

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2890

Appeal MA12-315

Toronto Police Services Board

May 29, 2013

Summary: The appellant sought access to records relating to purchases made to supply a licensed facility located at police headquarters with alcohol and food. The police responded by indicating that they do not exercise control over, or have custody of, any responsive records. The appellant appealed this decision. In this order, the police decision is upheld on the basis that the records are maintained by a separate entity, which is governed by its own constitution, bylaws and executive committee and is not "part" of the police. The records are not maintained by the police and are not within their custody or control.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1).

OVERVIEW:

[1] The appellant, a representative of the media, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Toronto Police Services Board (the police) for access to information relating to a licensed facility located in police headquarters (the lounge). Specifically, the appellant sought:

. . . all records of purchases made in stocking this lounge in the past six months. This request includes, but is not limited to, receipts and invoices

for purchases of beer, wine, liquor, and any other beverages or food that are available in the lounge.

[2] The police responded to the request stating that any responsive records are outside the scope of the *Act*. Specifically, the police advised the appellant that:

. . . the records described in your request meet the criteria for exclusion as the Executive Officers' Lounge is privately operated. As such, the *Act* does not apply as the Lounge is not a Municipal Organization under the jurisdiction of the *Act*. Consequently, the Access & Privacy Unit does not have the authority to release documents of this nature.

[3] The appellant appealed the decision of the police, arguing that because the lounge is located in the headquarters of the police, and the contact person to whom the liquor license was issued provided a police telephone number with the application, any records relating to the operation of the lounge ought to be within the ambit of the police record-holdings.

[4] As mediation was not likely to be successful in this case, the appeal was moved directly to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the police and the appellant, and shared with each complete copies of their representations. In addition, I also sought and received additional representations from the police by way of reply.

[5] In this order, I find that the police do not exercise a sufficient degree of control over the records to bring them within their custody or control for the purposes of the *Act*. As a result, I uphold the decision of the police and will not require them to provide the appellant with a decision letter respecting access to any responsive records.

DISCUSSION:

[6] The sole issue for determination in this appeal is whether the police exercise the requisite degree of control over, or have custody of, records that are responsive to the request.

General principles

[7] 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 . . .

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

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

[10] 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 (Order PO-2836). 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).

[11] 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.), and Order MO-1251].

Factors relevant to determining "custody or control"

[12] 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, as follows [Orders 120, MO-1251, PO-2306 and PO-2683]. 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 and 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? [*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.); Orders P-120 and 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 and P-239]
- If the institution does have possession of the record, is it more than "bare possession"? [Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above]
- 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 and P-239]
- Does the institution have a right to possession of the record? [Orders P-120 and P-239]
- Does the institution have the authority to regulate the record's content, use and disposal? [Orders P-120 and 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? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above]
- To what extent has the institution relied upon the record? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders P-120 and P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120 and 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]

[13] 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? [PO-2683]
- 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? [PO-2386]
- 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? [Orders M-165 and MO-2586] 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? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.)]
- 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 of the parties

[14] The police take the position that records relating to the operation of a licensed facility in its headquarters are not within its custody or control because the activities of the organization that operates it are at arms-length from the police service. The police have provided the appellant and this office with information relating to the operation of the lounge, which is located in the police headquarters building in downtown Toronto. The lounge is operated by a group of police officers, the Executive Lounge Committee (the ELC), according to its own "constitution, executive structure and by-laws that govern the operation of the room, hours of service, membership fees and prices etc."

[15] The police submit that all of the records relating to the operation of the lounge are in the custody and under the control of the officers who comprise the ELC, which it describes as a "separate and stand-alone entity." They indicate that the records are kept at a location away from that of the police service and that the ELC does not receive funding from the police. The police indicate that the ELC does not report to any authority within the police service "and is accountable solely to its own members."

[16] The appellant places great emphasis on the fact that the ELC's application for a liquor license from the Alcohol and Gaming Commission of Ontario (the AGCO) lists an individual who is a police officer as the "contact person" for the application. More importantly, according to the appellant, is the fact that this individual provided the AGCO with his badge number, official title, along with his police service mailing address and facsimile and telephone numbers on the application form. The appellant argues that this demonstrates a close connection between the police and the operation of the lounge.

[17] In its reply representations, the police submit that the license application simply asks for a contact person and their daytime contact information, which was supplied by an individual police officer on behalf of the ELC.

Analysis and findings

[18] In my view, the police do not exercise the requisite degree of control over, nor do they have custody of, the records which are the subject of this request. I accept that the records sought by the appellant are maintained by the ELC alone and are kept off-site and completely separate from the record-holdings of the police. I find that the ELC is, as the police submit, a privately-run organization whose membership is made up primarily of senior officers and that it is governed by its own constitution, by-laws and executive structure. While the lounge itself is located within the police headquarters

building, this alone is not sufficient to bring records relating to its operation within the purview of the *Act*.

[19] In addition, I find that the fact that the license application was completed by a serving officer is not determinative of the question of custody or control of records relating to the ELC. I accept the explanation of the police that the application required the inclusion of a day-time contact person and, for this reason, the officer who completed the form provided his own contact information, including how he could be reached by the AGCO during business hours. I do not agree with the appellant's position that because a police service employee provided his contact information in the application form, this renders the organization he is representing a part of the police for the purposes of the *Act*.

[20] I find it significant that the operation of a lounge is not part of the "core functions" of the police. In my view, records relating to that entity do not relate to the law enforcement "mandate or functions" of the police. As well, I accept that the police do not have authority to regulate the record's use or disposal because they are maintained by the ELC's membership separately from the record-holdings of the police service. Finally, I note that the ELC is not an institution under the *Act* due to its independent status. I find that the ELC cannot be said to be "part" of the police, nor can the officers who maintain the records be said to be acting as an "agent" for the police in doing so.

[21] I conclude that any records which may be responsive to the appellant's request are not within the custody of the police and are not within their control for the purposes of section 4(1) of the *Act*. Accordingly, as the police do not exercise the requisite degree of control over the records and do not have custody of them, I am unable to order them to issue a decision letter respecting access to any such records.

ORDER:

I uphold the decision of the police and dismiss the appeal.

Original Signed by: _____
Donald Hale
Adjudicator

_____ May 29, 2013