Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3467

Appeal MA11-23-3

Toronto Police Services Board

July 7, 2017

Summary: This is a the last in a series of orders involving the appellant and the Toronto Police Services Board (the police) resulting from an access request under the *Act* for access to various records relating to the appellant and the police, including a named officer. This order finds that the police would have had control of particular types of responsive records but that the police conducted a reasonable search for responsive records. The appeal is dismissed.

Statutes Considered: *Police Services Act,* R.S.O. 1990, c. P.15, sections 42(1)(e) and 80; Ontario Regulation 268/10, section 30; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 4(1) and 17.

Orders Considered: MO-2841-I, MO-3107-F, MO-3281 and PO-3666.

Cases considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306, *City of Ottawa v. Ontario*, 2010 ONSC 6835; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247.

OVERVIEW:

[1] This order is the last in a series of orders involving the appellant and the Toronto Police Services Board (the police) resulting from the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> I am requesting access to and copies of all personal records through [*MFIPPA*] as an UPDATE from my request received 17 October 2003 [identified request][1] of copies of all written and electronic records, including all log books, flipbooks, notebooks, files, telephone messages, inter and intra office emails and Outlook Express records, or any similar proprietary internal or external communication system used by [the police] in whatever format, of Officer #[specified badge number] or "[named police officer]". This will include all internal or external records, of any and all sorts and formats of communication between "[named police officer]" and Officers of the Hamilton Wentworth Police Service, Correctional Service of Canada and the National Parole Board, and all revised and altered "police occurrence" reports relative to me alleged to have been authored by "[named police officer]". My request will also include all personal references and documentation in Internal Investigation File [specified number].

[2] In Interim Order MO-2841-I, I found that the police did not conduct a reasonable search for responsive records. Accordingly, I ordered them to conduct further focussed searches and to provide a reasonable amount of detail to this office regarding the results of those searches, including searches conducted by the police officer named in the request.

[3] The police conducted a further search, but did not identify any additional records responsive to the request. After receiving further materials from the parties, I then issued final Order MO-3107-F. In that order, I required the police to conduct further focussed searches and, if as a result of the further searches, responsive records were identified, to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.

[4] For the purpose of the discussion that follows, I will be addressing the searches that were ordered in Order MO-3107-F for:

- any steno notebooks containing notes that an identified police officer took at court proceedings involving the appellant (discussed at paragraphs 81 to 83 of the order);

- any responsive records that may be found in the police officer's personal email account identified by the appellant (discussed at paragraphs 103 to 109 of the order);

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[1] The earlier request was the subject of Order MO-1908-I and Reconsideration Order MO-1968-R, both of which were subject to applications for judicial review. Those Orders were further reconsidered in Reconsideration Order MO-2953-R, and the applications for judicial review were abandoned.

- a copy of any materials that the police officer provided to a crown attorney in the context of disclosure (discussed at paragraph 116 of the order).

[5] The police issued a decision letter regarding the additional searches I ordered. In their decision letter, the police wrote:

> Further to information gleaned from prior contact with former officer, [named police officer], and noted in our decision letter of December 01st, 2011, any notes taken on "steno notepads" were in the possession of the officer and not this Police Service. As we were advised by [named police officer], any notes of importance would have been transcribed later into the officer's issued memorandum book. Access cannot be granted to any notes that may exist as they are not in the custody/control of this Service and could not be located by [the identified police officer] when they were requested. [83] and [115] A search of all materials in the Services' possession regarding the appellant's case were searched and confirmed further that there were no steno pads located.
>
> A review of the materials in the Services' possession did not locate the "certain notes to the crown attorney … in the context of disclosure." [116]
>
> Lastly, as stated above, while with the Service, we were advised by [named police officer] that his home email was never used for work. Without any compulsion to produce any data that may exist on his personal computer drive, records not in the care/custody of the Service remain the officer's personal property. [Named police officer] is no longer an employee of the Service and access to his personal email account cannot be granted as it is not under the Service's control. [109]

[6] The appellant appealed the police's decision. As a result, the within appeal file (MA11-23-3) was opened.

[7] In his Mediator's Report, the mediator summarized the appellant's concerns regarding the police's decision letter in the following way:

> … the appellant appeals the police's decision on several grounds. He submitted detailed written submissions outlining his reasons for appeal, his concerns are summarized as follows:
>
> - the "steno pads" of the officer are in the custody and control of the police and a search for these records should be conducted.
>
> - notes to the crown attorney ought to exist.

> • the named officer's home email is in the custody and control of the police and a further search for these records should be conducted.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[9] During the inquiry into the appeal I sought, and received, representations from the police and the appellant. Although I also sent a Notice of Inquiry to the named police officer (care of the police) inviting his representations, none were provided in response. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[10] This appeal raises the following two issues which, as will be seen below, are interrelated:

- if they exist, are any steno notebooks containing notes that the identified police officer took at court proceedings involving the appellant or any responsive records that may be found in the police officer's personal email account, under the control of the police under section 4(1) of the *Act*?
- did the police conduct a reasonable search for these steno notebooks and emails as well as any materials that the police officer provided to a crown attorney in the context of disclosure?

DISCUSSION:

[11] Section 4(1) of the *Act* 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 . . .

[12] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is either in the custody or under the control of an institution; it need not be both.[2] "Custody" and "control" are not defined terms in the *Act*.

[13] It is important to note that 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.[3] 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

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[2] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] Order PO-2836.

to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[14] The courts and this office have applied a broad and liberal approach to the custody or control question. One court has observed that "[t]he notion of control referred to in [the *Act*] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control."[4]

[15] If it is established that an institution has custody or control of a record or a part of a record, where a requester claims that additional records of the same nature exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[5]

[16] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[6] To be responsive, a record must be "reasonably related" to the request.[7] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[8] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[9] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[10]

Factors relevant to determining "custody or control"

[17] This office has developed the following list of factors to consider in determining whether or not a record is in the custody or under the control of an institution.[11] The list is not intended to be exhaustive. Some of the listed factors may not be relevant in a specific case, while other unlisted factors may apply.

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[4] *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), cited with approval in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072.
[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.
[10] Order MO-2246.
[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]

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[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-120 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]

[18] The following factors may be relevant 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?
- 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?[28]
- 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?[29] 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?

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[23] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Order 120.
[24] Orders 120 and P-239.
[25] Order MO-1251.
[26] Order PO-2683.
[27] Order M-315.
[28] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[29] Orders M-165 and MO-2586.

- 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?[30]

- 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?[31]

- 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?[32]

[19] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[33]

[20] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (*National Defense*),[34] 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?

The police's representations

[21] The police take the position that they do not have custody or control of any pads containing notes that the identified police officer took at court proceedings involving the appellant. Nor do they have custody or control of any responsive records that may be found in the police officer's personal email account identified by the appellant. Their alternative position is that, in any event, these records no longer exist.

[22] The police acknowledge that "steno pads" were prepared by an employee of the institution, but contend that "the notes were taken informally with the intent of transcribing anything he perceived of value into his memorandum book notes".

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[30] *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.).
[31] Order MO-1251.
[32] Order MO-1251.
[33] *City of Ottawa v. Ontario,* cited above.
[34] 2011 SCC 25, [2011] 2 SCR 306 (hereinafter *National Defence*).

[23] The police explain:

> … the former officer acknowledged that he did take notes during the trial, though the pads were not part of the notes retained by the [police]. He advised that the notes taken were regarding part of the testimony given on the stand. At that time, he advised that the notes were not in the [police's] possession, but may be in his personal possession (possibly at his home). In his follow up response in 2013, the officer advised that he had looked for the steno pad but was unable to locate it. He advised that any information he deemed important was re-written into his memorandum book, and confirmed that the notes were not retained by the [police]. It should be noted that his memorandum books remain with the [police].

[24] The police submit that they have never been in physical possession of the "steno pad" and therefore had no areas to search. They add:

> … The officer responded to all queries regarding the steno pad's whereabouts and as it was his "personal property", there was no reason to disbelieve him nor did we have any legal compulsion for its production. The officer willingly responded to all questions posed by the IPC during the mediation process as well as met personally with the members of the Access & Privacy Section to respond further to our requests to acquire the requested records. At no time did the officer refuse to provide the institution with a copy of the record at issue.
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> As the officer contends that anything of investigatory value was written into his memorandum book, which is the property of the institution, the retention or disposal of his personal steno pad was not controlled or regulated by the institution. A search of all materials in the [police's] possession regarding the appellant's case were searched and confirmed that there were no steno note pads located.

[25] With respect to any responsive emails the may be found in the named police officer's personal email account the police submit that:

> A review of notes taken from the interview and email correspondence with the officer confirm that, while with the [police], the involved officer advised that his home email computer was never used for work. Without any legal compulsion to produce any data that may exist on his personal computer drive, records not in the care/custody of the [police] remain the officer's personal property. The involved officer is no longer an employee of the [police] and access to his personal email account cannot be granted as it is not under the [police's] control.

> The institution supports that at this time, the involved officer has a clear and reasonable expectation of privacy. While a member he cooperated and responded to all queries regarding his home computer but without some form of judicial authorization, to conduct any searches of his personal computer.

[26] The police further state that the officer advised that any responsive emails were not retained and any archived data was wiped out when he changed applications on his computer.

[27] Finally, the police rely on materials provided by the named police officer and analyst in the course of the adjudication of Appeal MA11-23-2[35] in support of their position that they conducted a reasonable search for responsive records. They submit that they did not locate a copy of "certain notes to the crown attorney....in the context of disclosure."

The appellant's representations

[28] In an effort to demonstrate that the "steno pads" are under the custody and control of the police, the appellant referred to the policies, standards and procedures adopted by the police for the creation and retention of records generated in a criminal investigation.

[29] He points to the provisions of the *Police Services Act*[36] and Ontario Regulation 268/10[37], which refers to a "Schedule/Code of Conduct". The appellant submits that this includes the requirement for a police officer to develop and keep "records" related to his employment as a core competency, which are not personal or private property but are, in every case, "records" belonging to his/her employer as a work product. The appellant asserts that the police have the authority to regulate a record's use and disposal, not the officer.

[30] The appellant asserts that the "steno pad" is a part of the named officer's investigative notes and is therefore a responsive record. He states that the named officer should never have taken the "steno pad" to his place of residence. The appellant submits that at the time of his request, the named officer was employed by the police and was obligated to abide by the police's record retention requirements. The appellant submits that the records at issue relate to the mandate of a police service and are "a core function of policing".

[31] The appellant further states that records are also stored electronically in various entries on online secured caches which are regulated, monitored and accessible through

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[35] Which resulted in Orders MO-2841-I and MO-3107-F.
[36] R.S.O. 1990, c. P.15 at section 80.
[37] At section 30.

codes and passwords assigned to a police officer by the police.

[32] The appellant submits that the two-part test in *National Defense* is satisfied:

> (a) the records held in the several formats, especially and including the Steno Pads [which contain mostly references or jottings from interviews with witnesses and potential witnesses whose testimony was to be heard and cross examined at a criminal trial], not transcribed into memorandum books, but referred to in the memorandum books as "see notes" relate to a departmental matter, and
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> (b) by law and statute … the institution must reasonably expect to obtain a copy of the document on request. This request may come from a Crown, or from a defense or appellate counsel retained by the defendant, or from Supervisors in the Professional Standards branch, the SIU or other regulatory bodies.

[33] The appellant submits that as a result of the delay in addressing the appellant's search requests, the police have contributed to the failure to locate the records, asserting that they would have been found had they searched earlier. He argues that because the officer has left the police he is no longer under the obligations and duties of the *Police Services Act*, even though he was subject to its requirements at the time of the request.

[34] The appellant further submits that simply stating that the named officer looked for the "steno pad" and could not locate it, is not sufficient to establish a reasonable search. He submits that more detail should have been provided regarding the steps that were taken to try to locate it.

[35] He also submits that the police have provided insufficient evidence to support its position that it conducted a reasonable search for responsive emails from the named officer's personal email account. He submits that any responsive emails would have been retained on the identified officer's ISP server and that the police have access to that server through a variety of means.

[36] Finally, with respect to his position that there are undisclosed records of communications between the named officer and a crown attorney, the appellant submits that based on the extensive records that were produced in the course of disclosure in proceedings involving the appellant, additional responsive records ought to exist.

The reply representations of the police

[37] The police submit in reply that employees in their Access & Privacy Section met with various stakeholders throughout the course of the appeal and conducted a reasonable search in response to the appellant's access to information request. They

further submit that they reasonably relied on the information provided by the involved officer with respect to the location of responsive records. They submit that they "[s]pecifically addressed the issue of 'steno pad' and 'emails' in our representations dated September 2015."

The appellant's sur-reply representations

[38] In sur-reply the appellant takes issue with the police's reply and provides further representations in support of his position, portions of which expand on his early representations.

Analysis and findings

[39] It is important to consider the purpose, scope and intent of the legislation when determining the issue of whether personal records are within the custody or control of the public body.[38] In all respects a purposive approach should be adopted.[39] In determining whether records are in the custody or control of an institution, the relevant factors must be considered contextually in light of the purpose of the legislation[40].

The purpose of the *Act* is set out in section 1 as follows:

> The purposes of this Act are,
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> > (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> > > (i) information should be available to the public,
> > >
> > > (ii) necessary exemptions from the right of access should be limited and specific, and
> > >
> > > (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
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> > (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[40] If the records existed, they would bear upon the processes of the police and

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[38] *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 at paras. 84-85. *City of Ottawa v. Ontario*, 2010 ONSC 6835 at 21.
[39] *City of Ottawa v. Ontario*, 2010 ONSC 6835 at 28.
[40] *Children's Lawyer for Ontario v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 642 at 89.

could provide information to citizens, including the appellant, about the functioning of the police.

[41] In its discussion of the concept of "control" for the purposes of freedom of information legislation, the majority in *National Defence* stated:

> As "control" is not a defined term in the *Act*, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The Canadian Oxford Dictionary defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the *Act*.[41]

[42] The Court also stated:

> Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* … The reasonable expectation test is objective. If a senior official of the government institution, based on

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[41] *National Defence* at para 48.

> all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.[42]

[43] In my view, if the records existed, a strong argument could be made that although they may not be in the custody of the police any steno notebooks or emails containing information relating to the appellant's criminal matters are responsive records within the control of the police. It must be noted that the identified named police officer did not refuse to provide any responsive records, he took the position that they no longer exist (in the case of steno notebooks) or never existed (when he asserted that his home computer was never used for police business).

[44] Part of the job of a police officer is participating in prosecutions[43] as well as conducting investigations. In my view, notes taken at a trial in which the named officer is lead investigator, emails to witnesses or sent or received relating to these matters as well as communications between the named police officer and crown attorneys that fall within the scope of the request, relate to a police matter.

[45] In this regard, any responsive notes would have been taken in the course of the police officer's employment and his duties for the purposes of policing, either to participate in the prosecution or to conduct an investigation, and thereby relate to the police's mandate and functions. As set out at paragraph 81 of Order MO-3107-F, the named police officer advised that, "[t]he notes taken were regarding parts of the testimony given on the stand and is typical for officers to do as information revealed may lead to the uncovering of additional evidence for further investigation". As it relates to policing, the police would surely have the right to request them and they could have been relied upon by the police in conducting a further investigation. And if they were incorporated into a memorandum book which the police retain, then it would support an assertion that the information was integrated into records held by the police. Although there was no evidence provided regarding restrictions about bringing steno notebooks to a police officer's residence this does not alter my finding that the police would have had control of any responsive notes.

[46] Any responsive email found in the police officer's personal email account would be subject to the same analysis. I pause to note that as set out in paragraph 103 of Order MO-3107-F, the appellant provided me with a copy of an email that was sent to the police officer's personal email account from a witness. I also note that emails sent from the officer's personal email account, being an address associated with him personally rather than the police, would likely not be retained on the police's internal

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[42] *National Defence* at para 56.
[43] See in this regard, section 42(1)(e) of the *Police Services Act*.

servers. However, that is not a complete answer. In decisions of the court[44] and this office[45] emails were found not to be within an institution's custody or control if they were private communications of employees unrelated to government business or emanated from a body that was not part of the institution or dealt with matters unrelated to the institution's matters, mandate, functions or business. If they did, then they would be found to be within the institutions custody or control[46]. In this case, any responsive email would have been related to police matters, not personal matters involving the identified police officer. Although there was no evidence provided regarding restrictions about the use of personal email addresses by police for police business this does not alter my finding that the police would have had control of responsive emails.

[47] I am also satisfied that the two-part test in *National Defence* is met.

[48] Firstly, for the reasons set out above, I am satisfied that the records, if they existed, would relate to a police matter.

[49] Secondly, while acting as a police officer, in light of the duties and responsibilities of a police officer and the crown's general disclosure obligations in criminal proceedings, if a record related to a criminal matter, the police could reasonably expect to obtain a copy of the steno notebook, any email relating to police business or any communication between the named officer and a crown attorney from the identified police officer, upon request. I find it unlikely that the named police officer would refuse to provide it, given its likely close nexus to the appellant's criminal proceedings.

[50] While the power to dispose of a record would be one factor tending to establish institutional control over the record, the absence of such a power does not automatically lead to a finding that the institution could not reasonably expect to obtain a copy of it. As noted by the Supreme Court of Canada, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include not only the legal relationship between the government institution and the record holder but also the substantive content of the record and the circumstances in which it was created. I find the latter factors of utmost importance in this appeal. Given the content of the requested record and the circumstances under which it would have been created, I find that the police could assert control over the responsive records, if they existed.

[51] The police argue that without legal compulsion the named police officer would not have to provide any responsive email sent from the officer's personal email account.

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[44] *City of Ottawa v. Ontario* (*City of Ottawa*), 2010 ONSC 6835; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247.
[45] Order PO-3666.
[46] Order MO-3281.

The Supreme Court of Canada has stated, however, that *de facto* (as opposed to *de jure*) control is recognized as control. Given this fact and particularly the very close nexus between any record (including an email) relating to the criminal matters involving the appellant, I find that the police could reasonably expect the named police officer to provide the records, if they existed, to the police.

[52] Again, I reiterate that the request would not encompass any emails of a personal nature but rather emails relating to policing. In that regard, with proper safeguards and analysis, the named police officer's privacy interests would be considered and protected. This is because a conclusion that the police have custody or control of the records (or an email) is not determinative of disclosure as exemptions or exclusions might apply depending upon their content.

[53] I conclude, therefore, that the police could reasonably expect to obtain a copy of the records upon request. Therefore, the two-part test in *National Defence* is met.

[54] I also reach the same conclusion if I consider the list of factors developed by this office, outside of the two-part test articulated in *National Defence*. Weighing the above factors contextually in light of the purpose of the *Act*, and for the above reasons, I find that the records, if they exist, are under the control of the police.

[55] However, that does not end the matter, because I am satisfied that in any event, the police complied with their obligations under section 17 of the *Act*.

[56] I am satisfied that the police provided sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records. The FOIC is an experienced employee knowledgeable in the subject matter of the request and she expended a reasonable effort to locate records reasonably related to the request. It is the FOIC, rather than the named police officer, who was responsible for the conduct and coordination of the searches. In that regard, I find that she acted appropriately in asking the named officer, whether or not he was employed by the police at the time of the search, to search for responsive records. She was entitled to rely on his statements that he was not able to locate a copy of a steno notebook. I am also satisfied with her explanation regarding why there were no records that were located that were responsive to the request for a copy of any materials that the police officer provided to a crown attorney in the context of disclosure.

[57] With respect to the possible existence of additional emails, the appellant provided a copy of an email sent from a witness addressed to the named officer. The named police officer was asked to address this email. As set out at paragraph 105 of Order MO-3107-F, he specifically states that although email correspondence from one victim may have been sent to his personal email account, "nothing was ever retained." In the circumstances, and based on the police officer's statement and the absence of any additional information supporting the position that additional responsive records may exist, I will not require the police to conduct further searches for records

responsive to this part of the request.

ORDER:

I uphold the reasonableness of the police's search for responsive records and dismiss the appeal.

Original Signed by: July 7, 2017

Steven Faughnan
Adjudicator