City. He was an independent person appointed to conduct an inquiry into, and to report on the selection process. He was to conduct the inquiry and make his report independently of, and at arms-length from the City.* In my view, he was not an agent of the City in the traditional sense of one who has the authority to

> bind his principal; *Mr. Osborne had no such power or authority. His recommendations were not to be binding on anyone. Nothing in the record before us leads to the conclusion that the documents were ever actually controlled by the City.* Although they were in some cases stored in a computer owned by the City, it is clear that the computer was allocated to the inquiry and not accessible to persons not associated with the actual inquiry. [Emphases added by the Panel in its representations.]

The Panel submits that it "… shares all of the essential attributes of Mr. Osborne's inquiry that led the Divisional Court to its determination that documents in his custody were not under the "control" of the City." The panel notes that, in particular:

- its members were not employees of the Board;
- it was appointed to conduct an independent review and make findings and recommendations;
- it made its report independently and at arms' length from the Board;
- it was not an agent of the Board;
- its recommendations were not binding on the Board; and
- its documents were never controlled by the Board.

The panel also reiterates its submissions concerning separate facilities, and notes that it hired its own staff, maintained its own website independent of the Board, and made independent decisions concerning financial matters.

The Panel goes on to note that neither its terms of reference nor any other document entitles the Board to have access to the Panel's documents, nor is there any statutory or regulatory basis for the Board to have such access. The Panel also notes that it promised confidentiality to the individuals it interviewed.

The Panel also replied to the appellant's representations with similar arguments to those put forward by the Board in that regard, as outlined above.

The Panel concludes its representations by noting that "[t]he policy rationale of creating a vehicle for an institution to review its own operations through an independent body, using information provided on a "without attribution" basis, is a compelling one…" that has been endorsed in jurisprudence.

In response to my request to clarify whether there was a "contract" governing the relationship between the Board and the Panel, both parties responded that no such contract exists, and that the terms of reference of the Panel are the governing document.

Analysis

In my view, the main question in this appeal is whether the records are under the control of the Board. On the evidence presented, there is nothing to suggest that they were within the Board's custody. It is clear that neither the hard copies of the responsive records, nor any electronic versions, were ever in the Board's physical possession. The Panel maintained separate office space to which the Board did not have access, and after its work was concluded, it continued to maintain separate and exclusive possession of the records. The Board and the Panel have provided very similar evidence and representations on this point, and there is nothing to contradict it. I find that the Board did not have custody of the records.

The issue of "control" was addressed by the Ontario Court of Appeal in *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611. The Court stated (at 619) that the resolution of this issue "… properly depends on an examination of all aspects of the relationship between committee members and the Ministry that are relevant to control over the documents". In *Walmsley*, the question was whether records in the possession of members of the Judicial Appointments Advisory Committee were under the control of the Ministry of the Attorney General. In finding that they were not, the Court stated:

> It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role on the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. *Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them.* While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry. Hence, it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry. [My emphasis.]

In my view, there is nothing to distinguish the facts of the present appeal from the circumstances in *Walmsley*. The members of the Panel were not employees of the Board, and the Panel was set up to provide independent recommendations. The Board had no statutory or contractual right to control the records or to require that they be dealt with in any particular way.

This conclusion is reinforced by the decision in *David*. As in this case, the work of the investigator in *David* did relate to the work of the institution from whom the records were requested, but that did not mean that they were under its control for the purposes of the *Act*. The analysis in that case applies equally here. Again, the panel members were not employees or officers of the Board. They were independent persons appointed to conduct an inquiry into, and to report on, school safety issues. They were to conduct the inquiry and make their report independently of, and at arms-length from the Board. Their recommendations were not binding on the Board. Nothing in the evidence before me leads to the conclusion that the documents were ever actually controlled by the Board. As in *David*, although they were in some cases stored in a computer owned by the City, it is clear that the computers were allocated to the Panel and not accessible to persons not associated with the Panel's work, and the evidence shows that the Panel's records were carefully removed before the computers were returned to the Board.

Based on the evidence, I find that the requested records are not under the Board's control.

Accordingly, while I appreciate the appellant's view that there is a significant public interest in the issues addressed by the Panel, there is simply nothing in the evidence to support a finding that the records he has requested were either in the custody or under the control of the Board. As section 4(1) provides that the access scheme in the *Act* applies only to records in the custody or under the control of an institution, I find that the records referred to in part 4 of the appellant's request are not accessible under the *Act*.

ORDER:

I uphold the Board's decision.

Original Signed By: January 8, 2009
John Higgins
Senior Adjudicator