

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3189

Appeals MA13-570-2 and MA13-571-2

Toronto Police Services Board

April 29, 2014

Summary: The appellant sought access to the amount of legal fees paid to defend the Toronto Police Services Board (the police) in the G20 class action lawsuit. This order finds that the information responsive to the appellant's request, the amount of legal fees paid by the insurance company under an unlimited defence obligation policy to the law firm for its services in defending the police in the lawsuit, is not information that is within the custody or control of the police.

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

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *137328 Canada Inc. v. Economical Mutual Insurance Co.* 105 O.R. (3d) 141 (S.C.J.); *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551; and *Goodman v. AIG Commercial Insurance Co. of Canada*, (2009) 78 C.C.L.I. (4th) 249 (S.C.J.), 2009 CanLII 57159, upheld by the Ontario Court of Appeal in 2010 ONCA 391.

OVERVIEW:

[1] The Toronto Police Services Board (the police or the TPSB) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for access to the following information:

Continuing Request #1: Records that indicate the total amount paid to external law firms for legal representation of the Toronto Police Services Board in relation to the [named] Class Action [the lawsuit].

Continuing Request #2: Records that detail the legal costs paid to, and hours worked by, lawyers of external law firms for legal representation of the [police] in relation to the [named] Class Action.

[2] The police transferred the requests to the City of Toronto (the city) as they may have control or custody of the record(s) or a greater interest in the record(s) that were requested.

[3] In its decision, the city advised the following:

The city purchased a general liability insurance policy to insure the city, TPSB and the Toronto Police Service during the G20 conference. That insurance policy has a \$10,000 deductible so that the city only pays the first \$10,000 of any one claim. Costs above that deductible are not paid by the city, but by the city's insurer.

Only one external law firm [named law firm], is representing the city, the TPSB and its insurer in the [named] Class Action. The city has received only one invoice from [named law firm] dated December 31, 2010. That invoice totaled \$41,536.47.

The city paid just \$9,395.20 of the total.¹ The remainder of that invoice (\$32,141.27) was paid by the city's insurer. All subsequent invoices have been sent to and paid by the city's insurer. The city does not have a record of those invoices.

[4] The city granted access in part to one invoice from the law firm to the city. Access to some of the information in this record was denied pursuant to the discretionary solicitor-client privilege exemption in section 12 of the *Act*.

[5] The requester, now the appellant, appealed the decisions of the city and appeals MA13-3, MA13-243 and MA13-244 were opened.

[6] During mediation of appeals MA13-3, MA13-243 and MA13-244, the appellant advised that she believes that the city has custody or control of other responsive invoices. The appellant stated that the city did not conduct a reasonable search for the records. The appellant also confirmed with the mediator that she does not dispute the section 12 severances.

¹ The total amount paid by the city was \$10,000.00. The amount of \$9,395.20 was paid to the law firm. The amount of \$604.80 was paid by the city to the insurance adjuster as an adjusting fee.

[7] No further mediation of appeals MA13-3, MA13-243 and MA13-244 was possible and the files were transferred to adjudication, where an adjudicator conducts an inquiry. I then conducted an oral inquiry, where I heard evidence from the city and the appellant as to the existence of additional legal invoices.

[8] After the conclusion of the oral inquiry, the appellant decided to request access to the additional invoices from the police. The city agreed that appeals MA13-3, MA13-243 and MA13-244 would be held in abeyance pending the outcome of the appellant's request to the police.

[9] In response to the request, the police issued decisions, which indicated the following:

Pursuant to consultation with our Financial Management and Legal Services Units, we have been advised that the retainer and costs of legal representation is a matter between the insurer and the City of Toronto [the city]. As such, the Toronto Police Service does not have these records in our possession.

[10] The requester, now the appellant, appealed the decisions of the police and appeals MA13-570-2 and MA13-571-2 were opened.

[11] During the course of mediation of appeals MA13-570-2 and MA13-571-2, the appellant stated that the police did not conduct a reasonable search. The appellant believes that the police should have custody or control of these records. The police maintained their position, as per their decisions. No further mediation was possible and accordingly, these files were transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[12] I sent a Notice of Inquiry, setting out the facts and issues in appeals MA13-570-2 and MA13-571-2, to the police seeking their representations. I also added the city as an affected party in appeals MA13-570-2 and MA13-571-2 and sought representations from the city. I received representations from both the police and the city.

[13] The representations of the police and the city were sent to the appellant, along with a Notice of Inquiry. The appellant provided representations in response. I provided the appellant's representations to the police and the city and sought and received reply representations. These were shared with the appellant who provided surreply representations.

[14] I then sought and received representations from the law firm and the insurance company. Both these parties provided representations which were shared with the appellant. The appellant provided representations in response, which I sent to the law firm, the insurance company, the city and the police. These four parties provided

representations in response to the appellant's representations, essentially relying on the representations made earlier in the inquiry.

[15] In her final representations, the appellant narrowed her request to the amount of legal fees incurred to defend the police in the G20 class action lawsuit.

[16] In this order, I have also considered the representations of the parties in appeals MA13-3, MA13-243 and MA13-244. I find that the information responsive to the appellant's request, the amount of legal fees paid to the law firm for its services in defending the police in the lawsuit, as contained in the law firm's invoices sent to the insurance company, is not information that is within the custody or control of the police or the city.

DISCUSSION:

Background:

[17] The information at issue in this order is the amount of legal fees charged by the law firm to defend the police in the G20 class action lawsuit. This information is set out in the records, which are the invoices issued by the law firm to the insurance company after December 31, 2010.

[18] The police are named as one of the defendants in the class action lawsuit for their actions during the G20 summit that was held in Toronto on June 26 and 27, 2010. The appellant seeks information in her continuing requests about the total legal fees for legal representation of the police in this lawsuit. Both the city and the police received the same requests from the appellant.

[19] In response to the requests, which originally were transferred by the police to the city, the police's decision letter states that:

Pursuant to consultation with our Financial Management and Legal Services Units, we have been advised that the retainer and costs of legal representation is a matter between the insurer and the City of Toronto. As such, the Toronto Police Service does not have these records in our possession.

[20] The police state that they conducted further searches for responsive records and consulted with the involved stakeholders and the city and that the requested documents are neither in their custody nor under their control.

[21] The city, which is an affected party in appeals MA13-570-2 and MA13-571-2, as well as the named institution in the related appeals of MA13-3, MA13-243 and MA13-

244, states that it is not a party to the lawsuit, which is ongoing, and that it is a legal proceeding as against a separate legal entity, the police.

[22] The city states that the insurance policy provides the police with insurance benefits, which include an obligation to defend the police in the lawsuit. It states that the insurance company commenced a defence of the specific legal proceeding in the name of and on behalf of the police and that the insurance company is instructing the retained legal counsel.

[23] The city states that Canadian Courts have repeatedly determined that where an insurance policy imposes a duty to defend the named insured, the duty comes with a "corresponding right" for the insurer to control the defence; meaning that the insurer chooses, instructs and pays counsel directly.² It states that this jurisprudence establishes that a named insured has an extremely limited ability to direct the defence of an action, or instruct counsel retained under an insurance policy.

[24] The city states that it did make inquiries to both the law firm and the insurance company concerning whether the city could access the requested documents. In particular, it contacted a representative from each of the law firm and the insurance company to determine if there were barriers to the city's access to documents held by them.

[25] The city provided emails from the city's freedom of information co-ordinator (the foic) to the City Solicitor and the Manager, Insurance and Risk Management at the city's Corporate Finance Division asking them to provide her with the records responsive to the requests.

[26] In response, the City Solicitor stated:

Legal Services is not involved in this matter as it is being handled by Insurance and Risk Management.

[27] The Supervisor, Insurance and Risk Management, confirmed that he emailed the lawyer at the law firm and the Director of Claims at the insurance concerning the request for legal costs.

² The city relies on *Goodman v. AJG Commercial Insurance Co. of Canada*, (2009) 78 C.C.L.I. (4th) 249 (S.C.J.), v. *(T. W) v. W (K.R.J)*, (1996), 29 O.R. (3d) 277, (Gen. Div.); *Non-Marine Underwriters, Lloyd's of London v. Scalera*, (2000), 1 S.C.R. 551; *Brockton (Municipality) v. Frank Cowan Co.*, (2002), 57 O.R. (3d) 447 (C.A.); and, *137328 Canada Inc. v. Economical Mutual Insurance Co.* 105 O.R. (3d) 141 (S.C.J.).

[28] In response, the Director of Claims at the insurance company stated that she had discussed the issue with the lawyer at the law firm and they agree that all that should be disclosed is what the city actually paid towards legal costs and to advise the appellant that all costs incurred in excess of the retention amount of \$10,000 are being handled by the insurer.

[29] Following this series of emails, the city wrote the appellant that it asked staff at the Corporate Finance Division to search for the requested records and that this division's staff advised of the following:

The city purchased a general liability insurance policy to insure the city, TPSB and the Toronto Police Service during the G20 conference. That insurance policy has a \$10,000 deductible so that the city only pays the first \$10,000 of any one claim. Costs above that deductible are not paid by the city, but by the city's insurer.

Only one external law firm [named law firm], is representing the city, the TPSB and its insurer in the [named] Class Action. The city has received only one invoice from [named law firm] dated December 31, 2010. That invoice totaled \$41,536.47.

The city paid just \$9,395.20 of the total.³ The remainder of that invoice (\$32,141.27) was paid by the city's insurer. All subsequent invoices have been sent to and paid by the city's insurer. The city does not have a record of those invoices.

[30] The city provided the appellant with access to the December 31, 2010 invoice, except for the information withheld under the discretionary section 12 solicitor-client exemption. The remaining invoices that contain the responsive information have not been provided to the appellant by either the city or the police.

Do either the police or the city have custody or control of the responsive records?

[31] As stated above, after receipt of the initial set of representations, I sought representations from the law firm and the insurance company.

[32] In its representations, the law firm states that it was retained to represent the police in connection with the lawsuit by the insurance company pursuant to an insurance policy obtained by the city under which the police are insured. The law firm states that according to the insurance policy, the insurance company has control of the defence of the lawsuit and as counsel it is instructed by the insurance company.

³ The total amount paid by the city was \$10,000.00. The amount of \$9,395.80 was paid to the law firm. The amount of \$604.80 was paid by the city to the insurance adjuster as an adjusting fee.

[33] The law firm states that its account of December 31, 2010 was provided to the city as it was responsible for paying the first \$10,000 of its fees pursuant to the terms of the insurance policy and since that time no further account has been provided to anyone other than the insurance company. It states that any accounts in excess of \$10,000 are and have been the responsibility of the insurance company and will not be provided to anyone other than the insurance company.

[34] The insurance company states that the remaining invoices were sent to it and that they are not in the custody of the police or the city as neither it nor the law firm have provided them to any other entity. In this order, the responsive records are not within the physical custody of either the city or the police. These invoices have not been sent by the law firm or the insurance company to either institution.

[35] The insurance company states that the remaining invoices are not in the control of the police or the city as the insurance policy provides it with the right to control the defence of the action for which it is paying, unless there exists a conflict of interest as between the insurance company and the police. It further states that neither the police nor the insurance company has asserted that any such conflict of interest.

[36] The insurance company states that although the policy has indemnity limits of \$5,000,000.00,⁴ it is obligated under the terms of the primary policy of liability insurance it issued to the police to provide unlimited defence costs as there are no monetary limits in respect of its defence obligation.

[37] The insurance company further states that the city and the police are covered under a tower of excess insurance sitting above the primary insurance policy, which would respond to any settlement or judgment above the primary limits. It states that:

Accordingly, and contrary to [the appellant's] representation, the city and the [police] enjoy an unlimited defence obligation from [the insurance company] under the primary policy, and they actually have \$130,000,000 (\$130 million) available to them in insurance coverage.

[38] In response, the appellant submits that the city and the police have a right to possession of the remaining invoices, as these records relate to a departmental matter and both these parties could reasonably expect to obtain copies of these records upon request.

[39] With respect to the police, the appellant states that the records relate to a departmental matter, the costs of defending the police, a client of the law firm, in the class action.

⁴ The insurance company states that this \$5,000,000 is to be used to indemnify the police for any settlement of claims as authorized by the insurance company or for damages awarded against the police.

[40] The appellant further submits that the police have a right to possession of the records that are in the physical possession of the insurance company that is apparently directing and paying for the police's legal defence.

[41] With respect to the city, the appellant states that records relate to a departmental matter, the costs incurred by the city's insurance company with respect to the legal defence of the police and that the city would seem to have a clear interest in a reporting or an accounting from the insurance company of the costs that are being incurred under this policy (including the costs incurred to defend the police in the lawsuit).

[42] The appellant asks that the police and the city request that the law firm and the insurance company provide them with the responsive records.

[43] In reply, the city, police, insurance company and law firm rely on their initial representations. In addition, both the law firm and the insurance company state that they would not provide a copy of the invoices to the police or the city upon request.

Analysis/Findings

[44] Section 4(1) of the Act 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,

(a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[45] 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.⁵ From the parties' representations, it is clear that the responsive invoices are not in the physical custody of the police or the city. The issue, therefore, is whether the records are in the control of these institutions.

[46] 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.⁶ 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).

⁵ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁶ Order PO-2836.

[47] I find that the responsive information, which consists of the legal fees charged by a law firm to an insurance company during the handling of a legal claim for damages against an insured, is an issue for the insurance company and its retained legal firm.

[48] In making this finding, I have taken into consideration the findings in the cases cited by the appellant.⁷ I find that these cases are not applicable as they concern the issue of coverage under an insurance policy and the situation where lawyers for an insured and an insurer or two joint clients receive information which would have the potential of resulting in coverage being denied.

[49] The appellant has raised the application of the Law Society of Upper Canada's (the LSUC) requirement⁸ that a law firm is required to prepare an invoice in order to be paid for legal services.

[50] I have also considered the LSUC's Rules of Professional Conduct on Joint Retainers, which reads.⁹

Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[51] At issue in this order is whether an insured has a right to receive copies of invoices sent to an insurer by a law firm where there is an unlimited obligation by an insurer to pay the legal fees of the insured and where there is no issue of insurance coverage or conflict of interest as between the insured and the insurer.

[52] Neither the cases cited by the appellant, nor the Rules of Professional Conduct, speak to the issue of when there is no coverage issue under an insurance policy, or where there is no conflict of interest issue as between an insured and an insurer, and where there is an unlimited obligation by an insurer to pay the legal fees of the insured.

⁷ The appellant relies on *Hopkins v. Wellington*, 1999 CanLII 5583 (BC SC) at para. 7, *Muir v. Williams*, [2001] O.J. No. 2604 at paras. 7 and 8, and *Abick v. Continental Insurance Co. of Canada*, [2002] O.J. No. 877 at paras. 11, 12.

⁸ The appellant refers to By-law No. 9 of the LSUC.

⁹ Section 3.4-5 at <https://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>

[53] In particular, the LSUC rule concerns the confidentiality of information received by the lawyer from one client vis-a-vis the other client. The information at issue in this order is not information received by a lawyer from a client of the law firm. The application of solicitor-client privilege as between joint clients is not the issue. The issue is whether the city or the police have control of the law firm invoices paid by the insurance company.

[54] The parties have raised the issue as to whether the responsive records are subject to solicitor-client privilege. This issue would only arise if a determination is made in this appeal that either the city or the police have control of the responsive records.

[55] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,¹⁰ the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[56] Concerning part 1 of the test, I find that the contents of the records at issue, the total legal fees paid by the insurance company to the law firm where neither institution can be responsible for payment, do not concern a departmental matter for either institution.

[57] Even if I had found that the records related to a departmental matter, I am not satisfied that part 2 of the test has been satisfied. Concerning part 2 of the test, I find that, based on my review of the parties' representations and my findings set out below, neither the city nor the police could reasonably expect to obtain a copy of the invoices upon request. I particularly note that the law firm and the insurance company have said that neither the city nor the police would be provided with copies of the invoices if they asked for them. This is consistent with the law firm's practice. As well, there is no evidence that the city has been provided with this sort of information in other insurance defence circumstances.

[58] 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.¹¹ 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.

¹⁰ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306, referred to as the *MND* case in this order.

¹¹ Orders 120, MO-1251, PO-2306 and PO-2683.

- Was the record created by an officer or employee of the institution?¹²
- What use did the creator intend to make of the record?¹³
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁴
- Is the activity in question a “core”, “central” or “basic” function of the institution?¹⁵
- Does the content of the record relate to the institution’s mandate and functions?¹⁶
- 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?¹⁷
- If the institution does have possession of the record, is it more than “bare possession”?¹⁸
- 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?¹⁹
- Does the institution have a right to possession of the record?²⁰
- Does the institution have the authority to regulate the record’s content, use and disposal?²¹
- 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?²²

¹² Order 120.

¹³ Orders 120 and P-239.

¹⁴ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹⁵ Order P-912.

¹⁶ *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.) and Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

¹⁸ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁹ Orders 120 and P-239.

²⁰ Orders 120 and P-239.

²¹ Orders 120 and P-239.

²² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- To what extent has the institution relied upon the record?²³
- How closely is the record integrated with other records held by the institution?²⁴
- 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?²⁵

[59] 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?²⁶
- 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?²⁷
- Who paid for the creation of the record?²⁸
- What are the circumstances surrounding the creation, use and retention of the record?²⁹
- 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?³⁰
- 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?³¹ If so, what were the precise undertakings

²³ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

²⁴ Orders 120 and P-239.

²⁵ Order MO-1251.

²⁶ PO-2683.

²⁷ Order M-315.

²⁸ Order M-506.

²⁹ PO-2386.

³⁰ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

³¹ Orders M-165 and MO-2586.

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?³²
- 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?³³
- To what extent, if any, should the fact that the individual or organization that created the record have refused to provide the institution with a copy of the record determine the control issue?³⁴

[60] In determining whether the records are in the control of the city or the police, the above factors must be considered contextually in light of the purpose of the legislation.³⁵

[61] In this order, the \$10,000 deductible under the insurance policy was paid by the city and that invoice from the law firm for \$10,000 was provided to the appellant and is not at issue. The issue is whether subsequent invoices sent by the law firm or information about the total legal costs generated by the law firm for defending the police in the lawsuit are in the control of either the police or the city.

[62] Based on my review of the factors listed above concerning control over a record not in an institution's possession, I find that the factors weigh in favour of a finding that neither the city nor the police have control over the responsive records. In particular, concerning each factor, I note the following:

[63] *Were the records created by an officer or employee of the city or the police?*

The records were not created by the city or the police. The law firm was retained by the insurance company to be the legal representative of the police under the

³² *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

³³ Order MO-1251.

³⁴ Order MO-1251.

³⁵ *City of Ottawa v. Ontario*, cited above.

authority provided to it under a contract of insurance and the law firm is not an officer or employee of either institution.

[64] *What use did the creator intend to make of the record?*

The law firm created the records to be paid by the insurance company for services rendered.

[65] *Does the city or the police have a statutory power or duty to carry out the activity that resulted in the creation of the record?*

The duty that resulted in the creation of the records is the legal representation of the police in a lawsuit. Neither the city nor the police have a statutory duty to carry out the duty that resulted in the creation of the records.

[66] *Is the activity in question a "core", "central" or "basic" function of the city or the police?*

The directing of a legal defence is not a core, central or basic function of the city or the police. The interactions between the insurance company and the law firm are not core, central or basic functions of either institution but of the law firm and the insurance company.

[67] *Does the content of the record relate to the city or the police's mandate and functions?*

The records do not relate directly to the city or the police's mandate and functions but rather the costs associated with carrying out the instructions of the insurance company relating to the defence of the police in a specific legal action. The records may indirectly relate to the police's mandate and functions as they concern a legal bill for defending the police in a lawsuit.

[68] *Does the city or the police have physical possession of the records, either because they have been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement?*

Neither the city nor the police have possession of the records. The city also states that it does not have a right of access as access is incompatible with the contractual requirements of a policy of insurance.

[69] *If the institutions do not have possession of the records, are they being held by an officer or employee of the institutions for the purposes of his or her duties as an officer or employee?*

The records are not being held by an officer or employee of the city or the police for the purposes of his or her duties as an officer or employee of these institutions. The records are held by entities retained on behalf of the police, under an insurance policy.

[70] *Does the city or the police have a right to possession of the records?*

The city, the police, the law firm and the insurance company state that neither the city nor the police have a right to possession of the records created by the law firm for the insurance company. I agree with the city that this appears to be consistent with numerous court decisions³⁶ on the issue of a named insured being able to direct a legal defence which is the subject of a policy of insurance.

For example, in *137328 Canada Inc. v. Economical Mutual Insurance Co.*,³⁷ the court stated that:

I find that there is no reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer, and that Alliance [the insured] is not entitled to engage independent counsel at the insurer's expense. Economical [the insurer] is therefore entitled to retain counsel of its choice to defend the claim advanced by Richelieu Hosiery International Inc. against the applicant [the insured] in action number 10-47994, and may choose and instruct lead counsel to represent it in the action. [Emphasis added by me]

Similarly, in *Non-Marine Underwriters, Lloyd's of London v. Scalera*,³⁸ the court stated:

An insurance company's duty to defend is related to its duty to indemnify. A homeowner's insurance policy entitles the holder to have the insurer indemnify any liability falling within the policy's terms. Since the insurance company will be paying these costs, it has also developed the right - now a duty - to conduct the defence of such claims. [Emphasis added by me]

[71] *Does the city or the police have the authority to regulate the records' content, use, and disposal?*

³⁶ As stated above, the city relies on *Goodman v. AIG Commercial Insurance Co. of Canada*, (2009) 78 C.C.L.I. (4th) 249 (S.C.J.), 2009 CanLII 57159, upheld by the Ontario Court of Appeal in 2010 ONCA 391, *W.-V.(T.) v. W (K.R.J)*, (1996), 29 O.R. (3d) 277, (Gen. Div.); *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551; *Brockton (Municipality) v. Frank Cowan Co.*, (2002), 57 O.R. (3d) 447 (C.A.); and, *137328 Canada Inc. v. Economical Mutual Insurance Co.* 105 O.R. (3d) 141 (S.C.J.).

³⁷ *137328 Canada Inc. v. Economical Mutual Insurance Co.* 105 O.R. (3d) 141 (S.C.J.) at paragraph 36.

³⁸ *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551 at paragraph 49.

Neither the city nor the police have the authority to regulate records' content, use, and disposal. As an insured, they have very limited rights with respect to the regulation of documents related to the conduct of a defence, covered under a policy of insurance.

- [72] *Are there any limits on the use to which the city or the police may put the records, what are those limits, and why do they apply to the record?*

Neither the police nor the city has the ability to use the records.

- [73] *To what extent has the city or the police relied upon the records?*

There is no evidence that either institution relied on the records.

- [74] *How closely are the records integrated with other records held by the city or the police?*

The records are being held by the law firm and the insurance company and are not integrated with the city or the police's records.

- [75] *What is the customary practice of the city and the police and institutions similar to them in relation to possession or control of records of this nature, in similar circumstances?*

The ability for an insured party to access information produced by counsel retained by the insurers on behalf of a client is restricted, as noted above. As well, a duty to defend has been interpreted as meaning that the insurer chooses, instructs and pays counsel directly.³⁹

- [76] *To what extent, if any, should the fact that the individual or organization that created the record have refused to provide the institution with a copy of the record determine the control issue?*

Although the appellant states that the police are a client of the law firm as the law firm is representing their interests in the lawsuit, the issue before me is not whether there exists a solicitor-client relationship between the law firm and the police.⁴⁰ The issue as to whether the responsive records are subject to solicitor-client privilege would only arise if I determine that either the police or the city

³⁹ See footnote 36, especially paragraph 4 of *Goodman v. AIG Commercial Insurance Co. of Canada*, (2009) 78 C.C.L.I. (4th) 249 (S.C.J.), 2009 CanLII 57159, upheld by the Ontario Court of Appeal in 2010 ONCA 391.

⁴⁰ The appellant relies on *Hopkins v. Wellington*, 1999 CanLII 5583 (BC SC) at para. 7, *Muir v. Williams*, [2001] O.J. No. 2604 at paras. 7 and 8, and *Abick v. Continental Insurance Co. of Canada*, [2002] O.J. No. 877 at paras. 11, 12.

have control of the responsive records. The issue is not whether the institutions should be required to disclose the total amount of legal fees either institution has paid to the law firm, as any the legal fees paid to the law firm by the city have already been disclosed.⁴¹

The issue is whether the police or the city, even if one or both can be said to be a client of the law firm, have a right to receive a copy of the invoices sent by the law firm to the insurance company asking the insurance company to pay money to the law firm.

[77] I also find that my findings set out above also support the following factors that may apply when the institution does not have possession of the records, as follows:

[78] *If the record is not in the physical possession of the institution, who has possession of the record, and why?*⁴²

The records seek payment of the law firm legal fees and were prepared by the law firm and sent only to the insurance company for payment.

[79] *Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the Act?*

Neither the law firm nor the insurance company are institutions under the *Act*.

[80] *Who owns the record?*⁴³

The records are invoices between the law firm and the insurance company. The records are not owned by the city or the police.

[81] *Who paid for the creation of the record?*⁴⁴

The insurance company paid for the creation of the records.

[82] *What are the circumstances surrounding the creation, use and retention of the record?*⁴⁵

The records were created by the law firm to bill the insurance company for legal services in defending the actions of the police.

⁴¹ The appellant has received access to the information at issue in the December 31, 2010 invoice.

⁴² PO-2683.

⁴³ Order M-315.

⁴⁴ Order M-506.

⁴⁵ PO-2386.

- [83] *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?*⁴⁶

There are no provisions which permit or prohibit the disclosure of the information at issue.

- [84] *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 institutions?*⁴⁷ *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?*

According to the insurance company:

[It] would not and does not provide the [police]⁴⁸ with copies of the remaining [law firm] invoices or information concerning the total amount of them, as [the insurance company] has full and uncontested control of the defence of the [lawsuit].

The law firm states the position of the insurance company is consistent with the instructions it has received and would expect to continue to receive.

- [85] *Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?*

The law firm has been retained to be the legal representative of the police in relation to the lawsuit under the authority provided to the insurance company under a contract of insurance. As noted by the city in its representations, the courts have determined that the right of the insurer to control the defence, including directing legal counsel, is in return for its obligation to pay a proper claim.⁴⁹

Although, there may be circumstances where the police may have a basis to require the law firm or the insurance company to provide information, namely where a conflict of interest between the insurer's interests and the duty of good faith of the insurer to the insured arises or where there are policy coverage

⁴⁶ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

⁴⁷ Orders M-165 and MO-2586.

⁴⁸ The police are a party to the lawsuit. The city is not a party to the lawsuit.

⁴⁹ *Zurich of Canada v. Renaud & Jacob*, (1996), R.J.Q. 2160 (Que. C.A.).

issues,⁵⁰ I have no evidence that such a situation exists here. Nor is there any evidence that the city or the police were kept apprised by the law firm of the developments in the lawsuit.

[86] *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?*

The record was created by the law firm for the purposes of creating the invoices for the insurance company.

[87] *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?⁵¹*

The law firm's practice in cases where it is retained under an insurance contract by an insurance company is to send the invoices only to the insurance company.

Conclusion

[88] In this order, I am only determining whether the police and/or the city, both institutions under *MFIPPA*, have control of the responsive records, as the responsive records are not within their physical custody. None of the responsive invoices have been sent by the law firm or the insurance company to either institution.

[89] It is not disputed that if the police did not have an insurance policy covering the defence of the lawsuit against them and instead had directly dealt with the law firm and paid the legal fees that the responsive records would have been in their custody or in their control.

[90] Based on my consideration of the factors set out above and the parties' representations, I find that neither the city nor the police have control of the responsive information. What is being requested is the amount of legal fees paid by the insurance company, a third party, to the law firm, another third party, in defending the police in the lawsuit. The requested information does not provide any insight into the expenditure of public funds or any other information which is at core of freedom of information.

[91] The insurance company has an obligation under the terms of the insurance policy to provide unlimited defence costs. There are no monetary limits in respect of the insurance company's defence obligation. Neither the city nor the police are responsible

⁵⁰ The city states that a conflict of interest is not apparent in this case.

⁵¹ Order MO-1251.

for the payment of the law firm's invoices. In the absence of a conflict of interest between the law firm and the insurance company and in the absence of a policy limit limiting the amount of legal fees that the insurance company is obligated to pay, the contents of the invoices do not concern either institution.

[92] I find that the contents of the records, which are the law firm's invoices sent to the insurance company, do not relate to a departmental matter of either the city or the police and that neither of these institutions could reasonably expect to obtain a copy of them upon request.

[93] As neither the city nor the police have custody or control of the information responsive to the appellant's request, I am dismissing these appeals.

ORDER:

I dismiss the appeals.

Original Signed By: _____
Diane Smith
Adjudicator

_____ April 29, 2015