

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3646-I

Appeal MA17-107

City of Greater Sudbury

August 8, 2018

Summary: The issues in this appeal are whether the records at issue are in the custody or control of the City of Greater Sudbury and, if so, are they exempt under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this interim order, the adjudicator finds that the records are in the custody or control of the city. She also finds that most of the records are not exempt from disclosure under section 10(1). She defers her findings regarding two records, pending the notification of two third parties.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4 and 10(1).

Orders and Investigation Reports Considered: Orders MO-3450 and MO-3471.

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an appeal of an access decision made by the City of Greater Sudbury (the city). The city had received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to and copies of general records related to a named organization of which the city is a member. In particular, the request was for the named organization's meeting agendas and minutes circulated to members between a specified time period.

[2] The requester also requested the following related information from the city:

- General records related to the named organization;
- All records related to items described as a "Forestry Project" and "Forestry Strategy" in the named organization's financial reports for a specified number of years; and
- All records regarding revenue, expenditures, consulting fees, other supplies and expenses, donations, accounts receivable, other revenue and accounts receivable-other for a specified number of years.

[3] In response, the city located records responsive to the request and notified a third party who might have an interest in the records. The third party wrote to the city, objecting to the disclosure of most of the records at issue, claiming the application of the exemption in section 10(1). The city then issued a decision to the requester and the third party, granting the requester full access to the responsive records.

[4] The third party, referred to above, (now the third party appellant) appealed the city's access decision to this office, claiming the application of the mandatory exemption in section 10(1) (third party information) of the *Act* to most of the records.

[5] During the mediation of the appeal, the requester confirmed that they continue to seek access to all the responsive records, as per the city's full access decision.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I am the adjudicator in this matter. While I was preparing the Notice of Inquiry, the third party appellant emailed the mediator and advised that it would like to rely on section 4 (custody or control) as an issue in this appeal, instead of section 10(1). I provided the third party appellant, initially, with the opportunity to provide representations on whether the records are in the custody or control of the city under section 4, as well as whether they are exempt under section 10(1) of the *Act*.

[7] The third party appellant contacted this office, requesting an extension of time in which to submit its representations. That extension was granted. To date, the third party appellant has not provided representations in response to the issues set out in the Notice of Inquiry, despite having been contacted by staff of this office subsequent to its issuance, and having been given a specific deadline in which to provide representations.

[8] I then provided the third party appellant, once again, as well as the city, with the opportunity to provide representations on whether the records are in the custody or control of the city. I received an email from the city, advising that it continues to believe that the records at issue should be disclosed in full. The third party appellant again did not provide representations.

[9] For the reasons that follow, I find that the records are in the custody or control of the city, and that most of them are not exempt under section 10(1) of the *Act*. As a result, I order the city to disclose all of the records to the requester, with the exception of a research study and contract proposal. I remain seized of the appeal, and defer my findings regarding the possible application of section 10(1) to the research study and contract proposal, pending notification of two third parties regarding those records.

RECORDS:

[10] There are approximately 1200 pages of records, consisting of agendas, minutes of meetings, an annual report, emails, a research study conducted by a third party, and a contract proposal made by another third party.

ISSUES:

- A. Are the records in the custody or control of the city?
- B. Are the records exempt under the mandatory exemption in section 10(1)?

DISCUSSION:

Issue A: Are the records in the custody or control of the city?

[11] 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 . . .

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

[13] 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.¹

[14] 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.² 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).

¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

² Order PO-2836.

[15] The courts and this office have applied a broad and liberal approach to the custody or control question.³

Factors relevant to determining "custody or control"

[16] 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.⁴ 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?⁵
- What use did the creator intend to make of the record?⁶
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁷
- Is the activity in question a "core", "central" or "basic" function of the institution?⁸
- Does the content of the record relate to the institution's mandate and functions?⁹
- 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?¹⁰
- If the institution does have possession of the record, is it more than "bare possession"?¹¹
- 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?¹²

³ *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.

⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

⁵ Order 120.

⁶ Orders 120 and P-239.

⁷ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁸ Order P-912.

⁹ *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.

¹⁰ Orders 120 and P-239.

¹¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- Does the institution have a right to possession of the record?¹³
- Does the institution have the authority to regulate the record's content, use and disposal?¹⁴
- 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?¹⁵
- To what extent has the institution relied upon the record?¹⁶
- How closely is the record integrated with other records held by the institution?¹⁷
- 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?¹⁸

[17] 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?¹⁹
- 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?²⁰
- Who paid for the creation of the record?²¹
- What are the circumstances surrounding the creation, use and retention of the record?²²
- 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

¹² Orders 120 and P-239.

¹³ Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

¹⁵ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

¹⁸ Order MO-1251.

¹⁹ PO-2683.

²⁰ Order M-315.

²¹ Order M-506.

²² PO-2386.

creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?²³

- 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?²⁴ 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?²⁵
- 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?²⁶
- 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?²⁷

[18] 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.²⁸

[19] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,²⁹ 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?

²³ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁴ Orders M-165 and MO-2586.

²⁵ *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.).

²⁶ Order MO-1251.

²⁷ Order MO-1251.

²⁸ *City of Ottawa v. Ontario*, cited above.

²⁹ 2011 SCC 25, [2011] 2 SCR 306.

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[20] Both the city and the third party appellant were provided with the opportunity to provide representations on the issue of whether the city has custody or control of the records at issue, including being provided with the list of factors and test detailed above. The city responded by submitting that it continues to believe that the records should be disclosed to the requester, and that it is the responsibility of the third party appellant to justify why the records should not be released. As previously stated, the third party appellant, who claimed during the inquiry by email to the mediator that the records were not in the custody or control of the city, did not provide representations.

[21] In Order MO-3471, Senior Adjudicator Gillian Shaw considered the burden of proof in an appeal where the issue was whether an institution has custody or control of records. Senior Adjudicator Shaw stated:

Before concluding, I will briefly address the burden of proof, since the city raised the issue in its representations. The city argues that the burden of proof is on the appellant to establish that the records are in the custody or under the control of the city. Relying on *Snell v. Farrell*³⁰ and Order MO-2660, it argues that the onus is on the appellant because the appellant has raised the allegation that the requested records are in the custody or control of the city. . .

In The Law of Evidence in Canada,³¹ the authors note that there have been various attempts to create formulae to determine the allocation of the burden of proof; for example, the principle that a party asserting an affirmative of an issue must prove it. However, the authors note that since it is merely a matter of choice whether an issue is stated positively or negatively, this principle is of limited usefulness.

The authors also note that where legislation is silent or unclear as to the allocation of the burden of proof, decision makers must examine the legislation and resolve these problems on a case-by-case basis.³²

In civil proceedings, the persuasive burden does not have a role in the decision-making process if the trier of fact can come to a conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state

³⁰ [1990] 2 S.C.R. 311.

³¹ *The Law of Evidence in Canada*, 3d ed by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst (Markham: LexisNexis Canada) at p. 115.

³² *Ibid* at p. 114.

of uncertainty, the persuasive burden is applied to determine the outcome.³³

I find that I do not need to make a finding as to who bears the burden of proof in this case, because I can reach a conclusion on the evidence. The request in this case was for records of communications among the councillor and/or his staff relating to the councillor's Twitter account. This appeal turns on the application of the appropriate legal principles to the nature of the request and the evidence before me. The evidence does not leave me in a state of uncertainty.

Given that the city was the only party to make representations on the burden of proof, and since the outcome of this appeal does not turn on the allocation of the burden of proof, I decline to make a finding about who bears the burden of proof in this case.

[emphasis added]

[22] In Order MO-3450, Adjudicator Hamish Flanagan found that cheque images, receipts, bank statements, memoranda, meeting minutes, emails, written communications and other information of a third party was not in the custody or control of a municipality. It should be noted that the third party in Order MO-3450 is the same organization as the third party appellant in this appeal. In finding that the records were not in the custody or control of the municipality, Adjudicator Flanagan relied on the evidence provided by both the municipality and the third party.

[23] In both Orders MO-3471 and MO-3450, the adjudicators made findings regarding the custody or control of the records based on the evidence provided by the parties. In this case, the third party appellant advised the mediator at the commencement of the inquiry that it was claiming that the records were not in the custody or control of the city. However, the third party appellant has not provided any evidence to support its position, despite being given the opportunity to do so by this office on more than one occasion. In addition, the city has not claimed that it does not have custody or control of the records.

[24] I find that the records are in the city's possession, and relate to part of the city's mandate. Consequently, in the specific circumstances of this appeal, and in the absence of evidence before me by the third party appellant who claims that the records are not in the city's custody or control, I find that the records at issue are in the custody or control of the city.

[25] I will go on to determine if the records are exempt from disclosure under section 10(1) of the *Act*.

³³ Ibid at p.91.

Issue B: Are the records exempt under the mandatory exemption in section 10(1)?

[26] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[27] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³⁴ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³⁵

[28] For section 10(1) to apply, the third party appellant³⁶ must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

³⁴ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³⁶ In this appeal, the city is not required to satisfy the three-part test because it is not claiming that section 10(1) applies to the records.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[29] As previously stated, the third party appellant did not provide any representations to this office regarding the possible application of section 10(1) to the records, and the city's position is that the records are not exempt from disclosure under the *Act*.

[30] On my review of the records, it appears that some of them meet parts one and two of the three-part test. However, even if I find that the first and second parts of the three-part test have been met, I also find that the third party appellant has not established the harms contemplated in the third part of the test in section 10(1), nor are the harms self-evident from my review of the records.

[31] In this appeal, the burden of proof with respect to the application of this exemption to the records lies with the third party appellant. The party resisting disclosure (the third party appellant) must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³⁷

[32] In the absence of evidence before me from the third party appellant regarding the harms that could reasonably be expected to occur should the records be disclosed as specified in paragraph (a), (b), (c) and/or (d) of section 10(1), and on my review of the records, I find that most of them are not exempt under section 10(1) of the *Act*.

[33] I note that two records were prepared by other third parties. The first is a 26-page research study and the second is a six page contract proposal. I defer my findings regarding whether section 10(1) applies to these records, pending notification of the two third parties who authored these records.

ORDER:

1. I find that the records are in the custody or control of the city.
2. I order the city to disclose the records, with the exception of the research study and the contract proposal to the requester by **September 13, 2018** but not before **September 10, 2018**.

³⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

3. I reserve the right to require the city to provide this office with copies of the records it discloses to the requester.
4. I remain seized of the appeal, pending notification of two third parties regarding the remaining records at issue.

Original Signed by: _____
Cathy Hamilton
Adjudicator

August 8, 2018 _____